

**Comparative study on national damage definitions and severity thresholds
for biodiversity, water and land damages in EU member states**
- a summary -

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The association Justice and Environment (J&E) is a European network of environmental law organisations which was created in 2003 and was founded as non-profit association in 2004. J&E is striving to protect the environment, human health and nature by improving environmental legislation and enhancing the enforcement thereof.

Introduction

In assessment and application of ELD severity thresholds in member states' practice various difficulties can be detected. This is especially confusing when having to deal with different notions of damage in different systems (ELD notion and pre-existing liability systems). In order to establish a level-playing field and an effective liability system we are convinced, that it is highly important to integrate the ELD system into internationally and nationally existing liability systems (or the other way around) and to have a clear notion of environmental damage in place not inhibiting ELD practice by its narrow scope. Consequently with the J&E comparative study on the notion of damage and thresholds in Austria, Croatia, Estonia, Hungary, Germany, Romania and Spain we try to highlight how these concepts are perceived on national level (ELD thresholds, in different countries, ELD vs. national liability system thresholds) and how this might hinder/foster ELD implementation. The following paragraphs shall provide an insight into the main results of the study. The complete study will be available in the next weeks under: www.justiceandenvironment.org

Biodiversity Damages

Regarding biodiversity damages the ELD was transposed into national legislation without mentionable adaption of its damage definitions and severity thresholds. The broad notion of damage and the unclear concepts make an interpretation and practical application quite difficult. There seems to be no clear notion of which national liability regimes (if existent) are in competition or to be complementarily applied when it comes to biodiversity damages. The situation seems slightly easier in countries where the ELD was transposed by amending the existing national liability systems (i.e. Hungary). The option to include national biodiversity damages was broadly applied by the assessed countries – only Austria (except Vienna) and Germany did not opt for an inclusion of nationally protected species and habitats. Here and there national

liability systems somehow similar to what could be called the nature of the ELD are existent and mainly embedded in the national Nature Protection Acts. They establish a much broader notion and indeed a rather different understanding of biodiversity damage than ELD does. At the same time these national systems lack valuable components provided for by the ELD: e.g. no accidents covered, concept of compensatory and complementary remediation missing, no public participation and access to justice.

Water Damages

The notion of and the threshold for water damages is seen very differently in the analyzed systems: Although the definition of "waters" in the ELD transposing legislation is quite uniform – the wording is basically lend from the Water Framework Directive and the perception of water damage seem to be equal –at least it is standard evaluation that damages to "*all waters*" are covered by the ELD transposing legislation.¹ As most of the assessed countries made references to their Water Acts with respect to the definition of "waters" both the ELD transposing legislation and the national liability regimes for water damages emanate from the same concept of "waters". Due to a lack of adequate case law and respective case databases the "*significance threshold*" for water damages and its application seems very unclear. There is no harmonized approach how to interpret the significance threshold for water damages across the analysed EU member states – in Estonia they would say only a change in the classification of waters fulfills the significance threshold, whereas in Austria the threshold would be interpreted to be lower. Due to the lack of clear criteria and definitions the decision if the threshold is reached, is to be made on case-by-case basis. Indeed it is not coherent that the discussion in some countries departs from the change of water category, whereas somewhere else the criteria is a measurable adverse change (under the premise that the Directive draws the line at natural fluctuation and self-regeneration) meaning that the threshold is interpreted to be very low. The Hungarian legislation stipulates criteria for the evaluation of a "significant adverse effects" on surface waters and separately for groundwater – similarly it would be advisable to have a set of clear criteria for the assessment of the significance threshold of water damages on European level embedded in the ELD.

The national liability regimes for water damages – those which by its nature are very similar to the ELD system - are predominantly stricter. They provide for no or very low thresholds. It would be a real step forwards in the achievement of a

¹ By restricting the definition to "water bodies" only very few incidents would be sufficiently severe to trigger environmental liability because, among other things, some water bodies may cover a very large area. And the purpose of the ELD promoting environmental protection would be deeply undermined – as huge incidents polluting considerable water paths wouldn't even fall under the scope of ELD water damages.

high standard of environmental protection and a uniform environmental liability system all over Europe if the mentioned systems (ELD and national) could melt and incorporate – having low threshold criteria in the ELD in place and appealing for an integrative approach on national level.

Land damages

The ELD significance threshold for land damage is often undercut – be it by the ELD transposing legislation itself (Germany, Hungary, Croatia, Carinthia) or by some national liability system on soil damages (Austria, Estonia, Spain). Nevertheless the national systems on soil protection are not quite elaborated and the missing EU legal framework on soil protection does not improve this situation. The concept of “land” and “soil” is generally confusing – clear regulations about their meaning and the necessary protective framework are missing. This might be an indication that the concept of the environmental media itself (“land” or “soil”) is to be adapted and clarified. By now the central element of land damages is not - as in the case of water damages - the deterioration of a natural resource but the health risk. I.e. land damage can be caused by direct ingestion, inhalation absorption, indirect uptake via food, including drinking water derived from ground water. These criteria do not comply with the environmental damage concept, as they foresee an additional element to be fulfilled → risk of human health being adversely affected - an element predominantly deriving from civil liability which should not be a criteria for environmental damage to be evaluated as such. Preferably an integrated approach for land damages – either on EU level or deduced from national liability regimes on soil damages and their practice and integrated into the ELD regime – could lead to high protection standards and a unified perception of land damages all over the EU – the establishment of clear criteria or limit values would be rather useful.