

Chapter 1

The Environmental Liability Directive: Legal Background and Requirements

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Abstract The objective of the Environmental Liability Directive (ELD) is to provide a common framework for preventing and remediating certain forms of environmental damage. It complements existing *ex ante* European Union nature conservation regimes such as the Habitats, Wild Birds, and Water Framework Directives and provides guidance on how to assess damage to protected natural habitats and species. This chapter provides a legal analysis of the ELD.

Keywords Legal analysis · Environmental liability directive · Habitats directive · Wild birds directive · Water framework directive · Damage assessment · Standing · Public natural resources

1.1 Introduction

In April 2004, the European Community legislature adopted Directive 2004/35/CE on environmental liability with regard to the prevention and remediation of environmental damage.¹ The objective of this Directive is to provide a common framework for preventing and remediating certain forms of environmental damage. The Environmental Liability Directive (ELD) complements in this respect existing *ex ante* European Union nature conservation regimes, such as those established by the Habitats Directive (HD) and Wild Birds Directive (WBD).² Unlike the ELD, these Directives do not contain provisions which enable Member States in *ex post* situations, to order (certain) persons responsible for causing environmental damage

¹Directive 2004/35/EC, 21.4.2004, OJ 2004 L 143/56.

²Resp. Directive 79/409/EEG, OJ 1979 L 103/1 and Directive 92/43/EEG, OJ 1992 L 206/7.

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to remediate such damage or to recover the costs of remediation measures if the Member State took these measures itself.

Member States were required to implement the ELD before the end of April 2007, but not every Member State succeeded in this. As is shown by the European Commission report of 12 October 2010, drafted to comply to Article 14(2) of the ELD (European Commission 2010a), the transposition of the ELD was slow and was only completed by July 2010.³ This resulted in a number of cases before the European Court of Justice (ECJ).⁴

The 2010 European Commission report as well as other more reports also showed a divergent implementation of the ELD across the European Union.⁵ The result thereof is that the ELD is not applied among the Member States in a uniform manner.⁶ In addition, the 2010 report revealed that the ELD was seldom applied in the European Union Member States in the period 2007–2010.⁷ More recent studies, one of them being a 2016 Commission Report on the application of the ELD (European Commission 2016), show that this has not changed significantly. Between April 2007 and April 2013, 1,245 ELD cases were reported. However, 11 Member States have not reported any ELD cases at all and two Member States account for more than 86% of all reported damage cases (European Commission 2016, p. 3). Thus, the number of annual ELD cases per Member State varies considerably, from 95 to less than 1. Most of these reported cases concern soil pollution (around 50%). Damage to water accounts for 30% and damage to biodiversity for around 20% (European Commission 2016).

To further support the use of the ELD, the European Commission recently developed a work programme aimed at improving the application among Member States of the ELD. The aim of the programme is make the ELD deliver better on its original objectives; i.e. to contribute to a better environment by preserving the natural resources, including biodiversity, in the European Union (European Commission 2017).

So most Member States still have no or only a few ELD cases.⁸ There are various explanations for this. One is the misconception that the ELD only applies to

³See European Commission 2010, p. 3 et seq. See also Stevens and Bolton LLP (2013), Table 1 at p. 32.

⁴See Case C-417/08, *Commission v. United Kingdom* (2009) ECR 2009 I-00106 (judgement ECJ of 18 June 2009) and Case C-422/08, *Commission v. Austria* (2009) ECR 2009 I-00107 (judgement ECJ of 18 June 2009).

⁵See e.g. BIO Intelligence Service (2013), p. 21 et seq. and Annex A; Stevens and Bolton LLP (2013), pp. 34–103 and *Milieu Ltd. and IUCN* (2014), Annex I. See also Goldsmith and Lockhart-Mummery (2013), p. 139 et seq.

⁶*Milieu Ltd. and IUCN* (2014), p. 78 et seq and BIO Intelligence Service (2014), i.e. Tables 1, 3 and 4.

⁷In 2010, 16 ELD cases were identified and it was estimated that the total number of ELD cases across the EU was in 2010 around 50. See European Commission (2010), pp. 4–5 and 9–10.

⁸See BIO Intelligence Service (2013), p. 96 et seq. See also <http://ec.europa.eu/environment/legal/liability/index.htm> under the heading ‘Member State reports on the experience gained in the application of the Directive’.

the most severe instances of damage to the natural resources covered by the ELD (Milieu Ltd and IUCN 2014, p. 78). In addition, the ELD is considered to be difficult to apply; specifically the part of the ELD that deals with assessing damage and compensation in case protected habitats and species have been impacted by a certain incident.

This chapter serves as an introduction to the ELD. It provides an overview of the scope of the regime and discusses its key elements, such available defences, threshold criteria, standing and remediation options.

1.2 Scope of Application of the Environmental Liability Directive

1.2.1 *Strict and Fault-Based Liability*

The ELD imposes either a strict or fault-based liability—depending on the type of activity involved—on the operator of an occupational activity for damage to (1) protected species and natural habitats, (2) contamination of land and (3) damage to waters covered by the WFD⁹ (provided the damage is above a certain threshold) [see Articles 2(1) and 3].¹⁰

Operators who undertake an activity that is covered by the European Union legislation listed in Annex III of the ELD, can be held strictly liable for the above three types of harm (for which the overarching term ‘environmental damage’ is used). The EU legislation listed in Annex III of ELD includes directives concerning Integrated Pollution Prevention and Control, on waste management operations, on the geological storage of carbon dioxide, on the transportation of dangerous substances, and on the direct release of genetically modified organisms into the environment. Most of the activities covered by the listed European Commission legislation can be considered environmentally risky activities.

A fault-based liability is imposed on operators of non-listed occupational activities. These operators can only be held liable for damage to protected species and natural habitats and not for the other types of harm mentioned (provided, naturally, that all requirements listed in the ELD are met).

⁹Directive 2000/60/EC establishing a framework for Community action in the field of water policy, OJ 2000 L327/1.

¹⁰The European Court of Justice ruled in a decision of 13 July 2017 that air pollution as such does not constitute environmental damage covered by the ELD. However, in case airborne elements cause damage to water, land and protected species and habitats, such damage could come within the scope of the ELD. See ECJ C-129/6, para 41–46.

1.2.2 Exemptions

There are a number of situations that are exempt from the ELD. For example, environmental damage that arises from an incident that falls within the scope of a number of listed international civil liability conventions is not covered by the ELD, provided the convention is in force in the Member State concerned.¹¹ An example of such a convention is the International Convention of 27 November 1992 on Civil Liability of Oil Pollution Damage [1992 Civil Liability Convention (CLC)]. This convention, which is in force in most of the Member States, covers environmental damage caused by sea-going vessels constructed or adapted for the carriage of oil in bulk, such as oil tankers. It is in that respect irrelevant that the ELD imposes more comprehensive obligations on polluters with regards to the preventive and remediation measures to be taken in case of environmental damage or the threat thereof than these international conventions (Brans 2001; Oosterveen 2004; Nesterowicz 2007; Carbone et al. 2008).¹² This is even the case if damage has been caused to the nature conservation areas designated under the HD and WBD (Natura 2000 sites).¹³ This occurred following the incident with the oil tanker Erika in France in 1999. The tanker spilled over 19,500 tonnes of oil and some 400 km of shoreline were affected, including Natura 2000 sites.

Furthermore, an operator may not be held liable if they prove that the damage was caused by a third party (provided appropriate safety measures were in place), or if he proves that the damage resulted from compliance with an order or instruction from a public authority.¹⁴ The ELD also allows Member States the discretion to exempt an operator from liability where the operator demonstrates that he was not at fault or negligent, and that the environmental damage resulted from an emission or event expressly authorised by the regulatory authority.¹⁵ However, according to a judgement of the ECJ of 1 June 2017, the ELD precludes a provision of national law which excludes, generally and automatically, the application of the ELD due to the mere fact that the environmental damage that was caused, is covered by an authorisation granted under that law.¹⁶

Apart from this so-called regulatory compliance defence, Member States may also decide to exempt an operator from liability where the operator demonstrates that he was not at fault or negligent, and that the environmental damage caused

¹¹See Article 4(2–4) and Annex IV and V of the ELD.

¹²A difference between the 1992 CLC and the ELD is that under the 1992 CLC, interim losses are not recoverable. See IOPC Funds (2017), p. 7. Since many international liability conventions use the same damage definition as the 1992 CLC, most likely interim losses are also not recoverable under these regimes.

¹³See further on the difference between these international civil liability conventions and the ELD (Brans 2006), pp. 212–214).

¹⁴See Article 8(3) of the ELD.

¹⁵See Article 8(4)(a) of the ELD.

¹⁶ECJ C-529/15, para. 42.

resulted from an emission or event not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time the emission was released or the activity took place.¹⁷

These and other options for exemptions have resulted in an inconsistent transposition of the ELD in the various Member States (Horswill 2009, p. 57; BIO Intelligence Service 2009, pp. 24–36; Weissenbacher 2009, pp. 199–202; Fogleman 2009, pp. 147–176; BIO Intelligence Service 2013, pp. 29–76). Thus, although the ELD undoubtedly is an important step in the harmonisation of environmental liability in the European Union, the ELD has not been implemented in the Member States in a uniform way. It should be noted that this could have an impact on the approach to be taken in case of transboundary incidents and possibly makes it more difficult for the public authorities to successfully deal with such cases.

The ELD also does not apply to environmental damage caused by an emission or incident that took place before 30 April 2007, the date by which the ELD should have been transposed into national law. This is affirmed by the ECJ in its decisions of 9 March 2010 and of 1 June 2017.¹⁸ The court concluded in the first judgement that the ELD does apply to ‘damage caused by an emission, event or incident which took place after 30 April 2007 where such damage derives either from activities carried out after that date or activities which were carried out but had not finished before that date’.¹⁹ The court does not provide any further guidance as to how to apply this rule in case of the latter. However, it is likely that if evidence is produced that makes it possible to distinguish between damage or the imminent threat thereof which occurred before and after 30 April 2007, the ELD can be applied to the ‘new damage’ or the threat thereof.

Finally, the ELD does not apply to environmental damage or the imminent threat if such damage is caused by diffuse pollution [Article 5(5) ELD]. However, if the despite the diffuse nature of the pollution, a causal link can be established between the damage caused or threatened to be caused and one or more operators, the ELD can be applied.²⁰ Obviously, in such cases this often will be difficult.

¹⁷See Article 8(4)(b) of the ELD. Taken the wording of Article 8(3) and (4) of the ELD, Member States may decide to apply above exemptions to both occupational activities listed in Annex III and non-listed occupational activities. See further on exceptions and defences, Bergkamp and Bergeijk (2013), pp. 80–94.

¹⁸ECJ C-378/08 (9 March 2010), para. 38–47. The opinion of Advocate General Koddett in this case includes an interesting expose on the applicable *ratione temporis*. See opinion AG Koddett of 22 October 2009 in ECJ case C-378/08. See also ECJ C-529/25 (1 Juni 2017), para. 21–25.

¹⁹See ECJ C-378/08, at 41.

²⁰*Ibidem*, at 54.

1.2.3 Unlimited Liability

Liability under the ELD is not limited to a certain ceiling.²¹ This does not mean, however, that liability is unlimited. Under the ELD, damages are preferably assessed based on the costs of remediation. However, the monetary value of the natural resources and services impacted is an alternative measure of damages that can be used under the ELD should the ‘cost of remediation approach’ not be appropriate. The ELD contains a set of guidelines on selecting the most appropriate measures to remedy the environmental damage caused (see Annex II of the ELD). These guidelines have been introduced to, among other things, prevent liable operators from being confronted with disproportionate costly restoration measures or a disproportionate claim. According to these guidelines, only reasonable restoration measures are to be taken to remedy the environmental damage caused, thereby taking into account, among other things, the costs of implementing the various restoration options.²² The ELD does not define a specific point at which the costs of a certain restoration option become disproportionate.

1.2.4 Natural Resources Covered by the Environmental Liability Directive

As noted earlier, the ELD imposes a strict or fault-based liability, depending on the type of activity involved, for (1) damage to protected species and habitats, (2) contamination of land and (3) damage to waters covered by the WFD. Operators who undertake an activity listed in Annex III of the ELD can be held strictly liable for these three types of harm. Operators of non-listed occupational activities can only be held liable for damage to protected species and natural habitats, and not for damage to the waters covered by the WFD or for the contamination of land.²³

Neither the ELD nor its preamble explains why an operator is exempt from liability if the damage to waters covered by the WFD or the soil pollution damage is caused by a non-listed activity. This is understandable in cases where damage has been caused to nature conservation areas not covered by the ELD and not brought under the scope of the ELD by the Member States. However, if damage is caused to a nature protection area falling under the scope of the ELD, such as Natura

²¹It is beyond the scope of this chapter, but the fact that the ELD does not limit the financial exposure of an operators to a certain amount, has an effect on the availability insurance products for companies and others. For that and other reasons, the European Commission explored the feasibility of establishing a fund (or sectoral funds) and/or risk-pooling scheme(s). See BIO Intelligence Service et al. (2012).

²²See para. 1.3.1 of Annex II.

²³See Article 3(1)(a) and (b).

2000 sites, this choice has striking consequences. One is that if it appears necessary to first clean-up the polluted area before one can start taking remediation measures to bring back the impacted natural resources and services to baseline conditions, Member States have to fall back on their national laws to force the operator concerned to take clean-up measures, or to recover the costs of such measures if the Member State took such measures itself. This might prove to be difficult if the soil protection legislation of the Member State concerned is not adequate. This problem might also arise where an operator of a non-listed activity causes damage to the waters covered by the WFD.

1.2.4.1 Protected Species and Habitats

The scope of the ELD to protected species and habitats is, in principle, limited to the species and natural habitats protected by the HD and WBD. However, Member States have the option to bring additional species and natural habitats under the scope of the ELD. This is only possible if such natural resources are protected by national protection and conservation laws.²⁴

What natural resources are protected by the HD and WBD? According to Article 1 of the WBD, the Directive applies to all species of wild birds naturally occurring in the European Union including their eggs, nests, and habitats (Sadeleer De 2005, p. 219). Alternatively, the HD has a different approach, as it provides that measures taken pursuant to the HD ‘shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild flora and fauna of European Community interest’.²⁵ Thus not all types of natural habitats and species of wild flora and fauna are covered under the HD, only those of Community interest.

The natural habitat types of Community interest are listed in Annex I of the HD. The list includes about 210 natural habitat types. The habitats concerned are either endangered, have suffered from regression, or constitute outstanding examples of the typical characteristics of one or more of the five following biogeographical regions: Alpine, Atlantic, Continental, Macaronesian, and Mediterranean. Species of Community interest are listed in Annex II and/or Annex IV or V of the HD. Such species are either endangered, vulnerable, rare, or endemic.²⁶

In order to fulfil the conservation and biodiversity objectives of both the HD and WBD, Member States are required to designate Special Protection Areas (SPAs)

²⁴Article 2(3)(c).

²⁵See Article 2(2) of the HD.

²⁶In accordance with Article 1(d) and (h) of the HD, a distinction is made in Annex I and II between respectively so-called priority natural habitat types and other habitat types of Community interest and priority species and other species of Community interest. With regard to the priority natural habitat types and species ‘the Community has particular responsibility in view of the proportion of their natural range which falls within [the territory of the Member States]’ (Article 1 of the HD).

and Special Areas of Conservation (SACs).²⁷ The latter are sites hosting natural habitat types listed in Annex I of the HD and the habitats of the species listed in Annex II of this Directive.²⁸ The SPAs and SACs together form a European ecological network called Natura 2000. These Natura 2000 sites should enable ‘the natural habitat types and the species’ concerned to be maintained or, where appropriate, restored to a favourable conservation status’.²⁹ It is expected that about 10–12% of the territory of the European Union will finally be classified as Natura 2000 sites.

In early drafts of the ELD, the proposed liability regime was to be limited to the natural resources located in Natura 2000 sites. Damage to natural resources located outside the Natura 2000 sites would not have been covered, even if damage was caused to species and/or natural habitats protected under the HD and WBD. The geographical limitation of the draft ELD to Natura 2000 sites was considered by non-governmental organizations and others as a serious restriction to the scope of the regime (Betlem and Brans 2002). In response, the final text of the ELD as adopted was revised to set the liability to cover all natural resources protected by the HD and WBD.

1.2.4.2 Damage to Waters Covered by the Water Framework Directive

The ELD also covers damage to waters, however, only insofar as these waters are covered by the WFD. The WFD establishes a framework for water policy in the European Union based on the principle of integrated river basin management.³⁰ The environmental objectives of the WFD are defined in Article 4. The main objectives of the WFD are the reduction and prevention of water pollution, the protection of the aquatic environment, and the improvement of aquatic ecosystems. The WFD applies to almost all water resources in the European Union, including inland surface waters, transitional waters, groundwater and marine waters under the jurisdiction of Member States.³¹ With regard to marine waters, due to the scope of the WFD, in principle only the waters in the coastal strip of a Member State are covered. This is only different where damage is caused or likely to be caused to European Union protected natural habitats and species (European Commission 2010b). Interestingly, in response to the incident with the Deepwater Horizon platform in the Gulf of Mexico in April 2010, the scope of the ELD has been

²⁷See further on the classification process and the criteria used to select SPAs and SACs (Sadeleer De 2005, pp. 220–231).

²⁸See Article 3(1) of the HD.

²⁹Ibid.

³⁰Linked to the WFD is a number of so-called ‘Daughter Directives’, one of one of which is the Groundwater Directive (2006/118/EC).

³¹See Article 1 of the WFD. See further Olazábal (2004, pp. 166–170).

extended and now covers all marine waters under the jurisdiction of Member States, including the Exclusive Economic Zone of Member States.³²

Member States are currently in the process of implementing the WFD. One of their tasks is to make sure that the WFD-related standards and environmental objectives are met for ‘protected areas’ (unless otherwise specified in other European Commission Directives) by 2015.³³ These include locations designated for the protection of habitats or species where the maintenance or improvement of the status of water is an important factor in their protection, including relevant Natura 2000 sites designated under the HD and WFD.³⁴ Other examples of protected areas are the ‘bodies of water used for the abstraction of water intended for human consumption’ and ‘areas designated for the protection of economically significant aquatic species’.³⁵ Member States may assign protected status to areas that have yet not been designated as such.

It should be noted, that damage to the waters covered will only be recoverable if certain threshold criteria about the significance of damage are met. Furthermore, the ELD excludes operators of non-listed activities from liability for damage to these waters.

1.2.4.3 Soil Pollution

The ELD also covers soil pollution. The specific location and ownership of the contaminated land is not material to the liability regime. However, as noted earlier, this type of damage is only recoverable under the ELD if the land damage is caused by a listed potentially dangerous activity (see Annex III). If this is not the case, the operator will not be liable, at least not under European Union law. In fact, most Member States do have laws for the decontamination of soil pollution (Grimeaud 2001; Seerden and Deketelaere 2000).

As with the other types of damage covered by the ELD, land damage is only recoverable if certain threshold criteria for damage are met. Striking is that despite the focus of the ELD on natural resource, where it concerns soil pollution or land damage these criteria only refer to human health risks and not to ecological risks (see Annex II).

³²See Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178, 28.6.2013, p. 66–106.

³³See Article 4(1)(c) of the WFD.

³⁴See Article 6 and Annex IV of the WFD. See further Grimeaud (2001, pp. 91–92).

³⁵See Article 6 and 7 and Annex IV of the WFD.

1.2.5 *A Threshold Approach to Natural Resource Damage*

The ELD can only be applied in cases where significant damage is or is threatened to be caused to the natural resources covered. It achieves this by defining a threshold of damage above which the ELD's provisions apply and below which Member States have to fall back on national law. For example, with regard to damage to protected species and natural habitats, the ELD applies only if the damage is of such a nature that it has 'significant adverse effects on reaching or maintaining the favourable conservation status' of the habitats and species concerned (article 2.1(a)). 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 of the ELD.

The term 'conservation status of a natural habitat' is defined in the ELD—the wording is similar to that in the HD—as 'the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species 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 that habitat'.³⁶ The conservation status of natural habitats is considered favourable when 'its natural range and areas it covers within that range are stable or increasing, [...] the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and the conservation status of its typical species is favourable as defined in [Article 2(4)(b) of the ELD]'.

Conservation status of species means—the wording is, again, similar to that in the HD—'the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations 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 that species'.³⁷ The conservation status of a species is considered favourable when 'population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats', 'the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future', and finally 'there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'.³⁸

A comparable approach is taken with regard to damage to the waters covered by the ELD. Water damage is recoverable if it is of such a nature that it 'adversely affects the ecological, chemical and/or quantitative status and/or ecological potential' of these waters.³⁹ The WFD provides further guidance on how to interpret this threshold.

³⁶See Article 2(4)(a) of the ELD. See also Article 1(e) of the HD.

³⁷See Article 2(4)(b) of the ELD. See also Article 1(i) of the HD.

³⁸See Article 1(a), (e) and (i) of the HD, See also European Commission (2000, pp. 17–18).

³⁹Article 2(b) ELD.

Contaminated land can only be claimed for, as was noted earlier, if the contamination is such that it ‘creates a significant risk of human health being adversely affected’.⁴⁰ For interpretation of this threshold there currently is no European Union Directive that addresses and provides guidance regarding this type of environmental harm. However, Annex II of the ELD provides some guidance.

1.3 Enforcing the Environmental Liability Directive

The ELD contains provisions—in the event of an imminent threat of, or actual, environmental damage—authorising Competent Authorities to require that preventive and/or remediation measures are taken by the operator. In addition, it imposes a duty on operators who caused the imminent threat of, or actual, environmental damage to not only notify the Competent Authority of the fact that environmental damage has occurred or that an imminent threat of such damage occurring exists, but also to take measures to prevent and/or remediate the environmental damage caused.⁴¹ Articles 5–8 and 11 of the ELD are in that respect the most relevant for the ELD’s implementation.

Taken the scope of this book, Article 7(1) of the ELD is particularly relevant. This provision imposes a duty on the relevant operator to identify, in accordance with Annex II of the ELD, the potential remedial measures to make good the environmental damage done and to submit them to the Competent Authority for approval. The Competent Authority then decides which remedial measure is to be implemented.

In addition to requiring the operator to take necessary remedial measures, the Competent Authority may implement the remedial measures itself, as a means of last resort. If the Competent Authority takes the remedial measures, the Competent Authority ‘shall recover [...] the costs it has incurred in relation to the [...] remediation actions taken under the Directive’.⁴² In addition to the above, the Competent Authority is under a duty to assess the significance of the environmental damage caused by the incident.

1.4 Determination of Remediation Measures

According to Article 7 of the ELD, operators ‘shall identify, in accordance with Annex II [of the ELD], the potential remedial measures and submit them to the Competent Authority for its approval’. It is then up to the Competent Authority to

⁴⁰Article 2(1)(c) ELD.

⁴¹See Article 5–7 and 11 ELD, Some of these provisions are so-called self executing provisions. See for further details Fogleman (2006).

⁴²See Article 8(2) ELD.

‘decide which remedial measures shall be implemented in accordance with Annex II, and with cooperation of the relevant operator’.

1.4.1 Measure of Damages and the Objective of Remediation Measures

One of the primary objectives of the ELD is to restore damage to the species and natural habitats protected under the HD and WBD and to the waters covered by the WFD.⁴³ The ELD therefore emphasises restoration and chooses restoration costs as the primary and preferred method to assess damages.⁴⁴ However, because it takes time to restore the damaged natural resources to baseline condition—that is the condition the natural resources and services would have been in, had the damage not occurred—the operator will also be held liable for the loss or impairment of natural resources and natural resource services during the restoration period (interim losses).⁴⁵ In addition to restoration costs and interim losses, the responsible party can be held liable for the costs of assessing damages as well as the administrative, legal and enforcement costs, the costs of data collection and monitoring and oversight costs.⁴⁶

According to Annex II of the ELD, restoration of damage to waters and protected species and natural habitats is to be achieved by way of so-called primary, complementary, and compensatory remediation measures. It should be noted that the objective of these remediation measures is not only to bring back the damaged natural resources to baseline condition, but also to restore the impaired natural resource services to baseline condition.⁴⁷ Natural resource services are defined in the ELD as ‘the functions performed by a natural resource for the benefit of another natural resource or the public’.⁴⁸ For example, a coastal wetland provides food and nesting habitats for birds and other species, clean water for fish populations, and is important for biodiversity maintenance and for pollution assimilation. Examples of human benefits deriving from coastal wetlands include recreational fishing and boating, beach use, wildlife viewing, hiking, and hunting. This is akin to the ecosystem services approach (e.g. MEA 2005) that has become more commonly known since the drafting of the ELD (see Chap. 2 for more details on ecosystem

⁴³Although one of the goals of the ELD is to maintain biodiversity, the ELD focuses primarily on the protection and conservation of the natural resources covered by these nature conservation Directives and not or only indirectly on biodiversity as such. See further Brans and Dongelmans (2014).

⁴⁴See Article 7(1) ELD.

⁴⁵See Article 2(11), (13) and Annex II, para. 1(c) and (d).

⁴⁶See Article 8(2) jo 2(16) of the ELD.

⁴⁷See Article 2(15) and Annex II, para 1(b)–(d) of the ELD.

⁴⁸Article 2(13) ELD. See also paragraph 1(d) of Annex II.

services). It should be noted that the other European Union nature conservation Directives, including the HD, do not refer to the human benefits deriving from the species and natural habitats covered by these Directives.⁴⁹ So unlike the ELD, such human benefits do not play a role when considering measures to fulfil the obligations under Article 6(4) of the HD or the obligations under Article 6(2) of the HD.⁵⁰ The focus of the HD is entirely on species and natural habitats and not—or only indirectly—on the human services provided by these species and habitats.

1.4.2 Primary, Complementary and Compensatory Remediation Measures

As noted earlier, according to the ELD, damage to waters and protected species and natural habitats is to be restored to baseline condition by way of primary, complementary, and compensatory remediation measures. Primary remediation is defined in Annex II as ‘any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition’. The focus of these measures is thus on directly restoring the natural resources and services that have been impacted to baseline condition.⁵¹

Complementary remediation is defined in Annex II as ‘any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services’. The purpose of this type of remediation measures is to provide a similar level of natural resources and/or services at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition.

Because neither of these remediation measures compensate for the loss of ecological and/or human services during the remediation period, compensatory remediation measures also need to be taken to compensate for such interim loss of natural resources and services pending recovery. This compensation often consists of additional improvements to protected natural habitats and species or waters at either the damaged site or at an alternative site.

In order to determine the scale of the complementary and compensatory remediation measures, specific resource equivalency methods are proposed in Annex II,

⁴⁹Such services are also not addressed in the relevant EC guidance documents *Managing Natura 2000 Sites*. The provisions of Article 6 of the HD, Luxembourg 2000 and *Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC*, Brussels 2007.

⁵⁰Article 6(4) HD also uses the term ‘compensatory measures’. However, taken the text of this provision, the ECJ’s case law and the EC’s guidance material that is available on article 6 HD, the term has a different meaning and is not comparable to the one used in the ELD. The measures that need to be taken under this provision of the HD are more likely to be considered primary and complementary remediation measures, to use ELD language.

⁵¹See in this respect para. 1.1.1 and 1.2.1 of Annex II.

including resource-to-resource, service-to-service, value-to-cost, and value-to-value approaches (see further Chaps. 2–8 of this book).

A few observations about the framework outlined in Annex II are appropriate here. The first concerns the option to take complementary remediation measures at an alternative site. It is noted in Annex II that where possible and appropriate, the alternative site needs to be ‘geographically linked to the damaged site’, ‘taking into account the interests of the affected population’. What is meant by the terms ‘geographically linked’ and ‘affected population’ is not specified. It is also not clear whether the latter refers to humans, to non-human species, or both. Both the English and Dutch version of the ELD are unclear on this point. However, since the German version of the ELD uses the term ‘betroffenen Bevölkerung’, it appears as though the language specifically concerns human interests. Taking this version of the ELD as a starting point, human interests as well as impacted non-human species are to be taken into account when selecting the location of the alternative site. The ELD is also not very clear as to the geographical scope of the term ‘affected population’ and whether or not the term refers to the local community impacted by the loss or impairment of the natural resources covered by the ELD or, more widely, the community in that region of the given Member State or the nation in general. This is relevant to the application of the ELD as it determines whether or not it is permitted to undertake remediation further away from the place where the damage occurred, not benefiting the impacted local or regional community.

Second, Annex II requires that the alternative site is geographically linked to the damaged site. However, no further guidance is provided regarding the (maximum) allowable distance between the impacted site and the alternative site. According to European Commission (2000), for sites designated under the HD, the site selected for compensation should be located within the biogeographical region concerned (i.e. Alpine, Atlantic, Continental, Macaronesian, or Mediterranean). For sites designated under the WBD, the area selected must be located ‘within the same range, migration route or wintering area for bird species [...] in the Member States concerned’ (European Commission 2007).

Whether or not these guidelines apply to ELD incidents is not entirely clear, but it seems likely. If so, the consequence thereof is that when selecting the location of alternative sites, the focus is not so much on the territory of the Member State where the incident occurred, but on the biogeographical region concerned. It might thus well be that the alternative site that is taken to be the most suitable for remediation is located outside of the territory of the Member State where the damage was caused. To my knowledge, there are no examples whereby remediation measures were taken outside of the Member State where the damage was done.

Finally, the framework of complementary, compensatory, and primary remediation measures does not apply to soil pollution cases. Annex II of the ELD states that the aim of the remediation measures for land damage is to ‘ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk

of adversely affecting human health'.⁵² Interim losses for soil damages are not referred to in the ELD. So, most likely interim losses are not to be considered when selecting the most appropriate measure(s) to remediate land damage.⁵³ However, to my knowledge that is no case law that affirms this.

1.4.3 Selection of the Most Appropriate Remediation Measures

According to Annex II of the ELD, a reasonable range of remediation options—each consisting of a primary, and if necessary a complementary component, and compensatory component—should be developed.⁵⁴ The Competent Authority then evaluates the various options and selects the most appropriate one on the basis of a set of criteria.⁵⁵ These criteria include: the costs of implementing the various options; the extent to which each option avoids collateral damage and benefits each damaged natural resource and/or service; the likelihood of success of each option; the length of time it will take under each option to restore the damaged resources and services to baseline condition; the extent to which each option achieves the restoration of the site; and the geographical linkage to the damaged site if measures are taken elsewhere.⁵⁶ There is no hierarchy of selection criteria.

The process of identifying, evaluating, and selecting remediation options is also important for determining the extent of the operator's liability. As noted earlier, liability under the ELD is in principle unlimited. Because the ELD does not set a liability limit or a standard or numerical ratio for determining at which point the costs of remediation become unreasonable, the weighing of all of the aforesaid (and other) criteria when selecting the most appropriate remediation options is highly relevant to the potential liable person.

According to Articles 7(2) and 11 of the ELD, the Competent Authority finally decides which of the selected remedial options are to be implemented.⁵⁷ It might occur that the remedial measures adopted are less successful than expected. The Competent Authority is in that case entitled to alter the remedial measures previously adopted and/or to decide that additional remedial measures are necessary.⁵⁸ However, in such cases, the Competent Authority is required to hear the interested parties before adopting a decision on this issue, especially the operator that is

⁵²See para. 2 of Annex II of the ELD.

⁵³This is affirmed by Article 2(15) of the ELD.

⁵⁴Annex II, para. 1.3.2.

⁵⁵Annex II, para. 1.3.1–1.3.3.

⁵⁶*Ibid.*

⁵⁷Articles. 7(2) and 11 of the ELD. See also ECJ 9 March 2010, Joined Cases C-379/08 and C-380/08, para. 49–50.

⁵⁸See also ECJ 9 March 2010, Joined Cases C-379/08 and C-380/08, para 51.

required to take such measures and who funds them.⁵⁹ Where a Competent Authority considers substantially altering the remedial measures which were chosen, it is required to take into account the criteria of Sect. 1.3.1 of Annex II and to prevent that the operator concerned has to incur ‘manifestly disproportionate costs’ in comparison to the first remediation option chosen.⁶⁰ At the time of writing, there is no case law yet on the latter. It is thus unclear at what point these costs become manifestly disproportionate.

1.5 Outlook

The ELD introduces a complex but interesting and potentially powerful liability regime. Although there have already been a number of incidents in the European Union that are covered by the ELD, there is thus far only limited case law. One reason for this is the slow implementation of the ELD into national law. Another is the degree of awareness by public authorities and others of the ELD and its novel instruments. In addition, many Competent Authorities consider the ELD complex and expensive to apply.⁶¹ The European Commission is aware of this and has taken measures, for instance by making available training materials and is preparing additional measures to support Competent Authorities and others in applying the ELD.⁶²

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⁵⁹Ibidem, para. 55. The ECJ considers that such an obligation does not exist in case ‘where the urgency of the environmental situation requires immediate action on the part of the environmental authority’. Ibidem, para. 56.

⁶⁰Ibidem, para. 64.

⁶¹The European Commission funded various studies that investigated the causes of the limited application of the ELD. These studies are accessible via: <http://ec.europa.eu/environment/legal/liability/index.htm>.

⁶²See ELD Training Material, accessible via: http://ec.europa.eu/environment/legal/liability/eld_training.htm, and the ELD Multi-Annual Work Programme 2017–2020, (European Commission 2017).

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