



Overview of the implementation of the directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage at European level

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ABSTRACT

On 21 April 2004, the European Parliament and the Council of the EU finally succeeded in adopting an Environmental Liability Directive (Directive 2004/35/EC), which has the overall ambitious objective to establish a common European framework of environmental liability for damage to air, water, land, protected species, and natural resources. However, the efficient implementation of this *sui generis* legal framework regarding prevention and remediation of the environmental damage has been proved really problematic at the European level due to legal discrepancies and technical deficiencies. Eleven years after the adoption of the ELD particular interpretation issues concerning the determination of the responsible operator, the application of the optional provision of the ELD, the extent of the exceptions, the financial security, and the role of the competent authorities remain unanswered. The aim of this paper is to analyze the barriers to building up a coherent and harmonized liability system without the conceptual fragmentation of the past as well to present comparatively the main procedural and substantive variations among Member States stemming from the national transposition and application of the ELD.

Keywords: Environmental damage; Environmental liability; Directive 2004/34/EC

1. Introduction

The adoption of the Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (hereinafter referred to as “ELD”) was a very significant step towards the more efficient environmental protection, as well as the harmonization of the differentiated and fragmented environmental liability models among the Member States. The fundamental characteristic of this

initiative is the break with the traditional civil law liability models [1] and the establishment after more than 10 years of deliberations and several unsuccessful legal choices [2] of a *sui generis* system that deals straightforward with the pure environmental damage, reinforces the preventive action, and emphasizes the need for *in natura* restoration.

However, eleven years after the adoption of the Directive, the ambitious perspectives of this EU initiative have faded away revealing crucial conceptual

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ambiguities, although the choice of a Directive as the legal “vehicle” for the realization of such a regime was the most viable decision after the experience of the Lugano Convention, which has not been ratified by six Member States that had signed it, and the unsuccessful course of the White Paper on environmental liability [3]. On this basis, it was considered appropriate to adopt a new instrument with greater consistency in definitions and with a general horizontal and not a sectoral nature, in order to overcome the institutional and regulatory entanglement within a grid pattern of a supranational system of environmental liability.

Despite the fact that the ELD aimed to function as a *minima* compromise among legal, geographical, economic, and ecological diversity of the Member States [4], its inherent ambiguities and weaknesses has tested sorely its efficiency [5]. In particular, the ELD did not manage to give uniform procedural, substantive, and interpretative answers regarding the established environmental liability regime, and, by extension, to overcome the difficulties stemming from the coexistence of EU and national frameworks. Consequently, it ended up as a very complicated, uncertain and impractical tool.

2. Harmonization and practical implementation of the ELD

The European legislator aspired to establish with the ELD, for the first time, a completely new mechanism for environmental liability which is “based on the polluter pays principle and deals in a horizontal and systematic way with the prevention and the remediation of the environmental damage” [6]. However, given that the ELD was not adopted in *terra incognita*, it is impossible to overlook the question of difficulties in harmonizing the national legislative choices, as well as the technical problems concerning the implementation of the ELD rules by the Member States [7], which led finally to the shrinkage of its initial broad scope. Besides, given that the legal culture of the EU is very dynamic and multifaceted, as it consists of a pluralistic range of national legal backgrounds, the issue of harmonization continues to be a major challenge for the EU Environmental Law [8].

In this framework, the first differentiations concerning the implementation of the ELD can be already noticed in reference to its transposition time. Due to the essentially different level of environmental protection among the Member States at the time of the transposition deadline, April 2007, only four Member States (Italy, Lithuania, Latvia, and Hungary) had transposed it into their national legislation, and only by June 2010 the transposition of the ELD was finalized [9]. This

involves the first of the numerous substantive and procedural discrepancies among Member States.

Furthermore, many divergences arise from the way ELD is transposed into the existing legal systems of the Member States [10], mainly connected to the different national levels of environmental protection. Hence, countries like France have adopted the rules of the ELD by introducing a new section in the pre-existing Environmental Code. On the other hand, countries like Greece, which did not have an Environmental Code, have transposed the ELD as stand-alone legislation [11]. Additionally, further variations originate from the effectiveness of this transposition. While some Member States have incorporated the ELD by making the necessary amendments to the existing national laws, others have only applied a “copy-paste” approach to the European text, without the essential legal adjustments, thereby enhancing obscurities and legal instability.

Regarding the practical application of the ELD, as a first barrier can be detected the wealth of responsible authorities, despite the fact that the legislative choice of channeling this responsibility only to the competent authority aimed to simplify the implementation procedure. The designation of more than one central responsible authorities by several Member States causes an ambiguous interweaving among the involved powers and, by extension, may cause confusion to the interested parties. Moreover, there is a risk of inevitable overlaps among these authorities, especially because of the timeless and inter-regional character of the environmental damage. Particularly, in France, the *Préfet de département* of the *département* in which the imminent threat of, or actual environmental damage, occurs, is the competent authority, although the national provision is not exclusive and permits the final future designation of other competent authorities [12]. In Greece, the Ministry of the Environment, Energy and Climate Change and the Decentralized Administrations are both designated as competent authorities with complementary powers [13]. It is worth mentioning that Germany has several hundred competent authorities, mainly because of its federal system, whereas the UK has established a separate authority for marine affairs, because of the special state interest in this field [14].

Furthermore, the very restricted practical application of the ELD is being noticed by the European Commission stating that “the Commission (...) identified 16 cases treated under the ELD at the beginning of 2010, and estimates the total number of ELD cases across EU may now be around 50” [15]. In the light of the analysis of both the national and European jurisprudence emerges expressively the difficulty to reach the threshold set by the ELD, so that an environmental damage

Table 1

Main national variations concerning the scope of application of the ELD.

Member States				
Provisions of the ELD	Scope of Liability	Extension of strict liability beyond Annex III activities	Additional responsible parties article: 16(1) ELD	Extension of the definition of the operator article: 2(6) ELD
Austria	Joint and several liability	No	The owner of the land on which the damage occurred provided he has approved or voluntarily acquiesced in the harmful installations and has failed to carry out the statutory measures	No
Belgium	Joint and several liability	Addition of the transport of alien plant and animal species	No	No
Bulgaria	Joint and several liability. But when an imminent threat of, or actual, environmental damage is caused by successive operators, the last operator is liable but entitled to claim restitution against the other operators	No	No	No
Cyprus	Joint and several liability	No	No	No
Czech Republic	Joint and several liability	No	No	No
Denmark	Modified proportionate liability	No	No	No
Estonia	Unclear. The relevant national law that applies provides for both joint and several, and proportionate, liability	No	No	Yes
Finland	Modified proportionate liability	Biodiversity damage from an activity related to damming or water abstraction	No	Yes
France	Proportionate liability	Transport of oil by pipeline	No	No
Germany	Joint and several liability	No	No	No
Greece	Joint and several liability	Strict liability applies to non-Annex III activities as well as Annex III activities	No	No
Hungary	Joint and several liability	Strict liability applies to non-Annex III activities as well as Annex III activities	Joint and several liability of the owner and possessor/user of real property on which the damage occurs until and unless evidence is provided to the contrary	Operator: a user of the environment that carries out an activity involving the utilization or loading of the environment or a component thereof
Ireland	Joint and several liability	No	No	No
Italy	Proportionate liability	No	No	No
Latvia	Joint and several liability	Activities of a petrol filling station or an oil storage facility and the transport of chemical substances or chemical products through pipelines	No	No

(Continued)

Table 1 (Continued)

Member States				
Provisions of the ELD	Scope of Liability	Extension of strict liability beyond Annex III activities	Additional responsible parties article: 16(1) ELD	Extension of the definition of the operator article: 2(6) ELD
Lithuania	Joint and several liability	Yes	No	Yes
Luxemburg	Joint and several liability	No	No	No
Malta	Joint and several liability only if it is expressly stipulated by a competent authority and liable operators	No	No	No
Netherlands	Unclear. National law applies that does not rule out joint and several liability	No	No	No
Poland	Joint and several liability	Activities that require a permit to introduce gases or dust into the Atmosphere	The landowner is jointly and severally liable for carrying out the preventive and remedial measures with the operator that caused the damage, if he knew or he consented for the activities of the operator	Operator: an entity which uses the environment, which carries out an activity involving a risk of environmental damage or which causes the damage
Portugal	Joint and several liability	No	No	No
Romania	Joint and several liability	No	No	No
Slovakia	Proportionate liability with a default to joint and several liability if allocation cannot be clearly determined or would result in disproportionate cost	No	No	No
Slovenia	Joint and several liability	No	No	No
Spain	Joint and several liability	Preventive measures and emergency remedial actions for non-Annex III as well as Annex III activities	A third party who is not connected with an activity that causes an imminent threat of, or actual, environmental may reimburse the costs of preventing or remedying the threat or damage	No
Sweden	Joint and several liability	Yes	The owner of the land on which damage has occurred may be liable for its remediation, if the liable operator is unable to carry out/pay for the remediation, provided that the landowner knew or should have known of the damage when acquiring the land	Operator: persons who pursue or have pursued an activity or taken a measure that has contributed to pollution damage or serious environmental Damage
United Kingdom	Joint and several liability	No	No	No

Table 2

Main national variations concerning the optional provisions of the ELD.

Provisions of the ELD Member States	Adoption of the permit defense article: 8(4)(a) ELD	Adoption of the State-of-the-art defense article: 8(4)(a) ELD	Introduction of mandatory financial security
Austria	No	No	No
Belgium	Yes: Regions No: Federal Government	Yes: Regions No: Federal Government	No
Bulgaria	No	No	Entered into effect on 1 January 2011
Cyprus	Yes	Yes	Considered the introduction of mandatory financial security in 2008 and 2009 but decided not to introduce it at that time
Czech Republic	Yes	Yes	Entered into effect on 1 January 2013
Denmark	Yes	No	Thoughts on introducing a mandatory financial security in 2006 but decided to wait until there was more experience in this filed
Estonia	Yes Except GMOs	Yes Except GMOs	No
Finland	Yes	No	No
France	No	Yes	No
Germany	No	No	No
Greece	Yes	Yes	Enacted legislation to introduce mandatory financial security on 1 May 2010, but still expected to be brought into effect
Hungary	No	No	Legislation to introduce mandatory financial security has not been finalized
Ireland	No	No	No
Italy	Yes	Yes	The legislation transposing the ELD provides for mandatory financial security; no secondary legislation to bring the provisions into force has been issued
Latvia	Yes Except GMOs	Yes Except GMOs	No
Lithuania	Yes	No	Thoughts on introducing a mandatory financial security but has not been done progress on this area
Luxemburg	No	Yes	No
Malta	Yes	Yes	No
Netherlands	No	Yes	No
Poland	No	No	No
Portugal	Yes	Yes	Entered into effect on 1 January 2010, but details are still being prepared
Romania	Yes	Yes	
Slovakia	Yes	Yes	Entered into effect on 1 July 2012
Slovenia	No	No	Carried out two studies on the introduction of mandatory financial security in 2010 and 2012, but decided not to introduce it at that time
Spain	Yes	Yes	Only preliminary actions
Sweden	No	No	No
United Kingdom	Yes except for GMOs in Wales	Yes	No

falls into its scope. The thresholds, regarding land and water damage in particular, are considered too high as has been shown from the very low number of cases under this regime. An indicative example comes from the UK concerning the *Rye Harbour spill* [16]. In that case of water damage, the relevant Environmental Agency concluded that the requirement under the ELD, that the environmental damage should affect the entire surface body, was not exceeded.

Additionally, the widely known case of the French jurisdiction *Coussouls de Crau* [17], regarding an oil leak into the homonymous nature reserve, was not treated under the ELD's system, because the transportation of the oil pipeline did not fall within the scope of Annex III activities. However, in Poland and in Germany, the ELD transposing legislation has been enacted [18] several times, but only in cases that the causal link is definitely established, and the competent authority identifies almost directly the liable part. In general, this limited activation of the ELD is also confirmed by the national reports on implementation of the Directive 2004/35/EC pursuant to article 18(1) of the Directive [19].

3. Summarizing the main national variations related to ELD

This Directive aspired to establish an effective model of environmental responsibility based on the Polluter Pays Principle that would offer cogent solutions to modern environmental problems, which are distinguished by the lack of spatial and temporal limits as well as by their dynamic and non linear development. However, more than 10 years following the adoption of the Directive the ambitious perspectives of the European initiative have faded away, revealing crucial conceptual ambiguities [20], and not overcoming the institutional and regulatory obstacles originating from the coexistence of the European and national legal frameworks [21].

Despite the efforts to develop a uniform and coherent legal regime with administrative mechanisms that focus on preventing imminent environmental damage and remedying incurred damages, the final text depicts clearly the differentiation among Member States concerning the crucial provisions of the ELD. In particular, lack of consistency derives from the margin for the application of national law that the ELD leaves in particular points. One typical example is the delimitation of the concept "operator", as some of the Member States have adopted a broader definition [22]. Additionally, variations arise also from the article 16 (1) which assigns national authorities the power to

enact more stringent legislation than the ELD's rules. In the light of this provision, some of the Member States have introduced additional responsible parties [23] or have extended the implementation of the activities of Annex III towards strict liability by either adding other activities to the list of Annex III, like in the case of France [24], or imposing strict liability for biodiversity damage on non-Annex III activities, like in the case of Greece [25].

Moreover, according to the optional regulation provided for by the article 2(3)(c) of the ELD, fourteen Member States have extended the ELD's strict liability to their nationally protected biodiversity, while Austria, Belgium, and the UK have not [26]. Similar discrepancies may appear due to the discretionary power that the European legislator has assigned via the article 8(4)(a) and (b) to the Member States regarding the adoption of the "permit" and the "state-of-the-art" defense, trying to conciliate the provisions of the White Paper, which did not provide for these exemptions at all, and those of the Draft Directive which treated the above cases as exemptions from liability [27]. Further, another field of the ELD that causes divergences among Member States concerns the non-provision of a mandatory financial security. The final version of the Directive did not include a clear solution to this tenacious issue and the relevant report of the European Commission of 2010 concluded that it was premature to submit proposal for a system of harmonized mandatory financial security [28]. Consequently, the introduction of a mandatory or optional financial security model is to be borne exclusively by the Member States.

By way of illustration, the two following comparative tables [29] summarize the main substantive variations among Member States with respect to some selected key features depicting the serious difficulties in achieving a harmonized implementation of the ELD's provisions (Tables 1 and 2).

4. Conclusion

It is undeniable that the vague and complicated content of the ELD constitutes a deterrent against its uniform interpretation and harmonized implementation. The divergent transposing national legislations in combination with the limited number of the ECJ cases confirm the persistent difficulties in building up a coherent liability system without maintaining or regenerating the conceptual and practical variations of the past. In this framework, the main challenge of the Member States in cooperation with the EU institutions is obviously to overcome the legal gaps and the

deficits of compliance left by the ELD's provisions. From the implementation of the ELD so far it is clear that the diverging regimes hamper the adoption of EU-wide solutions in the area of environmental liability [30]. Therefore, both the EU institutions and the Member States should try to find the best balance between, on the one hand, the considerable latitude given to Member States under the ELD, and, on the other hand, the urgent need to create an effective EU-wide regime for environmental damages.

To sum up, although the ELD constitutes the first positive step towards a coherent and uniform environmental liability regime in the European area that deals exclusively with the pure environmental damages, its weaknesses reveal that there is still a long and difficult way to go. In this delicate transitional phase, it is essential to investigate the possibility of revising this Directive in order to amend or improve some of its problematic points, as well as of establishing a compensation fund in parallel with the existing administrative liability system. The subsidiary function of such a fund perhaps provides sufficient solutions regarding financial insurance problems and the enforcement of the essential preventive and remedial measures. In addition to this, the implementation of the ELD may be strengthened by the designation of a special European Agency which will supervise the application of the regime and coordinate the national competent authorities.

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