



ENVIRONMENTAL LIABILITY IN EUROPE - IN NEED OF A CLEAR VISION AND CLEAR CONCEPTS

Position Paper

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a Udolní 33, 602 00, Brno, CZ
t/f 36 1 3228462 / 36 1 4130300

e info@justiceandenvironment.org
w www.justiceandenvironment.org

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The analytical work done by J&E in the last years showed, that the Environmental Liability Directive (ELD) did not lead to an equivalent environmental liability system within Europe. Member States' practice shows a broad variety of liability systems encompassing different elements of an effective environmental damage regime and on the other hand lacking important aspects (systematic methods for the estimation of damages or costs, public participation and access to justice, equivalent financial security regimes et al.) for further improvement. Most of the EU Member States did not find a good way to manage the interaction or integration of the ELD with already existing liability mechanisms in the environmental field. The reason might be that the ELD itself does not define clear criteria for the envisioned environmental liability system in the member states. Optional provisions weaken the "polluter pays system" which actually is the core element of the ELD. Furthermore, unclear definitions of the notion of damage and the significance thresholds led to confusion and uncertainty in Member States' practice.

The foregoing evaluation can be supported by the J&E studies on the notion of damage conducted in the run of 2013:

Biodiversity damages

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. The situation seems slightly easier in countries where the ELD was transposed by amending the existing national liability systems (i.e. Hungary). National liability systems mainly depart from a 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

Due to a lack of adequate case law and respective case databases the “significance threshold” for water damages and its application is very unclear. There is no harmonized approach how to interpret the significance threshold for water damages across the analysed EU member states. Due to the lack of clear criteria and definitions the decision on whether the threshold is reached, is to be made on a case-by-case basis which even fosters big differences on the concept of damage between the EU member states. 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.

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. 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. 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 criterion for environmental damage to be evaluated as such.

Recommendations:

- It would be a real step forwards in the achievement of a 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**.
- In order to establish an effective system which serves the aim of high environmental protection the **significance threshold for water damages shall be adapted in the ELD and interpreted in line with the national liability regimes** on water damages which provide for no/very low thresholds.

- Furthermore, for biodiversity and water damages **clear significance criteria** should be incorporated into the ELD in order to ensure equivalency on EU level.
- The **concept of “land” or “soil” is to be adapted and clarified.** In order to establish a stringent environmental liability system the threshold for land damage should not be combined with the risk to human health being adversely affected. For the assessment of land damages we would suggest **to have limit values in place.**
- Preferably an integrated approach for land damages – either on EU level (soil directive) or deduced from national liability regimes on soil damages and their practice and integrated into the ELD regime – would lead to high protection standards and a unified perception of land damages all over the EU.

Contact information:

name: Birgit Schmidhuber
organization: J&E
address: Volksgartenstraße 1, A-1010 Wien
tel/fax: 43 1 5249377/fax DW 20
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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