

Environmental Liability. Study for a Future Amendment of European Legislation

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Abstract

The great challenge of this century is to figure out how we can achieve development, combat climate change, conserve wildlife, and protect our common resources, in global terms, while maintaining a balance between the environment and social and economic considerations. Environmental liability, conceived by the European Union and the Member States as an instrument of administrative law in substantial and sanctioning terms, is one of the preferred for protecting the environment and ensuring sustainable development. It is a new approach to the environment as an injured party, allowing the repair of pure ecological damage, and ensuring its prevention. Given the particular characteristics of environmental damage, namely the fact that the environment is a collective good and has no geographical limits, environmental liability must focus on a cross-cutting and transnational approach. A European environmental liability regime was adopted and entered into force about 15 years ago. This work aims to assess the current usefulness of that regime and the need for its possible modification, through a comparative and critical analysis of the options took by some of the Member States, particularly Portugal, and the data available in this matter, and suggest aspects in which the regime can be improved.

Keywords: European Union, environment, environmental liability, polluter pays principle, energy, health, safety law.

JEL Classification: K32

1. Introduction

As soon as international society became aware that the protection of the environment was indispensable, unpostponable, and costly, the idea that environmental damage should be compensated by those who caused it began to take shape. In a first phase, environmental damage was that which resulted from the damage to environmental components and reflected on the health, life, and property of people, so that the recourse to civil liability seemed adequate and sufficient. Although such damages were remedied, the environment itself remained damaged unless the States endeavoured to repair it, which would have to be done at the expense of the State budget and taxpayers' taxes. The autonomation of the concept of environmental damage as pure ecological damage highlighted the urgency of a regime of environmental liability that would ensure not only the repair but also, and above all, the prevention of environmental damage. This regime found its legal basis in the polluter-pays principle, as well as in the other basic principles of environmental policy in the European Union, as referred to in the Treaty on the Functioning of the European Union: the precautionary principle, the principle of prevention and the principle that environmental damage should as a priority be rectified at source.

Adopted about 15 years ago, the question today is whether this regime is effective, given the scarcity of its implementation, whether it is useful and how its implementation can be strengthened.

The European Commission is preparing an assessment, due by the end of June, to determine whether the environmental liability regime is adequate and where it can be improved.

We will begin by analysing the genesis of the European environmental liability regime, what characterises it and what distinguishes it from other sectoral environmental legislation and the way in which it has been applied, using data provided by some of the Member States, in particular Portugal. This will be followed by a survey of the main challenges and difficulties it is facing and will conclude with some proposals for changes that could be important in strengthening this instrument for environmental protection.

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2. The Directive 2004/35/EC

After years of discussion on whether there should be a common environmental liability regime, the White Paper on environmental liability² culminated in the adoption of European Parliament and Council Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD).

2.1. A new environmental liability regime

The European Union has established, through the ELD, a common environmental liability regime to prevent environmental damage in the face of imminent threat of such damage, based on a high level of protection of the environment. This regime is based on the polluter pays principle³, but in line with the principle of sustainable development, in the expectation of not only guaranteeing the restoration of the environment, but also, above all, of increasing the levels of precaution and prevention⁴.

The adjective "civil", which used to qualify liability for environmental damage, had already been dropped years ago in the White Paper. This removal was maintained in the ELD, which is understandable given its non-application to traditional damage.

Although the ELD establishes a system of environmental liability and uses this term in its title, it does not contain any definition of it. We may say, however, that this is an administrative liability, because, although it makes use of institutes typical of civil liability (such as the notions of strict and faulty liability), it is performed by the competent public authorities of each Member State, without the need to resort to the intervention of the courts. In this context, it is up to the competent national authorities, responsible for implementing this new regime, to identify the operators responsible for pollution and ensure that they take the preventive or remedial measures deemed appropriate. It is also their task to determine and assess the extent of the environmental damage and, in the first instance, to reach agreement with those responsible on the measures to be adopted. Silveira qualifies this environmental liability regime as a *sui generis* public regime, "a special administrative procedure of environmental law".⁵ The intention was not, however, as she states, to merely "administrativise" the existing civil liability rules but, rather, to create a new liability regime, complementary to the existing liability regimes - administrative, civil, and criminal - at both national and European level. The truth is that none of the existing liability systems could meet the preventive purpose of the new regime because all of them presupposed the previous occurrence of damage in order to determine liability. Moreover, none of them offered, in themselves, a satisfactory and complete remedy for environmental damage, either because there was no private ownership of the affected legal assets - the environment itself (which raises a problem of active legitimacy) - or because of the difficulty of establishing a causal link, due to the diffuse character of many forms of pollution, and of fixing the definitive effect and extent of the damage, due to the continuous or prolonged nature of the pollution, or even of quantifying it.⁶

² COM(2000) 66 final.

³ Recital 18 of the ELD. In this regard, see Garcia Rocasalva, C., *La responsabilidad medioambiental*, Barcelona, Atelier Libros Jurídicos, 2018, p. 103, note 188.

⁴ Recitals 2 and 3 of the ELD. See judgment of 13 July 2017 in Case C-129/16, *Túrkevei Tejtermelő Kft*, paragraphs 47 and 53.

⁵ Silveira, P., *Dano à ecodiversidade: ruptura conceptual. Uma perspectiva juspublicista*. PhD thesis sustained in Faculdade de Direito, Universidade de Lisboa, 2017.

⁶ Ruda Gonzalez, A., *El Daño Ecológico Puro. La Responsabilidad Civil por el deterioro del Medio Ambiente, con especial atención a la Ley 26/2007, de 23 de Octubre, de Responsabilidad Medioambiental*, Navarra, Thomson Aranzadi, 2008, p. 26, and "Las Relaciones entre la Responsabilidad Ambiental conforme a la Directiva 2004/35/CE y la Responsabilidad Civil", in *Nuevas Perspectivas de la Responsabilidad por Danos al Medio Ambiente*, Madrid, Ministry of the Environment, 2006, pp. 93 ss.; Gomez Pomar, F. and Gili Saldaña, M., "Responsabilidad por danos al medio ambiente y por contaminación de suelos: problemas de relación", *InDret*, 2006, pp. 3 ss.; Esteve Pardo, J., *Ley de responsabilidad medioambiental*, Madrid, Marcial Pons, 2008, p. 21; Alvarez Lata, N., "El dano ambiental. Presente y futuro de su reparación (II)", *Revista de Derecho Privado*, No. 2002-12, December 2002, p. 886; Orteu, E. and Castroviejo, M., "La nueva directiva sobre responsabilidad por danos al medio ambiente", *Ambienta*, March 2005, p. 8; and also Pigrau Solé, A., "La Directiva 2004/35/CE del Parlamento Europeo y del Consejo, de 21 de abril de 2004, sobre

The ELD also complemented other European environmental legislation such as the *Habitats Directive*⁷, the *Wild Birds Directive*⁸, the *Water Framework Directive*⁹, the *Environmental Impact Assessment Directive*¹⁰, the *Industrial Emissions Directive*¹¹ and waste legislation¹². In fact, the most important and already existing environmental legislation fell short due to the lack of concrete rules concerning the prevention and remedying of environmental damage. Similarly, the ELD has formed a coherent whole with other areas of EU environmental legislation and with the international conventions listed in its Annexes IV and V.¹³

In matters of environmental liability, not only is the concept of damage relevant, but also that of imminent threat of damage. For this reason, Ruda Gonzalez qualifies environmental liability as a preventive liability¹⁴. In effect, with this liability regime, the intention was to put into practice the old saying "prevention is better than cure".

Prevention is thus the first innovative feature of ELD and one of the aspects that best distinguishes it from the traditional civil liability regime. As is well known, in traditional civil liability, the idea of threat of damage is totally irrelevant. In an innovative sense, the ELD allowed the extension to prevention of the application of the polluter pays principle, until then directed only to the repair of the damage. Thus, if the operator, by exercising an economic activity, causes damage to the environment, he must ensure its repair and the respective costs, and the one who creates an imminent threat must also adopt adequate measures to prevent the materialization of the damage. Therefore, the adoption of preventive measures ultimately has a dual function: on the one hand, it contributes to avoid or minimize the risks of occurrence of environmental damage; on the other hand, it saves the operator, who adopts them, from having to bear the costs of repairing the damage that would otherwise occur. It can therefore be said that this is a directive which incorporates the principles of prevention and restoration in the two different sets of measures it contains.

The ELD was drawn up on the model of a framework directive. The framework directive establishes the framework of a certain common overall objective, normally broad and undefined, requiring the Member States to adopt plans and programmes to achieve it, while leaving them the choice of the specific implementing objectives. Its flexibility allows account to be taken of the ecological diversity of the territories of the Member States and their natural resources, and its general nature makes it suitable for developing a policy for the integrated management of an environmental resource or source of pollution.

This is why the ELD has only established a minimum *standard of protection*, leaving the Member States free to adopt the provisions they deem to be most appropriate or even, if they so wish, more restrictive provisions to strengthen the level of environmental protection, for example by extending the concept of environmental damage to non-Community biodiversity damage, or by adding other activities or other parties responsible to those indicated in the ELD.¹⁵ Its general and flexible nature, particularly with regard to exceptions, has thus allowed Member States to opt for different paths in its transposition, resulting in different solutions between the various Member States,

responsabilidad ambiental", in Pigrau Solé, A. (Coord.), *Nuevas perspectivas de la responsabilidad por daños al medio ambiente*, Ministerio de Medio Ambiente, 2006, pp. 21-22.

⁷ Council Directive 92/43/EEC of 21 May on the conservation of natural habitats and of wild fauna and flora.

⁸ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, since repealed by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

⁹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000.

¹⁰ Directive 2014/52/EU of the European Parliament and of the Council of 16 April amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

¹¹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

¹² Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

¹³ Respectively, conventions on civil liability for damage caused by oil pollution and transport of dangerous substances and conventions on civil liability for nuclear damage.

¹⁴ Ruda Gonzalez, A., *op. cit.*, 2008.

¹⁵ Recital 29 and Article 16 of the Directive. As explained by Beltrán Castellanos, J. M., "Responsabilidad medioambiental: exigir garantías financieras en tiempos de crisis?", *Revista Catalana de Dret Ambiental*, Vol. VII, No. 1, 2016, p. 4, note 8. As an example, it can be mentioned that, as regards protected species and natural *habitats*, Portugal, Spain, Greece, Luxembourg, the United Kingdom, Belgium, Cyprus, Hungary Poland, Sweden, the Czech Republic, Estonia, Cyprus, Latvia, Lithuania and Slovenia have opted for a wider scope of application.

depending on their respective choices, and ultimately jeopardising the objective of harmonising environmental liability at European level.

2.2. The legal basis

The legal basis on which the ELD was founded was Article 175(1) of the EC Treaty (now Article 192(1) TFEU), since its objective is environmental in nature, with a view to conserving, protecting, and improving the quality of the environment.

As the environment is not an exclusive competence of the European Union, but a shared competence¹⁶, the intervention of the European Union in matters of environmental liability had to be guided by the principles of subsidiarity and proportionality, enshrined in Article 5(3) and (4) of the TEU. According to these principles, the Union may only act if and in so far as the objective of the action envisaged, *in casu*, the establishment of a common regime for the prevention and remedying of environmental damage at a reasonable cost to society, cannot be sufficiently achieved by the Member States and can be better achieved at Union level, but may not exceed what is necessary for that purpose.¹⁷

Before the adoption of the ELD, the principles of subsidiarity and proportionality had been invoked several times by the most sceptical parties as an obstacle to the creation of such a regime, which started a discussion on the justification and necessity of the European Union's intervention in this specific field. On the one hand, there were those who argued that Community action was indispensable for the establishment of a common environmental liability regime and for the regulation of transboundary pollution issues; on the other, there were those, such as the United Kingdom, who argued that some Member States already had liability regimes covering environmental damage and who considered European Union intervention to be an intolerable interference in areas which, by tradition, belonged to the States themselves. The absence of national legislation on environmental liability¹⁸, the need to ensure adequate decontamination and restoration of the environment, the transboundary nature of environmental damage, the need to strengthen the implementation of European environmental law and to favour a better integration of environmental considerations into the Union's policies and actions, the need to ensure a minimum level of environmental protection and to improve the implementation of key environmental principles, in particular the polluter pays principle, and the need to ensure the proper functioning of the internal market were finally considered sufficient grounds to justify the adoption by the European Union of the requested framework regime.

In this context, the Union found justification for its action on the grounds just mentioned, to which were added the complexity and specific characteristics of environmental damage and the fact that the ELD applies only to significant damage.

2.3. The adoption process

The Commission presented the proposal for the Environmental Liability Directive on 23 January 2002.¹⁹ The industry was strongly opposed to this proposal. It considered it too vague and feared that the implementation of the proposed regime would be too costly for the operators

¹⁶ See Article 4(2)(e) of the TFEU. According to Article 2(2) of that Treaty, "when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. (...)".

¹⁷ Article 5(3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. (...)". And paragraph 4: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. (...)".

¹⁸ While some Member States had specific environmental liability regimes for certain types of damage, the absence of environmental liability for biodiversity damage was widespread. And, generally, in those countries where there was some environmental liability legislation, it was weak and did not require the restoration of damaged natural resources and services to their original state.

¹⁹ Proposal of 25 June 2002 for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (COM (2002) 17 final).

concerned. For their part, the environmental organisations considered the existence of exceptions to be a surrender to the economic groups affected, and therefore unacceptable and contrary to the polluter-pays principle. They also criticised the fact that they were not allowed to claim compensation for the damage caused directly from the polluters responsible. As De Smedt said, it was a directive that nobody wanted.²⁰ It is therefore easy to see that this was not an easy process, given the various interests and players involved and because of the technical complexity of the subject. That is why all the possible stages of the co-decision procedure used for the adoption of the ELD were exhausted.

The proposal for a directive was submitted to the Council on 30 March 2004 as an "A" item on its agenda, and was adopted with Germany voting against, as it wanted a more flexible system in certain areas and a stricter one in others. Ireland and Austria also voted against, as they wanted the established liability regime to extend to nuclear damage.

The Directive on environmental liability was finally signed on 21 April 2004 by the President of the European Parliament and the President of the Council and consists, currently, of 21 articles and six annexes: Annex I - Significant nature of damage to biodiversity; Annex II - Criteria for remedying environmental damage; Annex III - Scope of the Directive; Annexes IV and V - Exclusions; Annex VI - Reports to be submitted by States.

2.4. The amendments to the Directive

The ELD has since been amended several times. All these amendments aimed to broaden the level of protection conferred, either by extending the range of activities considered dangerous or potentially dangerous for the purpose of applying strict liability, or by broadening the concept of water as a natural resource covered by this legal regime.

The first amendment resulted from Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries, which extended the activities listed in Annex III of the ELD, adding the management of extractive waste to the list.

Subsequently, Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide added the operation of carbon dioxide geological storage sites to the activities listed in Annex III of the ELD.

Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on the safety of *offshore* oil and gas operations (*Offshore* Safety Directive) has expanded the concept of environmental damage caused to water, provided for in Article 2(1)(b) of the ELD, by adding the environmental status of marine waters to damage which very seriously affects the ecological, chemical, or quantitative status or ecological potential of waters. It added the environmental status of marine waters²¹ to the damage seriously affecting the ecological, chemical, or quantitative status or ecological potential of waters referred to in the ELD (inland surface waters, transitional waters, coastal waters, and groundwater).²²

More recently, on 5 June 2019, Regulation (EU) 2019/1010 of the European Parliament and of the Council on the harmonisation of reporting obligations in the field of environmental policy was adopted, which, as far as the ELD is concerned, aims to improve transparency and subsidiarity, and prepare future assessments.²³

²⁰ Cf. De Smedt, «The Environmental Liability Directive: the directive that nobody wanted – Part I. A reflection on achievements and challenges of the ELD pending its REFIT evaluation», *Environmental Liability – Law, Policy and Practice*, Lawtext Publishing Limited, 2015, pp. 167-177.

²¹ As defined in Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), to the extent that particular aspects of the environmental status of the marine environment are not already addressed in Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for community action in the field of water policy (WFD).

²² As defined in the Directive 2000/60/EC, except for adverse effects to which Article 4(7) thereof applies.

²³ Article 3 of the Regulation has deleted Article 14(2) of the ELD and reworded Article 18 to read: "Article 18 (Information on implementation and factual basis): 1. The Commission shall collect information from the Member States, which has been made public pursuant to Directive 2003/4/EC of the European Parliament and of the Council and, insofar as it is available, on the experience gained in the implementation of this Directive. This information shall cover the data provided for in Annex VI to this Directive and shall be

2.5. The scope of the ELD

The concept of autonomous environmental damage, or pure ecological damage, was introduced into EU law by the ELD. The ELD applies only to so-called environmental damage, *i.e.*, it simply does not address compensation of private parties' rights following environmental damage or imminent threat of such damage²⁴. In fact, this is not its focus at all, but rather the liability for damage to the environment as a legal good, in its various components, environmental damage *tout court*. In fact, the environment as a legal good is less protected by the national systems²⁵. Its protection falls, normally, to the Public Administration, with the application of public law rules. Thus, an administrative approach was chosen, attributing to the competent public authorities the task of requiring the responsible party to prevent damage or to repair the damaged environment, to the detriment of the traditional system of civil liability. The injured party here is the environment itself and the aim of restoration is, in principle, the restoration of the environment to its baseline condition, as explained by Nogueira López.²⁶

The ELD establishes strict or faulty liability depending on whether the type of activity carried out by the operator causes, or threatens to cause, environmental damage to protected species and natural *habitats*, land, and water, provided that the damage is significant.

2.5.1. Environmental strict liability

The establishment of strict liability, objective liability or liability for risk is unanimously considered one of the most striking innovative aspects of the ELD. In fact, it innovated by contemplating, as a general rule, the environmental strict liability as a result of the exercise of certain occupational activities considered dangerous and potentially capable of producing damages, in which the operator will be liable, regardless of fault, in the cases expressly provided for, *i.e.* environmental damages and their imminent threat caused by any of the professional activities listed in Annex III, which are understood to be sources of risk for people and the environment.²⁷

It is undisputed that strict liability best serves the polluter pays principle. Since no proof of fault or unlawfulness on the part of the operator is required, it is easier, more efficient, and quicker to establish. It will be necessary, however, to establish the existence of a causal link between the activity in question and the environmental damage or imminent threat thereof²⁸, to which must be added the fact that the damage must obviously be capable of being evaluated.

The environmental strict liability applies to all types of damage that the ELD covers and is verified, under its terms, whenever environmental damage occurs caused by any of the occupational activities listed in Annex III.

In this type of liability, the operator is responsible for significant damage caused to protected species and natural *habitats*, water and land resulting from the activities mentioned above, as well as the necessary preventive measures to avoid the occurrence of such damage, in case of imminent threat of damage.

collected by 30 April 2022 and every five years thereafter. 2 Based on the information referred to in paragraph 1, the Commission shall carry out an evaluation of this Directive and publish it before 30 April 2023 and every five years thereafter. (3) By 31 December 2020, the Commission shall develop guidelines providing a common definition of the concept of "environmental damage" as defined in Article 2."

²⁴ Unlike the Lugano Convention and CERCLA.

²⁵ Lozana Cutanda, B., "Nuevas perspectivas en materia de responsabilidad medioambiental de la Unión Europea (Directiva 2004/35/CE)", in *Derecho Europeo Medioambiental: La protección del medio ambiente en la Unión Europea. Aspectos críticos, Estudios de Derecho Judicial*, No. 134, Madrid, 2007, p. 178.

²⁶ Nogueira López, A., "Responsabilidad por daños ambientales", in Casares Marcos, A. B. (Coord.) and Quintana López, T. (Dir.), *La responsabilidad patrimonial de la Administración Pública: estudio general y ámbitos sectoriales*, Vol. 2, Valencia, Tirant Lo Blanch, 2013, p. 1228.

²⁷ "Environmentally risky activities", in the view of Brans, E., "Fundamentals of liability for environmental harm under the ELD", in Bergkamp, L. and Goldsmith, B. J. (Eds.), *The EU Environmental Liability Directive. A Commentary*, Oxford, Oxford University Press, 2013, p. 42.

²⁸ At least according to the Portuguese legal system.

Ruda González and Mullerat criticized the choice of the activities included in Annex III, considering that there are activities which, despite having less environmental impact, are subject to environmental liability, while others, which are not mentioned there, may cause greater damage.²⁹ In a future revision of the environmental liability regime, Annex III of the ELD would be one of the areas to intervene, and the range of activities referred to therein should be broadened, particularly by including mining or the introduction of invasive exotic species.

There are States which, in transposing the ELD, have opted to extend the scope of strict liability provided for therein to activities other than those referred to in Annex III. Furthermore, it is difficult to understand why the ELD did not extend the system of strict liability to activities not listed in Annex III. Jordano Fraga even considers it incoherent that, as regards liability for environmental damage, liability is not strict in all cases, pointing out that the current trend is precisely to extend liability to all types of activities³⁰, a position that we share.

2.5.2. Environmental faulty liability

As regards liability for the prevention and remedying of faulty environmental damage, the ELD applies to damage caused to protected species and natural *habitats* by any occupational activity other than those listed in Annex III, and to an imminent threat of such damage as a result of any such activity, whenever the operator has been at fault or negligent.

It is unclear why the ELD did not also apply the faulty liability regime to water and land damage resulting from activities other than those listed in Annex III. In fact, no explanation for this can be found either in the ELD or in its preamble. Valencia Martin points out as a possible justification the fact that Member States are already obliged to remedy this kind of damage under Article 6 of the *Habitats Directive*.³¹

3. Some data on the implementation of the ELD: environmental damage and imminent threats in the European Union and Portugal

The ELD is an instrument used to reduce environmental damage, to reduce the loss of biodiversity, to increase the quality of fresh and marine waters and to protect the soil. Nevertheless, although the occurrence of environmental disasters was one of the reasons that dictated the urgency of adopting a European environmental liability regime, the ELD and its transposition by Member States has not been sufficient to prevent the occurrence of damage and threats of damage. This is exemplified by the environmental disaster caused by a toxic aluminium spill following a dike burst at Ajkai Timföldgyár in Ajka, Hungary, in 2010³², and in 2011 by a fire in the ChemiePack chemical industry in the Moordijk industrial area south of Rotterdam, the Netherlands.³³

²⁹ Cfr. Ruda González, A., «§1888-Sentencia de 14 de marzo de 2005 – Responsabilidad civil medioambiental. Contaminación del aire. Carácter objetivo de la responsabilidad. Antijuricidad. El sujeto responsable. El abuso de derecho. Prevención de daños. Daño indemnizable: en particular, el lucro cesante. El problema del daño ecológico puro. Transposición de la Directiva 2004/35/CE del Parlamento Europeo y del Consejo, de 21 de abril de 2004, sobre responsabilidad medioambiental en relación con la prevención y reparación de daños medioambientales», *Cuadernos Civitas de jurisprudencia civil*, n.º 71, 2006, pp. 739 and Mullerat, B., "Algunas reflexiones sobre el nuevo régimen comunitario de responsabilidad medioambiental", *Revista Aranzadi de Derecho Ambiental*, no. 7, 2005, p. 238.

³⁰ Jordano Fraga, *op. cit.*

³¹ Valencia Martin, G., "El impacto (favorable) de la Directiva 2004/35/CE en el sistema español actual de responsabilidad por daños ambientales", in Jordano Fraga, J. (Coord.), *Estudios sobre la Directiva 2004/35/CE de responsabilidad por daños ambientales y su incidencia en el ordenamiento español*, *Revista Aranzadi de derecho ambiental*, 7, 2005, p. 147. See also Brans, E., "The Environmental Liability Directive: Legal Background and Requirements", in Lipton, J. et al, *Equivalency Methods for Environmental Liability. Assessing Damage and Compensation under the European Environmental Liability Directive*, Springer, 2018, pp. 9-10.

³² Industrial disaster which occurred in the town of Ajka, Veszprém, Hungary, on 4 October 2010, in which a fissure in a dike, more than 25 meters long, released about 700,000 cubic meters of residual red sludge from aluminium production at the Ajkai Timföldgyár plant. The sludge reached between one and two meters in height, flooding nearby localities, in particular Kolontár and Devecser. The accident caused 10 deaths and more than 150 injuries. The total contaminated area was 40 km² and the contamination reached the river Danube and its tributaries.

³³ The fire broke out in the ChemiePack chemical industry in an industrial park near Rotterdam. ChemiePack was active in the storage and packaging of dangerous substances, one of the activities listed in Annex III of the ELD. The fire resulted in contamination of soil,

In compliance with the provisions of the ELD, Portugal, like the other Member States, prepared, in April 2013, the "Report on experience obtained with the application of Decree-Law 147/2008, of 29 July"³⁴, having identified in it, as situations of environmental damage occurred and covered by the ELD, two cases, both caused by the activities referred to in point 7 of Annex III.

Also under the environmental liability regime, the APA (Environmental Portuguese Agency), in 2008, in 2009, and between 2011 and 2016, registered several imminent threats of environmental damage. In 2008, there were two cases. In 2009, two cases were reported. In 2011, only one case was reported. A single case of imminent threat was also reported in 2012. In summary, under the ELD, from 2008 to 2013, in Portugal there are only two recorded cases of environmental damage.³⁵ Regarding imminent threats of damage, the six mentioned above were registered.

These numbers can be seen in the table below: environmental damage and the threat of such damage in the European Union. For the 2007-2013 period, we have 1407 confirmed cases of environmental damage (1243) and threats of damage (164) which, according to the information provided by the Member States, were covered by the legislation transposing the ELD, that is, situations in which preventive or remedial measures were adopted. The table also shows the figures for cases which are still being examined to see whether they are covered by the environmental liability regime.

**Environmental damage or imminent threat of damage confirmed
or under analysis (2007-2013)³⁶**

MEMBER STATE	CONFIRMED DAMAGES	CONFIRMED THREATS	CONFIRMED CASES	CASES UNDER EXAMINATION	TOTAL
GERMANY	60	n/ inf.	60	0	60
AUSTRIA	0	n/ inf.	0	3	3
BELGIUM	1	0	1	0	1
BULGARIA	0	4	4	1	5
CYPRUS	1	0	1	0	1
SPAIN	11	n/ inf.	11	1	12
ESTONIA	2	2	4	4	8
FINLAND	2	n/ inf.	2	0	2
GREECE	40	11	51	1	52
HUNGARY	563	n/ inf.	563	10	573
IRELAND	0	0	0	4	4
ITALY	17	< 133	< 150	approx. 1000	(ex. pending) 150
LATVIA	13	n/ inf.	13	0	13
LITHUANIA	4	n/ inf.	4	0	4
MALTA	0	n/ inf.	0	1	1
POLAND	< 506	n/ inf.	506	> 8	514
PORTUGAL	2	6	8	0	8
UNITED KINGDOM	13	7	20	0	20
ROMANIA	4	1	5	0	5
SWEDEN	4	0	4	1	5
TOTAL	1243	164	1407	1034	1441

Of all the Member States referred to in the table (the others have no information at all),

surface water and groundwater, caused mainly by the water used to extinguish the fire, which served as a means of transporting the various toxic substances. The cost of the remedial measures amounted to 65.4 million euros. The case was resolved by recourse to the soil and water laws of the Netherlands, which predate the transposition of the Directive.

³⁴ Cfr. Agência Portuguesa do Ambiente, I. P., *Relatório sobre experiência obtida com a aplicação do Decreto-Lei n.º 147/2008, de 29 de Julho*, Amadora, 2013. Available at https://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/PT%20Report%20En.pdf

³⁵ Cfr. Milieu Consulting, *Implementation of the Environmental Liability Directive. Portugal - Country fiche 2019*, June 2019^a, p. 12.

³⁶ Table adapted from the European Commission working paper, SWD (2016) 121 final, pp. 22-23.

Hungary stands out with 563 cases and Poland with 506. Most of the remaining cases were reported by six Member States: Germany, Greece, Italy, Latvia, Spain, and the United Kingdom. The Czech Republic, Denmark, France, Luxembourg, the Netherlands, Slovenia, and Slovakia did not report any damage or imminent threat. This may be for a variety of reasons: either because any damage was not considered significant, or because, if it was, it occurred before April 2007, or because only the period after the national transposing legislation came into force was taken into account, or because it may have resulted from activities considered not to be dangerous and the operator could not be proven to be at fault, or even because national legislation previous to the ELD was applied. An example of this is the case of environmental damage at the Moerdijk Industrial Park in the Netherlands, where land and water contamination occurred, but which was not dealt with under the ELD but under pre-existing Dutch land and water protection laws.

In short, the reasons mentioned above, together with the possibility that Member States have simply failed to provide the information requested or have provided insufficient information, may justify the total absence of data for some Member States and the scarcity of data for others. In fact, to have a complete and up-to-date overview of the application of the environmental liability regime in the European Union, the Member States should and must provide accurate information on the number of cases of environmental damage or threats in which it has been applied, as well as the number of cases which have been resolved by applying other national legislation.

As mentioned above, from 2007 to the end of 2012, Portugal reported to the European Commission the occurrence of two cases of environmental damage and six cases of imminent threat. From 2013 to 2018 there is no record of any other environmental damage in Portugal and only six imminent threats of environmental damage were recorded, which required the adoption of preventive measures by the operators involved.³⁷

All these imminent threats of environmental damage resulted from activities falling under point 7 of Annex III (manufacture, use, storage, processing, filling, release into the environment and on-site transport of hazardous substances).

In the years 2017 and 2018 there is no record of any imminent threats of environmental damage.³⁸

As of 2017, the APA has made available, on its portal, an electronic platform³⁹ for communication, by the operator or other interested parties, of environmental accidents or threats thereof, within the scope of environmental liability, which has facilitated their identification and qualification.⁴⁰

³⁷ Cfr. Agência Portuguesa do Ambiente, I. P., *Regime Jurídico da Responsabilidade por Danos Ambientais - Relatório de Ocorrências Ambientais - Ano de 2019*, Amadora, January 2020, p. 9. This report also aims to respond to the provisions of Article 3 of Regulation (EU) 2019/1010 of the European Parliament and of the Council of 5 June on the harmonization of reporting obligations under environmental legislation, the latest amendment made to the ELD. Available at: https://sniambgeoviewer.apambiente.pt/GeoDocs/geoportaldocs/Docs/Relatorio_RA_Ano2019_rev2.pdf. Accessed on 22.05.2020. Note that until May 2019, Portugal had not reported any case of environmental damage in which there had been recourse to compensatory measures. Cf. Milieu Consulting, *op. cit.*, 2019, p. 24.

³⁸ Cf. Milieu Consulting, *op. cit.*

³⁹ You can find it at: <https://ra.apambiente.pt/form>, accessed in 13.04.2023.

⁴⁰ Cf. Portugal submitted, in March 2019, under the REFIT (Regulatory Fitness and Performance Program), a report for the years 2016 and 2017, with data provided by IGAMAOT, one of the entities to which the Portuguese legislation grants enforcement powers in matters of environmental liability (Milieu Consulting, *Support for the REFIT actions for the ELD - Phase 2. Portugal Country fiche*, Brussels, February 2019, p. 18). The notion of environmental damage used for the purposes of drafting that document is identical to that in the ELD, which the RJRA has taken over. The data entered therein refer, however, to environmental incidents, and the term "environmental incident", according to the glossary in the report, corresponds to cases of environmental damage dealt with under any environmental legislation and not only considering environmental liability. From this report it is drawn that in 2016, 58 environmental incidents occurred. In 30 of those incidents water damage was caused, in a single one land was contaminated, seven were related to air and waste, another one was confined to the facilities where it occurred and the remaining 19 resulted in air pollution (IGAMAOT, *Report on Environmental Accidents/Incidents 2016*. It can be consulted at https://www.igamaot.gov.pt/wp-content/uploads/Acidentes_Incidentes_2016-1.pdf). In 2017, 108 incidents occurred. Five resulted from spills, 39 from wastewater discharges, 28 from the emission of atmospheric pollutants, one explosion and 35 fires. Of these incidents, six caused damage to biodiversity, 38 to water, six to soil, and the remaining 58 resulted in air pollution. The six situations with impact on air quality, as well as on fauna and flora, relate to fires that occurred in October, with consequences far beyond the affected facilities (IGAMAOT, *Report on Environmental Accidents/Incidents 2017*, Lisbon, January 2018. It can be consulted at https://www.igamaot.gov.pt/wp-content/uploads/2017.01.08_Relatorio_Acidentes_Incidentes_2017_v6.pdf).

In January 2020, a report was presented on environmental occurrences in 2019, which states that 33 occurrences were reported to the APA in that year, 31 of which through the referred platform. Of these, only four were framed, under the RJRA, as imminent threats of environmental damage caused by activities corresponding to point 7 of Annex III (like the previous ones). In one of the cases, it was a gasoline spill; in the other cases, diesel spills, all occurred in gas stations. All of them had a common contamination of the soil and, in three cases of the groundwater. Preventive measures were taken, including risk analyses for human health, investigation of soil and groundwater quality and treatment and monitoring.⁴¹

Although the information in the table above is not alarming for most Member States (apart from Hungary and Poland, which are far from the numbers given by the others⁴²), the fact is that 60% of protected species and 77% of typical *habitats* are in an unfavourable conservation status.

We cannot, however, fail to note that these numbers are, to say the least, desolating, both for the European Union and for Portugal. The ELD was conceived in order to apply the polluter-pays principle and to impute the prevention and repair of environmental damage to the respective party responsible and to fill the gaps in the existing environmental legislation, particularly regarding this aspect.⁴³ Unless if one can understand, in a clearly optimistic reading, that this translates an effective and efficient application of the environmental liability regime, which we face with scepticism. On the contrary, we believe that this result is certainly due to the difficulties or incapacities related to the application of this regime, such as operators' lack of legal knowledge, which prevents them from reporting any incidents, the application of national legislation, which may be more restrictive, the impossibility of identifying the operator or operators responsible, or the occurrence of grounds for exclusion of liability, which is still worrying⁴⁴. Or, perhaps, to a deficient processing of information at Member State level.

4. Suggestions for improvement

Concerning the processing of information, it is true that in most Member States there is no ELD data base at the relevant authorities and when it exists, it is not of a proper quality.⁴⁵ That is why it should be mandatory to process data on the ELD implementation, at national and European level.

In many cases, the application of sectoral laws pre-existing the ELD is preferred to its implementation. At the very least, this means that environmental liability legislation has not been adequately coordinated with other pre-existent environmental legislation. And in others, such as Germany, legislation implementing the ELD is subordinated to the environmental liability provisions of existing sectoral laws if more detailed provisions for the prevention and remediation of environmental damage are provided.⁴⁶ The ELD was adopted exactly because sectoral legislation was not adequate and sufficient to protect natural resources. «The ELD rules should fit organically into the tissue of other environmental liability laws, and more generally into the whole environmental law, as well as into the relevant other fields of administrative law»⁴⁷.

In what concerns the ELD itself, it should be revised to broaden the notion of environmental damage relevant for its application, by including components or aspects of the environment hitherto not covered, such as the atmosphere or the landscape, and by extending the range of activities

⁴¹ Cf. Agência Portuguesa do Ambiente, I. P., *op. cit.*

⁴² Perhaps because they have a more effective and efficient application of the ELD. In fact, already in previous reports, the number of cases in Hungary and Poland stood out compared to those presented by the other Member States, which leads us to conclude that, in these States, the application of the new environmental liability regime is being done in a more assertive way.

⁴³ *Ibidem*, p. 5.

⁴⁴ Cases of force majeure, environmental damage covered by certain conventions, nuclear risks, diffuse pollution and cases of national defence and civil protection.

⁴⁵ AA.VV., Improving implementation and the evidence base for the ELD - Under the Framework Contract No. ENV D.4/FRA/2016/0003, COWI, Prospect, Justice and Environment, pp. 26-27.

⁴⁶ *Ib.*, p. 35: «Environmental liability is not a new concept: environmental and environment-related laws in this field were in place decades before the ELD was introduced. There are ample *practical and technical examples available, and jurisprudence* is well known by public authorities and other stakeholders concerning liability laws in waste management, water management, water protection, nature protection, and soil protection».

⁴⁷ *Ib.*, p. 235.

considered potentially dangerous (for example, pipeline transport of dangerous substances, mining and the introduction of invasive alien species are not listed in Annex III), thus broadening the scope of application of strict liability, which currently does not sufficiently cover sectors with potentially significant negative effects on protected species and natural *habitats*. The very development of pollutants resulting from industrial activities and new scientific discoveries reveal the previously unknown effects of pollution on the environment and human beings, making it necessary to update the environmental liability regime. Strictly speaking, the strict liability regime provided for in the ELD turns out to be rather limited and should be extended to all activities, even those not referred to in Annex III, which may cause environmental damage with negative effects on the environment and human health.

Extending the objective and subjective scope of application of the ELD will promote a more effective application of the polluter pays principle and a more prudent and careful pursuit of industrial activities. Moreover, compensation mechanisms, possibly of a fiscal nature, should be contemplated for those operators who undertake to prevent environmental damage.

By providing the ELD with mechanisms that contribute to the increased effectiveness of the environmental liability regime in the European Union and to the harmonisation of its legislation at European level, it will contribute to the pursuit of the objectives of the Union's policy on the environment, namely the protection and improvement of the quality of the environment, the prudent and rational use of natural resources, and the protection of citizens' health.

Admittedly, many States have gone further than the ELD in their transposition acts and have, on their own initiative, extended the scope of application of the legal regime of environmental liability by increasing the level of environmental protection resulting from it.

Other substantive provisions should also be amended such as the definitions of causal connection, liable persons and exceptions and defences. A financial guarantees regime to cover operators' responsibilities under ELD should also be mandatory in all Member States and regulated uniformly to avoid internal market fragmentation and discrimination between operators.

5. Final considerations

We cannot fail to highlight some positive points of the ELD, which greatly contributed to the strengthening of environmental protection, as well as some aspects that may reinforce it. In the first place, the environment is now definitely treated as a protected legal good, together with others such as the life, physical integrity, and property of individuals. It is thus personalised, at least as a subject that may suffer damages and be compensated by its own right, with extra-contractual civil liability continuing to be considered the appropriate mechanism for the compensation of damages caused to people and their property, whether private or public. This combination configures an advanced environmental law, in which the competent national authorities appear as representatives of the environment, whose protection they are responsible for, while citizens and companies themselves must also prevent, repair, anticipate, avoid, and report environmental damage, or the threats of such damage. The introduction of a type of strict liability, characteristic in the risk society, allowed the extension of the liability regime, which, traditionally, would only be applicable when there was proof of fault on the part of the polluting operator. Another innovative aspect of the ELD is its preventive character, covering not only environmental damage, but also the imminent threat of such damage. The ELD encourages a preventive and precautionary approach by operators in carrying out their activities, avoiding high remediation costs which ultimately affect the economic health of enterprises.

Unfortunately, ELD, as seen above, has proved to be of limited application. Krämer states that the main reason why the ELD has not been widely applied is that the environment is in bad shape not because of accidents, but because it is sick because of its long and progressive degradation.⁴⁸

The ELD has thus fallen short of the expectations raised over years of debate on the need and urgency of having a legal regime for environmental liability. A reflection of this limited application

⁴⁸ «Come on, let's make a plan – towards an 8th EU environmental action programme», *ERA Forum* 20, 2020, pp. 659-681.

is the fact that, neither in Portugal nor in many of the States, it has not given rise to any legal action⁴⁹, and the Court of Justice itself has been called upon to give preliminary rulings on this matter on a small number of occasions.

In our view, the limited application of the ELD is mainly due to its framework nature, to its high degree of flexibility and to the discretion it confers to Member States, which have hindered the implementation, in the Union, of a harmonised environmental liability regime.

The first problem that arises, from the outset, corresponds to the diversity of regulation in the European Union, which the ELD allowed. The uncertainty in relation to some concepts that it uses, of a generic, vague, unclear, indeterminate or incomplete nature, namely those used to qualify the effects caused to the environment, as is the case of the "threshold of significant damage", the clarification of which is demanded by the competent authorities and by the insurers, since the qualification, or not, of a damage as environmental for the purpose of application of the legal regime of environmental liability depends on it, is one of the reasons that affects the application of the ELD. This question assumes even greater importance in the context of the preventive function of the regime, since, in the face of an imminent threat of damage, preventive measures to avoid damage to biodiversity are often not adopted, under the erroneous assumption that such measures would only be justified if it was known, in advance, that future damage would be significant. The exceptions provided for also make implementation difficult.

One wonders, therefore, after just over 15 years of environmental liability, whether the objectives of the ELD are still important for the environment in general and for human health. The truth is that Europe has not managed to halt biodiversity loss by 2020, as it intended, and we doubt that it will be able to do so by 2030, as the Von der Leyen Commission intends. In addition, more than half of the water in rivers and lakes is below good ecological status or potential. It is therefore necessary to continue working to protect the environment, and the ELD is an essential instrument in this respect. Despite prevention and repair, the truth is that incidents continue to occur that cause significant environmental damage, deteriorating the environment, damaging natural resources and their services, and affecting human health.

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⁴⁹ In fact, out of over 1400 cases of environmental damage or threats of damage, only 60 have reached court, and of these, only Poland reported 44. Spain reported three, Austria two, Hungary five, and Latvia, Bulgaria, Malta, Finland, Greece, Sweden and the United Kingdom reported a single case each. The other States did not report any cases before their courts.

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