



ELD Guidelines on Environmental Damage

7th ELD Stakeholder Conference

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Outline of presentation

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I. Background

- Multiple requests for clarification of ELD definitions, terms, concepts, including in **previous ELD stakeholder events**, for example in the 6th ELD Stakeholder Workshop of March 2019
- **ELD Commission REFIT evaluation 2016**: wide variations in implementation, partly linked to lack of common understanding of key concepts, notably notion of ‘significant environmental damage’
- Completion by consultants of a **Common Understanding Document** on ELD key terms and concepts in 2017, covering also ‘environmental damage’
- Amendment of **Article 18(3) of Directive** to require guidelines on a common understanding of ‘environmental damage’ in June 2019

II. Form, approach, style, presentation

Form: Commission Notice, to be adopted by the College.

Approach: Explanatory, analytical and contextual, closely following text, providing reasons and, where available, case-law references for positions proposed. Justification: need for common understanding.

Style: Accessible but still legally and technically precise

Presentation: Simple paragraph numbering system (for ease of future reference), boxes for key definitions (to assist reading) and case-law annex

III. Structure

1. Introduction
2. The legal and wider regulatory context
3. 'Damage'
4. Overview of 'environmental damage'
5. 'Damage to protected species and natural habitats'
6. 'Water damage'
7. 'Land damage'
8. Conclusions

Annex: List of decisions of the Court of Justice cited

IV. Process so far and next steps until adoption (1)

1. **Commission internal preparation:** Roadmap (October 2019), internal drafts and consultations, Inter-Service Group (1st meeting in May 2020)
2. **Consultation with the ELD government experts group** (two times in May and June 2020)
3. **Broad stakeholder and experts consultation** 15 July – 15 September 2020
4. **Last consultations** with Inter-Service Group and ELD government experts group (October 2020)
5. Launch of official ISC planned for end of November 2020 in view of **adoption and publication in January/February 2021**

IV. Process so far and next steps until adoption (2) - Summary of consultation

- **15 July – 15 September**
- **More than 300 targeted addressees**
- **20 respondents – more than 200 comments**
- **Comments mostly of good or very good quality, including**
- **Many detailed technical comments**
- **Many comments already taken into account in 4th ELD guidelines master version, some highly technical comments further considered in the 5th and last ELD guidelines master version**

V. Core issues and follow-up on main comments (1) – Generalities

- Definition of ‘environmental damage’ pivotal for the whole ELD, particular importance of ‘significance’
- Need to explain better ELD concepts was often raised, including in stakeholder events, and resulting from the ELD evaluation 2016
- ELD is based on the PPP, but all four EU environmental policy principles (Art. 191(2) TFEU) relevant for ELD are included in the ELD
- **The precautionary principle more emphasized due to consultation results**
- **Principle of inherent proportionality expressly mentioned**

V. Core issues and follow-up on main comments (2) – Generalities

- Liability: strict and fault-based, channelled to operators; three main obligations (prevention, immediate management of damage factors, remediation)
- Term ‘damage’ (Art. 2(2) ELD) and its four basic concepts: affected natural resources and services – adverse changes and impairments – measurable adverse effects – direct or indirect effects
- ‘Environmental damage’ follows for all three categories the same structure: material and geographical scope of natural resource; reference concept of adverse effects; assessment of significance
- **‘Significance’ v. ‘measurability’ better explained (‘significance = baseline condition + measurable data’)**

V. Core issues and follow-up on main comments (3) – Nature damage

- Material and geographical scope:

Material scope: all species and habitats listed in the annexes to the Birds and Habitats directives, plus any species and habitats designated by Member States for equivalent purposes in addition to those listed in the annexes.

Geographical scope: European territory of the Member States, including the EEZ and the CS where MS exercise own jurisdiction

- Reference concept for adverse effects: Favourable conservation status of natural habitats and species

V. Core issues and follow-up on main comments (4) – Nature damage

- The assessment of significance: Adverse change to the baseline condition regarding reaching or maintaining the favourable conservation status of habitats or species by measurable data on the criteria listed in Annex I ELD
- **Geographical references to different scales better explained for damage to nature; relevance of the assessment at local level**
- **Time factor: natural species' and habitats' capacity to recover (relevant for all categories of ELD environmental damage, in particular also water damage), relationship to 'interim loss'**

V. Core issues and follow-up on main comments (5) – Water damage

Water damage under the WFD:

- Material and geographical scope:

Material scope: all 'waters' covered by the Water Framework Directive

Geographical scope: 'surface water' (*'inland waters, except groundwater; transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters'*) and 'groundwater' (*'all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil'*).

V. Core issues and follow-up on main comments (6) – Water damage

- Reference concept for adverse effects: 'ecological, chemical and/or quantitative status and/or the ecological potential, as defined in Directive 2000/60/EC'
- The assessment of significance: measurable adverse change in respect of at least one status element of an area or areas of water affected
- **The four separate kinds of status under the WFD better explained**
- **Concepts of 'waters' v. 'water bodies': water bodies and areas of water better explained**

V. Core issues and follow-up on main comments (7) – Water damage

Water damage under the MSFD:

- Material and geographical scope: All marine waters of the EU (where MS exercise their jurisdiction including in the EEZ and CS) except coastal waters and territorial waters covered by the WFD
- Reference concept for adverse effects: Environmental status of marine waters in so far as not already covered by the WFD
- The assessment of significance: Measurable loss in respect of the environmental status of one or more qualitative descriptors in conjunction with the indicative list of characteristics, pressures and impacts, by taking account of ‘criteria elements’ and ‘threshold value’ in respect of the marine area affected

V. Core issues and follow-up on main comments (8) – Land damage

- Material and geographical scope: The scope of the definition is uniform for all land in the territory of the Member States. It extends to the surface and sub-surface of land (soil).
- Reference concept for adverse effects: Potential of land contamination to harm human health (includes harm to human well-being by contaminants)
- The assessment of significance: Significant risk for human health being adversely affected if there is any reasonable doubt that it will not occur without response measures
- **Difference between ‘hazard’ and ‘risk’ in land damage explained**

<https://ec.europa.eu/environment/legal/liability/index.htm>

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Thank you



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