

# **Environmental Damage and Liability Problems in a Multilevel Context**

The Case of the Environmental Liability Directive

By Sandra Cassotta

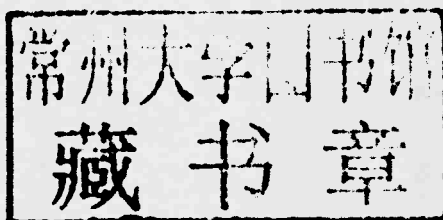


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The aim of the Editor and the Editorial Board of this series is to publish works of excellent quality that focus on the study of energy and environmental law and policy.

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- to facilitate cooperation between academic and non-academic communities in the field of energy and environmental law and policy throughout the world.

*To the Memory of my Adored Mother and Franco*



## Foreword

On 21 April 2004, the Council of Ministers and the European Parliament adopted the European Directive (2004/35/EC) on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage (ELD) which entered into force at EU level on 30 April 2004. Member States had until 30 April 2007 to bring these provisions into force at national level. A first evaluation of the implementation process is now possible, and maybe even necessary.

For this purpose, it must be recalled that the ELD of 2004 is the result of a long process. For more than 18 years, the European Commission had studied and debated the notion of an EU-wide legislative scheme, establishing the basic criteria for environmental clean-up and liability. From the Green Paper of 1993, to the White Paper of 2000, the Proposal of 2002 to – finally – in 2004 the text of the ELD.

The Text of the ELD is – in many aspects – the result of different compromises: at political level and, also, at a more substantial level. The issue of legal terminology in the ELD should not be underestimated, especially if we bear in mind that the goal of the ELD was and still is to harmonise the law in this field. The text of the ELD is very diplomatic, is not very explicit, not even on some core focal points of the whole new liability regime that it wanted to introduce, like the strict liability issue.

Thus, it is possible to find evidence of this compromise in the language of the ELD, in the legal terminology used in it.

Hence, by using a much generic or a non-technical legal terminology at European level, there is a risk of leaving a too wide space for interpretation at national level, putting at stake – from the very beginning – the result wanted to be achieved which is the one of harmonising the rules. This is the case for the definition of ‘damage’, included in Article 2, which according to the ELD means ‘a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly’.

## Foreword

Although whereas n. 5 states: 'Concepts instrumental for the correct interpretation and application of the scheme provided for by this Directive should be defined especially as regards the definition of environmental damage. When the concept in question derives from other relevant Community legislation, the same definition should be used so that common criteria can be used and uniform application promoted', the text of the ELD and its various linguistic versions is full of traps to this aim. Article 3 of the ELD, dedicated to define the scope of the ELD – for example – states that the Directive shall apply to:

- (a) Environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities.
- (b) Damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent. By consequence, it should be noted that 'fault and negligence' become in the English version important to define the liability regime of the ELD. Nonetheless, these concepts become in the German and in the Italian version criteria that include the malicious intent of the operators, having being translated into German with 'vorsätzlich oder fahrlässig', and into Italian with 'comportamento doloso o colposo'. In the French version the text seems the exact translation of the English one, stating that the operator must have committed 'une faute ou une négligence'.

Given these difficulties, in future years, it will be auspicious and urgent to understand how the legal framework of the ELD of 2004 has been put into work and has become 'law in action', and above all it has reached the result of harmonising the liability regime as far as environmental damages are concerned. The book of Sandra Cassotta, which goes back to the entire decision-making process of the development phase of the Liability Directive until the present legal text of the ELD, offers a rich variety of instruments in order to operate this analysis, which goes beyond the surface of black letter rules into the depth of the various implementation processes.

Barbara Pozzo,

November 2011



## Acknowledgements

In finalising my PhD Dissertation which has formed the base of the work of this book, and concluding a 'Chapter' of my life which has offered me an extraordinary and stimulating experience, I am delighted to record my sincere appreciations to the work of many, who have made contributions.

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Sandra Cassotta

Aarhus, 31 October 2011

# Table of Contents

<b>Foreword</b>	<b>xiii</b>
<b>Acknowledgements</b>	<b>xv</b>
<b>Part I</b>	
<b>'What' and 'How' in the Multilevel Environmental Liability Regime</b>	<b>1</b>
<b>Chapter 1</b>	
<b>Setting the Field: Environmental Law and Policy on Environmental Damage and Liability Problems</b>	<b>3</b>
1.1 Introduction and Statement of the Problem	3
1.1.1 Theoretical Framework	7
1.1.2 Operationalising the Theoretical Integrative Framework of International Law and Policy	13
1.1.3 Methodology and Research Design	15
1.1.3.1 Methodology	15
1.1.3.2 Research Design	19
1.2 Value Added of the Book	21
1.3 Towards an Untraditional Interdisciplinary Frame on the 'Coexistence Between Public Law and Private Law Approach'	23
1.4 A New Holistic Perspective of the Law	24
1.5 Terminology	25

<b>Part II</b>	
<b>Matching Theory with Facts: Building the Framework</b>	<b>29</b>
<b>Chapter 2</b>	
<b>In Search for a Framework of Analysis: The Focal Points at the EU, International and Domestic Levels</b>	<b>31</b>
2.1 Why the Need to Identify the Focal Points and How to Treat them	31
2.1.1 Definition of Environmental Damage	32
2.1.2 Scope of Application	32
2.1.3 Problem of Who Is Entitled to Claim for Environmental Damage	33
2.1.4 Compensation for Environmental Damage	34
2.1.5 Choice of the Type of Liability	34
2.1.6 Causality Link	35
2.1.7 Insurance Mechanism	35
<b>Chapter 3</b>	
<b>The Liability Directive from an Historical-Comparative Perspective</b>	<b>39</b>
3.1 Introduction: The Context of the Liability Directive – The Structure of the Historical-Comparative Chapter	39
3.1.1 The Main Existing Civil Liability Criteria for Environmental Damage Divided into Groups	41
3.1.1.1 Fault-Based Liability	44
3.1.1.2 Strict Liability	46
3.1.1.3 Absolute Liability	48
3.1.1.4 Environmental Liability and the Polluter-Pays Principle	48
3.1.2 The Original Idea of Harmonising Environmental Liability	51
3.1.3 The 1993 Lugano Convention	60
3.1.3.1 Definition of Environmental Damage	63
3.1.3.2 Scope of Application	63
3.1.3.3 Problem of Who Is Entitled to Claim for Environmental Damage	64
3.1.3.4 Compensation for Environmental Damage	65
3.1.3.5 Choice of the Type of Liability	66
3.1.3.6 Insurance Mechanism	66
3.1.4 The 1999 Basel Protocol	69
3.1.4.1 Definition of Environmental Damage	70
3.1.4.2 Scope of Application	71
3.1.4.3 Choice of the Type of Liability	71
3.1.4.4 Insurance Mechanism	72
3.1.5 The US Example as a Historical-Comparative Model	74
3.1.5.1 Definition of Environmental Damage	76
3.1.5.2 Problem of Who Is Entitled to Claim for Environmental Damage	77

3.1.5.3	Choice of the Type of Liability	78
3.1.5.4	Causality Link	78
3.1.6	Background of the Liability Directive	79
3.1.6.1	The Green Paper	83
3.1.6.2	The White Paper	86
3.1.6.3	A Comparison between the Papers	88
3.1.6.3.1	Definition of Environmental Damage	88
3.1.6.3.2	Scope of Application	89
3.1.6.3.3	Problem of Who Is Entitled to Claim for Environmental Damage	89
3.1.6.3.4	Compensation for Environmental Damage	90
3.1.6.3.5	Choice of the Type of Liability	90
3.1.6.3.6	Insurance Mechanism	91
3.1.6.4	Different Pre-existing Types of Environmental Liability in the EU Member States	92
3.1.6.5	A Comparison between the German and Italian Example	94
3.1.6.5.1	The German Example	94
3.1.6.5.2	The Italian Example	95
3.1.6.5.3	Definition of Environmental Damage	96
3.1.6.5.4	Compensation	97
3.1.6.5.5	Choice of the Type of Liability	97
3.1.6.5.6	Causality Link	98
3.1.6.6	The 2002 Liability Proposal	98
3.1.6.6.1	Definition of Environmental Damage	99
3.1.6.6.2	Scope of Application	100
3.1.6.6.3	Problem of Who Is entitled to Claim for Environmental Damage	100
3.1.6.6.4	Compensation for Environmental Damage	101
3.1.6.6.5	Choice of the Type of Liability Regime	102
3.1.6.6.6	Causality Link	103
3.1.6.6.7	Insurance Mechanism	103
3.2	Conclusion	104
3.2.1	EU Level	104
3.2.2	International Level	106
3.2.3	National Level	106

## **Chapter 4**

### **Institutional Interactions in the EU Environmental Liability Regime-Formation**

**109**

4.1	Introduction: Linking International Relations with the Effectiveness of the Environmental Liability Regime	109
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## *Table of Contents*

4.1.1	How Can an Environmental Liability Regime Be 'Effective'?	112
4.1.2	The Role of the EU as an Actor in Environmental Mixed Agreements	116
4.1.2.1	Legal Basis to Conclude Environmental Agreements	116
4.1.2.2	Voting Procedures to Conclude Mixed Environmental Agreements	121
4.1.2.3	The Question of Legal Competence and the Level of Harmonisation	122
4.1.2.4	The EC Negotiations on the Lugano and the Basel Conventions	123
4.1.2.4.1	Worst Case Scenarios for Environmental Effectiveness	125
4.1.2.4.2	Best Case Scenario for Environmental Effectiveness	127
4.1.3	Interactions in the Development Phase of the Liability Directive with the Lugano and Basel Conventions	128
4.1.4	The Role of the Non-official Actors in the Interactions of the 2002 Liability Proposal	134
4.2	Conclusion	139
 <b>Chapter 5</b>		
<b>The ELD on the Prevention and Remedying of Environmental Damage</b>		<b>141</b>
5.1	Introduction: Applying the Framework of Analysis	141
5.2	Goals, Ambitions and Challenges	142
5.3	Innovations and Different Directions	147
5.4	Relevant Principles Involved	150
5.4.1	The Polluter-Pays Principle	151
5.4.2	The Subsidiarity Principle	154
5.5	Definition of Environmental Damage	158
5.5.1	Comparison with the Definition of Environmental Damage at the International Level	160
5.5.2	Comparison with the Definition of Environmental Damage in the US Model	162
5.6	Scope of Application	164
5.7	Problem of who Is Entitled to Claim for Environmental Damage	165
5.7.1	Obligations for the Competent Authorities as 'Active Claimants' and 'Other Active Claimants'	166
5.7.1.1	The Role of the Non-official Actors as 'The Other Active Claimants'	168
5.8	Compensation for Environmental Damage	172
5.8.1	Obligations of Operators as the 'Passive Subjects' Restoring Environmental Damage	175



5.8.2	The Concept of Operator at the International Level	180
5.8.3	The Concept of Operator in the US Model	184
5.9	Choice of the Type of Liability	187
5.9.1	Optional Exemptions from Liability	187
5.9.2	Choice of the Type of Liability at the International Level	193
5.9.3	Choice of the Type of Liability in the US Model	194
5.10	Causality Link	196
5.11	Insurance Mechanism	198
5.12	Legal Terminology Used as a Result of a Compromise	201
5.12.1	Linguistic Compromise in the Formulation of the Definition of Environmental Damage	205
5.12.2	Linguistic Compromise in the Formulation of the Choice of the Type of Liability	207
5.13	Interactions Between the ELD and Other Parts of EU Law: The Habitat Directive, The Wild Birds Directive and The Water Framework Directive	208
5.13.1	Introduction	208
5.13.2	General Considerations	209
5.13.3	Damage to Habitat and Wild Birds	212
5.13.4	Damage to Waters	214
5.14	Conclusion	215

### Part III

## Implementation of Law and Policy at the Domestic Level 217

### Chapter 6

## Implementation of the Environmental Liability Directive: The Italian Example 219

6.1	Introductory <i>Panorama</i> on the Problems of Transposition of the Environmental Liability Directive in General	219
6.2	The Current <i>Status</i> of Implementation	220
6.2.1	Implementation of the ELD in Different National Contexts	221
6.3	Reasons for Member State's Difficulties in Handling Transposition	222
6.3.1	The Italian Implementation: <i>Status</i> of Legislation before and after the Enforcement of the Environmental Liability Directive	224
6.3.1.1	Definition of Environmental Damage	227
6.3.1.2	Scope of Application	227
6.3.1.3	Compensation for Environmental Damage	228
6.3.1.4	Choice of the Type of Liability	230

## *Table of Contents*

6.3.2	Response of Italy as to the Infringement Procedure Started by the Commission against Its Government	231
6.4	Conclusion	233
<b>Part IV</b>		
<b>Recommendations, Amendments and Perspectives</b>		<b>235</b>
<b>Chapter 7</b>		
<b>Overall Conclusions</b>		<b>237</b>
7.1	Conclusion I, Part IV: Has the ELD Achieved Its Goals and Ambitions?	237
7.2	Conclusion II, Part IV: What is the Optimal Level of Harmonisation in Terms of Environmental Protection Goal Achievements?	240
<b>References</b>		<b>245</b>
<b>Table of Cases</b>		<b>253</b>
<b>Index</b>		<b>255</b>

Part I

‘What’ and ‘How’ in the Multilevel  
Environmental Liability Regime