The transposition of the Environmental Liability Directive

the concept of threshold, the scope of application and defenses

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FOR THE PUBLIC HEARING ON THE IMPLEMENTATION OF DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 APRIL ON ENVIRONMENTAL LIABILITY WITH REGARDS TO THE PREVENTION AND REMEDYING OF ENVIRONMENTAL DAMAGE (ELD) with - COMMITTEE ON ENVIRONMENTAL PUBLIC HEALTH AND FOOD SAFETY, 11 APRIL 2017

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Introduction

Good afternoon Ladies and Gentlemen, I am very honored to have been invited today to give a speech on the ELD. Member States had until 30 April 2007 to bring the provisions of this Directive in force, so now it is possible to evaluate the implementation process. For this purpose, it must be recalled that the ELD is the result of a long process the EU Commission had studied and debated the concept, and an EU legislative scheme establishing the basic criteria for environmental clean-up and liability for more than 18 years. It is the result of a lot of thought and discussions.

The text of the ELD is the result of different compromises at political level and the text of the ELD is very diplomatic, is not explicit not even on some core focal points of the whole new environmental liability regime that it wanted to introduce, like the strict liability. These focal points are:1) the definition of environmental damage, 2) the scope of application, 3) the problem of who is entitled to claim environmental damage, 4) compensation, 5) choice of liability, 6) causation and finally 7) insurance mechanism.

It is important to note that the order of exposition of these focal points is not casual, but must be considered in a chain of logical sequence. If the first focal point, which is the definition of environmental damage, changes, all the others will change too, resulting in a "domino effect". I will then explain why and how the definition of environmental damage and the concept of threshold should be changed, thus changing all the other focal points, to make the ELD more effective and reach harmonization. Harmonization is an important goal here.

My talk will center on three focal points only: I) the definition of environmental damage and the concept of threshold contained on it; II) the scope of application; and III) issues related to the choice of liability, specifically exemptions and defenses. Finally, I will then wrap up, by concluding (IV).

I. Definition of environmental damage: significance of threshold

Environmental damage in the ELD is a **restrictive** notion which includes three types of specific natural resources: (a) Damage to protected species and habitats (Habitat-Wild Birds Directive); (b) Damage to water (Water Framework Directive); and (c) Damage to land (as a consequence of land contamination which determined significant risk to health).

The EU legislator has used a technique of legislation to design the definition of environmental damage which is known as "reference" which is a definition designed by "integrating" different definitions extracted from the above directives. For example the damage to protected species and habitat is only the one defined by the Wild Birds and Habitat Directives, the damage to waters is solely the damage

falling into the scope of the Water framework Directive and the damage to land (soil) is solely the damage as a consequence of land contamination which determines a significant risk to human health. The definition of environmental damage is not inclusive of "traditional damage" (damage to goods or individuals). Hence, the EU legislator has chosen a very technical definition in the text of the ELD but a "non-technical legal definition". Art. 2 defines as damage "*a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly*". This definition uses a scientific language with no concrete and clear criteria and allows the possibility of having different interpretations of definitions of environmental damage in the various national systems. A definition that can set a minimum common denominator, a legal one, not a scientific one, is needed because as it stands now, which is a definition with a scientific common denominator, the judges will have difficulties understand it. In addition, this scientific definition imposes too high a threshold in order to consider "damage" as environmental damage, meaning that it is seldom exceeded. The threshold imposed is much too high and will not be exceeded in many instances of damage. Ideally, the definition of environmental damage should be a definition that fixes limits or the precise criteria to enable the mechanism of liability to function in fact. The combination of vagueness and high threshold today means that protection is minimal at best.

II. Scope of Application

The scope of application **is strictly restricted** and **dependent** on what has been chosen and negotiated by the legislators to be considered as part of the definition of damage (chain of logical sequence): scope and definition are two sides of same coin. The scope is **narrow**: the activities determining environmental damage are those mentioned in **Annex III** of the ELD,[1] which determines a significant potential or real risk to health and environment. It is worth noticing that the ELD lists what the conditions are in respect to enforce and maintain these activities (i.e.: authorizations, special conditions and registrations). However, in case of **damage to biodiversity**, this method of "selecting" and "individualizing" what the professional activities determining the environmental damage are, does not really apply as liability is extended to any kind of professional activities (even those not mentioned) provided that is it possible to demonstrate ***culpa*** or **negligence** of the potential wrongdoer. One wonderes **why** the same definition of activities (those of Annex III) defined on the basis of the definition of environmental damage and also lists of the conditions for carrying on these activities (Art. 3, letter b) are retained, if in the case of damage to biodiversity, liability is extended to "any kind of professional activities" **even those not mentioned in Annex III** but provided that (or with the only condition) it is possible to demonstrate **culpa** or **negligence**? This determines a sort of artificial extension or enlargement of the scope of application because it provides the option of Member States of considering activities other than those mentioned in Annex III, in case of negligence of the operator.

[1] The activities in Annex III are: waste management operations including collection, manufacture, transport, disposal of waste, hazardous waste, incineration, discharge into waters, manufacture, use storage of dangerous activities, plant protection products, and transportation of genetically modified organisms.

The negative effects of this voluntary extension will be that some Member States will enlarge the scope of application and other will not, which will increase disparities in the degree of liability and entail that some competent authorities will have to act more than others, which will increase disaharmonisation.

III. Exceptions and Defenses

Art. 4 deals with the **exceptions**: "*This Directive shall not cover environmental damage or an imminent threat of such damage caused by: […] (b) a natural phenomenon of exceptional, inevitable and irreversible character. […] 5. This Directive shall only apply to environmental damage or to an imminent threat of such damages caused by pollution of a diffuse character, where it is possible to establish a* ***causal link*** *between the damage and the activities of individual operators*".

Art. 4 explicitly excludes from its scope of application damage as a consequence of climate change where it is impossible to establish causation as exclude these cases of "diffuse pollution" (also known as the "concept of remoteness of the damage" or "long distance pollution"). These kind exemptions **are not "optional"** like the other exemptions defined with the term "defenses" that I will examine in a minute. What we are talking now is about exemptions from liability in case of: a) Act of God, armed conflict, civil war, natural phenomenon b) caused by third party, provided that the operator took appropriate preventative measures (Art. 8, para 3, letter a); c resulted from compliance with a compulsory order or instruction emanating from public authority (Art. 8, para, 3, letter b). In addition, the ELD, in its Art. 4, provides also for other exemptions in cases of oil spills and nuclear disasters. However, these exemptions apply provided that the international instruments listed in Annex IV are in force in the Member States concerned. It is worth noticing that these international agreements are not a satisfactory alternative. The remedies provided by these agreements **are much less refined** with respect to: a) the nature and measures to be taken, 2) the problem of who bears the cost, and c) the level of remediation.

Now I will talk about the second type of "exemptions" which are better defined as "**defenses**". These differ in their nature compared to the exemption that I have just treated. Member States can enjoy a certain "defenses" from liability in two cases: ***a) Permit-defense*** *"An emission or event expressly authorised by, and fully in accordance with the condition of an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III"* Art. 8 (4) a); and **b)** ***State-of- the Art Defense*** "*An emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge"* Art. 8 (4) b).

What is the raison d'être for these "**defenses**"? My answer is1) **Equity** and 2) **Balance**. **Equity** between the dilemma that, the one hand, it is not fair to oblige parties to pay for damages as a consequence of an activity if, at that moment, the (potential) damage was unknown. On the other hand, if the activity is not stopped there will be no incentives to stop potential polluting activities. **Balance** refers to the eternal dilemma opposing growth and economic interests versus a regime protecting the environment.

Defenses allow too many exemptions from liability and are dangerous because they leave Member States too much freedom to apply them or not. Member States could even make an instrumental use of them in order for the operators not to pay costs of restoration in case of pollution. The **raison d'être** of these **defenses is a real paradox**, if it is believed that they are placed in a norm which is actually attempting to make the Polluter-Pays principle applicable. Defenses represents an obstacle to implementation since when faced with environmental damage no one should be exonerated from liability even in the absence of culpa and the damage should always be recoverable.

In addition, also the **"risk of development**" should be covered by liability but the ELD does not consider it. This kind of damage indicates the possibility, for the operator to be liable in case there is a risk that a given activity could be polluting or where there is a risk that the polluting effects of this same activity are susceptible to an increase over the time. This is what the German law defined as "Entiwicklundgsrisiko".

IV. Conclusion

1) Threshold: the notion of environmental damage should include a real system of **minimum threshold of graduation** within the same threshold system. It could be used, not only by Member States, but also by **regions** and **public administrations**. The graduation should also be subjected to regulation according to different uses of the different *media* (water, soil, air, etc…). The **method of graduation** should also guarantee the respect of the **Polluter-pays principle** and **the Subsidiarity Principle**, as well as **the public participation** of **non-official actors**.

2) Scope of Application: Is clearly limitative as a consequence of the definition of the environmental damage. It needs to be extended.

3) Exceptions and Defenses: Optional defenses from liability are weakening the environmental liability framework and accentuates, divergences in a way to rendering the tortfeasors liable. These defenses leave too much room for Member States to decide whether or not to use them, and thus instead of reinforcing harmonisation, they exacerbate differences among the national legislations of the Member States.

The transposition of the ELD in Member States:

the significance of the **threshold**, the **scope** of the environmental liability, **exceptions** and **defenses**

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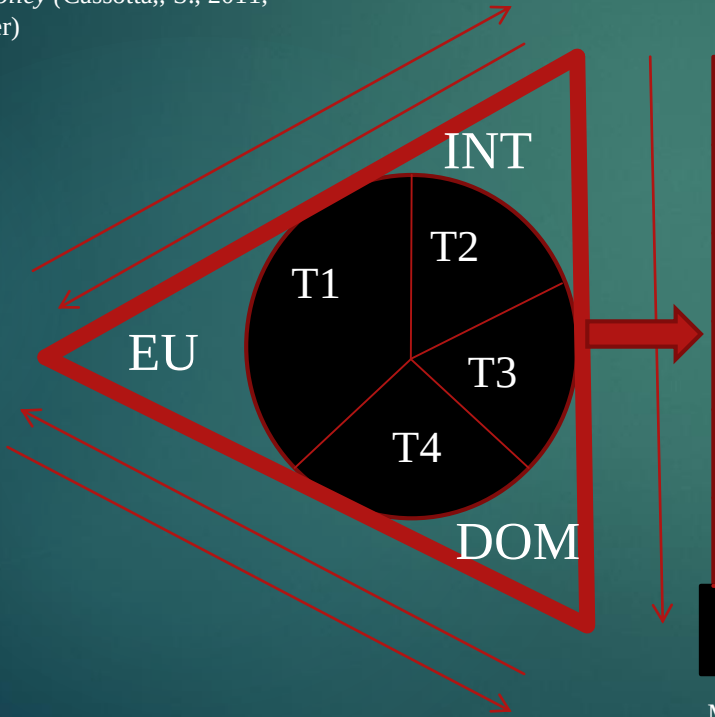
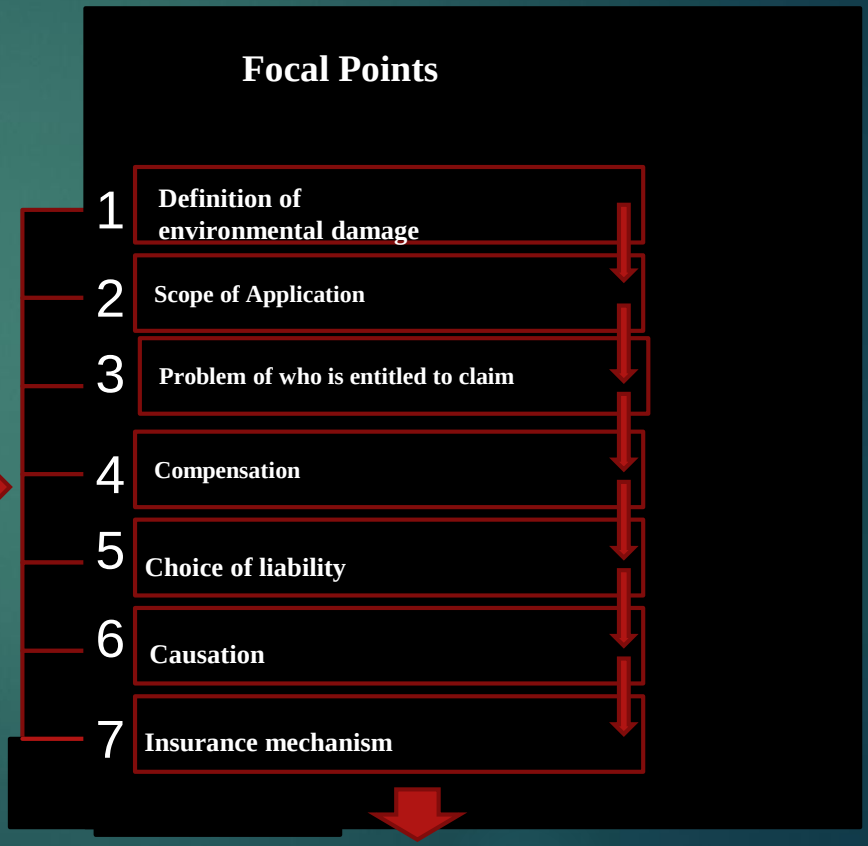
Theoretical Framework and Method “integrated”
*Three-level Triangular Theory and Theoretical Integrative framework of International Law and Policy (*Cassotta,, S., 2011, Kluwer)





Model of Effectiveness of Environmental Law and Optimisation of Harmonisation in the case of the ELD

Definition of Environmental Damage: **significance of threshold**

Environmental damage in the ELD is a (restrictive) notion which includes three types of specific natural resources:

(a) Damage to protected species and habitats (Habitat-Wild Birds Directives)

(b) Damage to water (Water Framework Directive)

(c) Damage to land (as a consequence of land contamination which determined significant risk to health)

Legislation by "reference" (definition designed by "integrating" different definitions extracted from the above directives)

Definition not inclusive of "traditional damage" (damage to goods or individuals)

Environmental damage to natural resource only (not inclusive of damage to human health) = ecological vision *versus* anthropocentric vision

Definition of Environmental Damage: **significance of threshold**

Art. 2 = "**technical definition**" where the term "damage" means:

"*A measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly*".

- ✓ Scientific language with no concrete and clear criteria
- ✓ Allows the possibility to have different interpretations of definitions of environmental damage in the various national systems
- ✓ Need for a definition that can "fix" a **minimum common denominator (**but a legal one, not a scientific one because if it stands like that, a scientific common denominator, then the judges will have difficulties to understand it)

Definition of Environmental Damage: **significance of threshold**

Problem = the scientific definition imposes **too high threshold** in order to consider "damage" as environmental damage

The **threshold imposed is much too high** and **will not be exceeded** in many instances of damage

To much **scientific wording** in the formulation without any "common action" in the definition of environmental damage which could be detected, understood and implemented by Member States

Definition of Environmental Damage: **significance of threshold**

- The definition of environmental damage should be a definition to **fix limits or the precise criteria** able to make the mechanism of liability functioning

- The delimitation of the boundaries for when it is considered to have environmental damage are too vague and **the high threshold** will not easily be exceed which entails that in the practical application of the ELD, **the protection is minimal since this render the mechanism of liability unable to functioning immediately**

The **Scope** of Application

- The scope of application **is strictly enchained** and **dependent** of what has been chosen and negotiated by the legislator to be considered as part of the definition" damage" (chain of logical sequence): scope and definition = 2 sides of same coin)

- The scope is **narrow**: the activities determining environmental damage are those mentioned in **Annex III** of the ELD which determine a significant potential or real risk to health and environment

- **Nota bene**: the ELD lists what the conditions are in respect to carry on and maintains these activities (i.e.: authorizations, special conditions and registrations)

The **Scope** of Application

- However, in case of **damage to biodiversity**, this method of choosing and individualizing what the professional activities determining the environmental damage are, does not really apply as liability is extended to any kind of professional activities (even those not mentioned) provided that is it possible to demonstrate ***culpa*** or **negligence** of the potential wrongdoer

- **Why** to retain the same definition of activities (those of Annex III) defined on the basis of the definition of environmental damage and also lists the conditions for carrying on these activities (Art. 3, letter b), if in the case of damage to biodiversity, liability is extended to "any kind of professional activities" **even those not mentioned in Annex III** but provided that (or with the only condition) it is possible to demonstrate **culpa** or **negligence**?

The **Scope** of Application

- This determine a sort of "artificial extension" or enlargement of the scope of application because it provides the option for Member States of considering activities other than those mentioned in Annex III, in case of negligence of the operator

- The negative effects of this voluntary extension will be that some Member States will enlarge the scope of application and other will not = increase disparities in the degree of liability for operators

- Some competent authorities will have to act more than others

- = increase disharmonisation

Choice of Liability: **Exceptions** and **Defenses**

Art. 4 (Exceptions): "*This Directive shall not cover environmental damage or an imminent threat of such damage caused by: […] (b) a natural phenomenon of exceptional, inevitable and irreversible character. […] 5. This Directive shall only apply to environmental damage or to an imminent threat of such damages caused by pollution of a diffuse character, where it is possible to establish a* ***causal link*** *between the damage and the activities of individual operators*"

Nota Bene: Already the 2013 IPCC Report has established a more stringent **causal relationship** between GHG emissions and damage related to climate change

Choice of Liability: **Exceptions** and **Defenses**

Member States can enjoy "defenses" from liability in 2 cases:

a) Permit-defence

"An emission or event expressly authorised by, and fully in accordance with the condition of an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III" Art. 8 (4) a)

b) State-of-the Art Defence

"*An emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge"* Art. 8 (4) b)

Choice of Liability: **Exceptions** and **Defenses**

What is the raison d'être for these "defenses"?

1) **Equity** and 2) **Balance**

- = **Equity** between:

On one hand = not fair to oblige to pay for damages as a consequence of an activity if it was not known, at that moment, the (potential) damage/ on the other hand= If the activity will not be stopped = no incentives to stop potential polluting activities

- = **Balance** between:

Eternal dilemma opposing growth and economic interests/regime protecting the environment

Choice of Liability: **Exceptions** and **Defenses**

- Defenses allow too much exemptions from liability and are dangerous because they leave Member States too much freedom to apply them
- Member States could make an instrumental use of them in order for the operators not to pay costs of restoration in case of pollution
- **Raison d'être**= **paradox**, if it is thought that they are placed in a norm which is actually attempting to make the Polluter-Pays principle applicable
- Defenses represents an obstacle to implementation since when one is faced with environmental damage no one should be exonerated from liability even in the absence of culpa and the damage should always be recoverable

Conclusion

1) Threshold

the notion of environmental damage should include a real system of **minimum threshold of graduation** within the same threshold system which could be used, not only by Member States, but also by **regions** and **public administrations**. The graduation should also be susceptible to being regulated according to different uses of the different *media* (water, soil, air, etc..). The **method of graduation** should also guarantee the respect of the **Polluter-pays principle** and **the Subsidiarity Principle** as well as **the public participation** of **non-official actors**.

2) Scope of Application

Is clearly limitative as a consequence of the definition of the environmental damage. Need to be extended

3) Exceptions and Defenses

Optional defenses form liability are weakening the environmental liability regime and accentuates divergences in a way to rendering the tortfeasors liable. These defenses leave too much room for Member States to decide whether or not to use them, and thus instead of reinforcing harmonization, they exacerbates differences among the national legislations of the Member States