The Baltic Sea Pipeline and EU Environmental Liability: Scope Matters

Professor Gerrit Betlem
Contents

1. Introduction to the ELD: ex post not ex ante perspective
2. Scope *ratione materiae* ELD
3. Scope oil pollution regime
4. Scope *ratione territoriae* ELD
6. Cooperation between MS (Art. 15 ELD)
7. Role civil actions
8. Transnational operator liability; Rome II Regulation
Introducing the ELD

Directive 2004/35 on environmental liability (ELD); transposition date expired 30 April 2007

Seeks to contribute to preventing/remedying environmental damage by largely creating a public law liability regime imposing obligations on operators

Liability claims by private actors (property damage, personal injury) not covered
Uncapped liability of operators for costs of preventive measures and remediation (as defined by ELD)

“Environmental damage” is one of three types: (i) protected species and natural habitats; (ii) waters as covered by the EU Water Framework Directive; (iii) contaminated land

Two types of liability: when caused by listed (dangerous) activity without fault; caused by any other occupational activity to protected species and natural habitats with fault/negligence
Operator liability ELD

- Key features: preventive/remedial action taken by operator or State
- Cost bearers: operator, third party, State
- Claimants: competent authority
- MS obliged to require operator to take action and to ensure operator bears the costs; no Community law obligations on MS to take action themselves
Limits liability

- Functional liability operator of the occupational activity triggered by (imminent threat of damage). Even when not caused by operator. Must take the measures subject only to a costs recovery action (against third party or public authority): “shall without delay …” (Arts. 5(1), 6(1)

- “Defences” of Art. 8(3) – act third party; compulsory order public authority - does not relieve operator from liability but from bearing the costs incurred after recovery
Costs remedial action

If action was taken by public authority, it must recover them from operator (third party). The previous defences apply to be proven by operator.

In addition and only where law of MS so stipulates – optional defences, not harmonised by ELD – no cost bearing when permit compliance or so-called “State of the Art” applies. Operator must prove was not negligent.
Scope Matter I

- If an “incident” occurs covered by the scope of the international regime for oil pollution damage the ELD shall not apply (Art. 4(2)) + Annex IV: the 1992 CLC, IOPC Fund, Bunker Oil Convention
- ELD does not define incident so delineation between the regimes decided by the relevant Conventions.
- Conventions apply to ship-source oil spills only so environmental damage caused by oil transported in pipelines remains within scope ELD. Likewise gas.
Non-ship source oil pollution

- No international convention based regime comparable with the CLC/IOPC Fund exists for offshore installations and pipelines (oil and gas). Art. 25 Baltic Sea Convention refers to national law.

- The general provisions regarding liability under UNCLOS apply and require states to offer redress for damage caused by persons under their jurisdiction.

- However, national law in conjunction with EC law enables redress by public authorities before their own courts against defendants based outside it.
When would environmental damage in the form of protected species or natural habitats defined by the ELD be covered although the source of the pollution is outside the territorial jurisdiction of the State where the harm occurs?
q ELD rules linked to existing scope Birds and Habitats Directives

q Designated habitats on the European territory MS over which it has jurisdiction. Includes migratory species using the geographical land and sea areas of an MS

q According to 2005 ECJ judgment this extends to the EEZ (Case C-6/04 Commission v. UK [2005] ECR I-9017, para. 117; see further presentation by Daniel Owen)
Significant adverse effects on favourable conservation status species/habitats. Significance to be assessed with reference to baseline condition: art. 2(14): “estimated on the basis of best information available” and Annex I criteria. If effects on human health: always significant. MS under duty to collect data.

Complex ecological assessment of “conservation status”, including sum of influences affecting long term natural functions habitat or distribution, abundance species.
**Remediation**

- Restore to baseline condition
- Take all three measures: primary, complementary and compensatory measures
- Primary would equate to oil pollution regime “measures of reinstatement”
- Complementary remediation goes further and requires providing similar level of services to natural resources at alternative site if primary restoration not fully possible
- Compensatory measures compensate for interim losses in form of projects; not financial compensation to members of the public
Interim loss
Oil as waste

q To what extent could an operator of a pipeline be considered producer of waste within the meaning of EC Waste law? If so, clean-up costs would be recoverable under that legislation

q ECJ judgment Re Erika (Commune de Mesquer) held spilled oil from a ship to be waste when mixed up with water and sand. The oil was involuntary discarded and washed up on the coast; therefore was discharged on State territory
Key feature of the case was who could be a liable person for this damage in the light of the exclusive channelling of liability by the CLC to ship-owners.

ECJ noted that Waste Directive 75/442 did not contain a restriction of its scope in favour of the CLC like the ELD does.

Where damage would exceed CLC and IOPC Fund limits a seller of oil and/or charterer ship would be “producer of waste.”
Correct transposition of the then applicable Waste Directive 75/442 requires MS to hold these producers liable, but only where their conduct had contributed to the risk that the shipwreck would occur (notably choice of ship).

Possible conflict of obligations for MS with CLC provision on possible liability of other persons based on “intent” or recklessness with knowledge of probable damage.
Erika ruling’s limited relevance

- In case of pipelines there is no equivalent international regime like the CLC and the IOP Fund
- Claims brought against other defendants than allowed under the CLC cannot extend the recoverable loss in terms of ELD defined remediation measures such as interim loss
- Erika rulings based on earlier Van de Walle case: oil spilled on land as waste. It would seem to follow that spilled oil from ships and pipelines ending up as contaminated land is no longer “waste”
Art. 15 (3): “Where a Member State identifies damage within its borders which has not been caused within them […] it may [(i) report matter to Comm. & other MS; (ii) recommend measures] and seek [(iii), in accordance with this Directive, to recover the costs] it has incurred in relation to the adoption of preventive or remedial measures.”
Impact on PIL

- Preamble recital 10 ELD: no additional choice of law rules; without prejudice to Reg. 44/2001 (so-called Brussels I)
- Who is the defendant? The operator
- Sue operator at: domicile (Art. 2)
- *Forum delicti* & at branch (Art. 5(3), (5))
- Non-EU based defendants sued on basis domestic law (Art. 4). Judgment still enforceable EU wide if in scope Reg.
- Swiss defendant sued on basis of Lugano Convention containing identical rules as cited above
Jurisdiction

- Brussels I place of harmful event covers both *Handlungsort* and *Erfolgsort* following the French Potassium Mines case ECJ. Domestic law possibly similar (e.g. Dutch residual jurisdiction)

- Branch forum available to sue parent of operator. Not required that damage took place in State of that branch after the ECJ case *Lloyd's register*

- Uncertainty, however, about whether claims by public authorities are “civil matter”. If not, no recognition/enforcement under Brussels I irrespective of which basis for jurisdiction was used
Choice of Law

q Why still relevant? No full harmonisation ELD
q Was decided by domestic law until entry into force of the Rome II Regulation on 11/1/2009): Art. 7 environmental damage
q Law of place of damage occurrence unless claimant chooses law of place event giving rise to the damage
q Based on Günstigkeitsprinzip, Preamble, recital 25; definition of “environmental damage”: recital 24 Preamble: differs from ELD. Much wider; it reads as follows:
"Environmental damage" should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.
Conclusion

- ELD regime as transposed into MS law applies to environmental damage occurring within the territory of the State involved irrespective of whether it was caused inside or outside that State.
- Regime mainly based on public law with limited scope for imposing obligations on operators based abroad.
- ELD, in conjunction with both EC and domestic rules on private international law, however does envisage transnational cost recovery actions by public authorities based on civil law.