

OVERCOMING CHALLENGES IN APPLYING AND ENFORCING THE ELD IN EU COUNTRIES

Valerie Fogleman, Consultant, Stevens & Bolton LLP
Professor of Law, Cardiff University School of Law and Politics

TOPICS

- Key challenges and suggested resolutions
 - Competent authorities
 - Significance criteria
 - Water damage
 - Biodiversity damage
 - Enforcement
 - Application to national legislation
 - Financial security for ELD liabilities

COMPETENT AUTHORITIES

- ELD does not specify how many competent authorities should be designated by Member States
 - Number of competent authorities varies widely between Member States depending in part on federal systems in some Member States
- Challenge
 - Personnel with the necessary expertise to implement and enforce the ELD
- Suggested resolution
 - Limit the number of ELD competent authorities
 - Increases the likelihood of personnel having the requisite knowledge
 - Decreases the need to outsource cases to experts in environmental assessment and remediation
 - Train personnel in non-ELD authorities in the significance criteria under the ELD so they can refer potential ELD occurrences to ELD competent authorities

SIGNIFICANCE CRITERIA

- ELD includes significance criteria for land, water and biodiversity damage
 - Threshold for land damage under the ELD may be as low as national legislation
 - Caveat: need a significant adverse effect on human health under the ELD
 - BUT
 - Thresholds for water damage in national legislation are almost always lower than significance criteria for water damage under the ELD
 - Thresholds for biodiversity damage in national legislation may differ substantially from significance criteria for biodiversity damage under the ELD

WATER DAMAGE

- Water damage
 - Significance criteria are linked to the Water Framework Directive (2000/60/EC; WFD) and the Marine Strategy Framework Directive (2008/56/EC; MSFD)
 - ‘any damage that significantly adversely affects:
 - (i) the ecological, chemical and/or quantitative status and/or ecological potential, as defined in [the WFD] of the waters concerned ...; or
 - (ii) the environmental status of the marine waters concerned, as defined in [the MSFD] in so far as particular aspects of the environmental status of the marine environment are not already addressed through [the WFD]’
 - Note: liability for water damage includes liability for damage to biodiversity due to the significance criteria for ecological status and ecological potential
 - That is, a determination of water damage takes into account damage to populations of species in the aquatic environment not protected by the Habitats (or Birds) Directive as well as protected species

WATER DAMAGE

- Challenge
 - ELD is unclear whether an entire water body or only ‘waters’ must be significantly affected
 - Definition of water damage refers to waters but significance criteria refer to classifications of water bodies under the WFD
- Suggested resolution
 - Apply Commission Guidelines on a common understanding of ‘environmental damage’ as defined in article 2 of the ELD [2021] Official Journal C118/1 (note: only binding on the Commission)
 - No need for entire water body to be affected
 - Sufficient for damage to affect only part of a water body
 - Application of Commission guidelines will necessarily encompass waters and water bodies without differentiating between them

WATER DAMAGE

- Challenge
 - Due to classification criteria for water bodies being included in the definition of water bodies in the ELD, it is unclear whether the classification of a water body needs to be reduced to a lower classification level for water damage to occur
- Suggested resolution
 - Apply the Commission guidelines
 - No need for the status of the affected water body (or water bodies) to be reduced to a lower classification
 - Note: a significance adverse effect on ecological damage may still have occurred because classification of a surface water body does not necessarily include damage to all species in that water body

BIODIVERSITY DAMAGE

- Biodiversity damage
 - Significance criteria are linked to the Birds Directive (2009/147/EC) and the Habitats Directive (92/43/EEC)
 - ‘any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species’, assessed with reference to the baseline condition, taking account of criteria in annex I
 - Significance is determined by reference to
 - ‘the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat [or species]’

BIODIVERSITY DAMAGE

- Challenge
 - ELD is unclear whether damage to a species or natural habitat needs to affect the EU, the territory of a Member State or the natural range of a habitat or species
- Suggested resolution
 - Apply the Commission guidelines
 - No need for adverse affects to occur at a national or EU level
 - Sufficient for them to occur only at a local level

BIODIVERSITY DAMAGE

- Challenge
 - ELD does not state whether the significance criteria for biodiversity damage should be high or low
- Suggested resolution
 - Refer to cases of the Court of Justice of the European Union (CJEU)
 - Cases apply the precautionary principle to the ELD
 - See especially *Naturschutzbund Deutschland - Landesverband Schleswig-Holstein e.V. v Kreis Nordfriesland* (Case C-297/19, 2020)
 - Refers to annex I criteria under the ELD for biodiversity damage that does ‘not have to be classified as significant damage’
 - Includes negative variations from intervention relating to the normal management of sites and other small variations
 - Significance criteria must therefore necessarily be low

BIODIVERSITY DAMAGE

- Liability for preventing and remediating biodiversity damage
 - May not exist at national level, or
 - May require an operator to be convicted of damaging biodiversity before liability for remediating the damage applies
- Challenge
 - Preventing a gap in remediating biodiversity damage before the ELD applies
- Suggested resolution
 - Consider including more stringent provisions than the ELD
 - Specify lower significance criteria
 - Require remediation for biodiversity damage in the absence of a prosecution

ENFORCEMENT

- Enforcement
 - Imminent threat of environmental damage; operator must
 - Carry out preventive measures ‘without delay’
 - Notify competent authority ‘without delay’ if measures fail to dispel the imminent threat of damage
 - Environmental damage; operator must
 - ‘Immediately’ carry out emergency remedial actions
 - Notify competent authority ‘without delay’
 - Carry out remedial measures agreed by the competent authority in accordance with the ELD
 - If the operator fails to carry out the above actions and measures, the competent authority must require it to carry them out

ENFORCEMENT

- Challenge
 - Determining whether there is an imminent threat of, or actual, environmental damage so that preventive and/or emergency remedial actions are carried out ‘immediately’ and the competent authority is notified ‘without delay’
- Suggested resolution
 - Draft national legislation according to the precautionary principle
 - Consider including requirements for an operator
 - To prevent an imminent threat of environmental damage if there are reasonable grounds to believe the damage will become environmental damage as well as if an imminent threat occurs
 - To prevent further environmental damage or remediate such damage if there are reasonable grounds to believe the damage is environmental damage as well as if environmental damage occurs

APPLICATION TO NATIONAL LEGISLATION

- Most Member States (and other States) have extensive environmental permitting legislation
 - Goes beyond the Industrial Emissions Directive (2010/75/EU)
 - Most legislation concerns only pollution
 - No need to apply significance criteria if an operator causes environmental damage
 - Breach of a permit condition not to cause environmental damage is an unlawful act that almost always requires remediation of the pollution
 - BUT
 - Environmental permitting legislation does not include complementary and compensatory remediation measures

APPLICATION TO NATIONAL LEGISLATION

- Extensive environmental permitting legislation (continued)
- Challenge
 - Ensuring that the ELD is complied with as well as the IED and environmental permitting legislation
- Suggested resolution
 - Draft legislation transposing the ELD to include a requirement for consultation between the respective competent authorities to determine whether damage under the IED and environmental permitting legislation (and other national legislation) is environmental damage under the ELD
 - Include a provision in environmental permitting legislation to require pollution that is environmental damage under the ELD to be remediated according to the ELD

FINANCIAL SECURITY FOR ELD LIABILITIES

- ELD encourages Member States to take measures to encourage the development of insurance and other financial security instruments
 - Czechia, Portugal, Slovakia, and Spain have mandatory financial security systems for ELD liabilities
 - Ireland has introduced a hybrid mandatory financial security system
 - Italy and Poland have introduced provisions to require financial security for a limited number of activities
 - Financial security for ELD liabilities in all other Member States is voluntary
 - Insurance is the only financial security instrument for voluntary financial security
 - Operators do not set aside funds for remediating environmental damage from an accident unless they are compelled to do so

FINANCIAL SECURITY FOR ELD LIABILITIES

- Development of insurance and other financial security instruments (continued)
- Challenge
 - Encouragement of financial security for ELD liabilities
 - BUT
 - Insurance for ELD liabilities may not be available

FINANCIAL SECURITY FOR ELD LIABILITIES

- Development of insurance and other financial security instruments (continued)
 1. Stand-alone environmental insurance policies that provide cover for ELD liabilities are widely available
 - In virtually all Member States for businesses with sites and/or operations in multiple Member States
 - In some Member States for businesses with sites and/or operations in a single Member State
 - E.g, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Slovakia, Spain (and the UK)
 - BUT not in many other Member States for operators with sites and/or operations in a single Member State
 - Cover provided by the policies in some Member States is limited
 - E.g., Bulgaria, Croatia, Cyprus, Estonia, Greece, Hungary, Latvia, Lithuania, Malta and Romania

FINANCIAL SECURITY FOR ELD LIABILITIES

- Development of insurance and other financial security instruments (continued)
 2. Environmental extensions to general liability policies are widely available
 - BUT
 - Except for Austria and Germany where they are specifically designed to provide cover for ELD liabilities, virtually none provide cover for ELD liabilities
 - Limited exception of liability for remediating off-site land/soil pollution from a sudden and accidental incident on an insured's site when liability for that remediation is imposed by other environmental legislation and overlaps with liability for land damage under the ELD
 - Do not include cover for remediating environmental damage on an insured's site

FINANCIAL SECURITY FOR ELD LIABILITIES

- Development of insurance and other financial security instruments (continued)
- Suggested resolution
 - Consider requiring mandatory financial security for limited environmental liabilities first to encourage the growth of environmental insurance markets
 - Waste management legislation is listed in annex III of the ELD
 - E.g., 17 Member States have introduced mandatory financial security requirements for waste management activities
 - Belgium, Croatia (introducing), Cyprus, Czechia, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland and Spain

Questions

Valerie.fogleman@stevens-Bolton.com

foglemanvm@cardiff.ac.uk