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Summary¹

The following is a summary of a workshop held as part of the EU-funded research project “European Union Action to Fight Environmental Crime” (EFFACE, www.efface.eu). Workshop participants included academics, practitioners and representatives of NGOs and European and national public bodies. The main issues at stake included strengths and weaknesses of the Environmental Liability Directive (Directive 2004/35/EC, ELD) as well as of related instruments; links between the ELD and the Environmental Crime Directive (Directive 2008/99/CE, ECD) as well as other instruments; links between provisions on environmental liability and provisions on environmental crime at national level; lessons learnt and experiences; comparative advantages and disadvantages of different remedies. This document summarises the presentations as well as the most important discussions developed during the workshop. Presentations of the workshop are available from the EFFACE website.

EFFACE research on Environmental Liability

Ugo Salanitro, Professor of Private Law at the University of Catania, presented EFFACE research on the ELD. He introduced the concept of environmental damage in the ELD and in the ECD, focusing on the meaning of the word “significant” (“grave” in the French version of ELD), which in his opinion should be interpreted as relevant damage. In particular, according to Salanitro, the damage should be considered relevant when it is incompatible with the purpose of other environmental directives (the Habitats Directive, the Birds Directive and the Water Framework Directive).

Then he stressed that different approaches exist between the ECD and the ELD concerning the identification of the “liable” person or entity: in the ECD the offender (who can be whoever, including under the conditions set out by Art. 6 and Art. 7, a legal person) is liable when the conduct, falling within the list of Article 3 of the ECD, is unlawful and committed intentionally or with serious negligence; in the ELD only the “operator” (natural or legal person) is liable, if he is in fault or the activity is dangerous for health or environment.

In the final part of his presentation, Salanitro dealt with the remedial measures, explaining that in his opinion not only primary remediation but also complementary and compensatory remediation are specific performance rules (i.e. rules aiming at obtaining *restitutio in integrum*).

Grazia Maria Vagliasindi, Researcher in Criminal Law at the University of Catania, presented on environmental liability and environmental crime in selected Member States (France, Germany, Italy,

¹ Authors of the summary: Grazia Maria Vagliasindi, Floriana Bianco and Annalisa Lucifora, University of Catania.

Poland, Spain, Sweden, and UK), explaining how the issue has been analysed as part of the EFFACE research on instruments, actors and institutions involved in combating environmental crime.

Vagliasindi gave examples on differences and similarities concerning relevant national provisions implementing the ELD, showing for instance how the concept of the “competent authority” in the ELD has been differently implemented within the national systems (e.g. centralised v. decentralised authority); she underlined that this element should be taken into account, together with others and without disregarding the constitutional structure of each legal system, when evaluating the effectiveness of the national provisions implementing ELD.

She then focused on the links – if any – between the latter provisions and the national environmental criminal provisions. For instance, in the UK, according to the EFFACE Country report,² the breach of the national provisions implementing the ELD constitutes a criminal offence.

Vagliasindi also dealt with the evaluation of the changes brought by the transposing instruments of ELD to the national law of the Member States investigated, in order to establish whether these changes are just limited/symbolic or, on the contrary, relevant ones.

For instance, in France before the ELD there was no system on environmental liability/damages, but courts had created mechanism of liability extending general principles. The limitation of the scope of liability only to the “grave” damage seems to entail only symbolic changes on the French national legislation. In fact, courts had already granted compensation for environmental damage (“*prejudice écologique pur*”), also after the “*Erika case*”. Nevertheless, it is not clear whether the implementation of the ELD is likely to take the environmental damage outside the scope of the civil liability or whether the courts will continue to recognise the role of civil liability whenever the environmental damage is outside the scope of environmental liability in the sense of the ELD (for example, because the environmental damage is not “grave”).³ In Sweden, according to the EFFACE Country report,⁴ most provisions on environmental liability were already in place in the Environmental Code; the ELD was added as an extra layer into the existing liability regime in the Swedish Environmental Code, which seems to create delineation problems.

Vagliasindi also emphasised the benefits brought by the ELD in terms of economic valuation of damage, complementary and compensatory remediation and public participation including access to justice.

The Environmental Liability Directive: core provisions and effectiveness issues in the perspective of highlighting the links with environmental criminal law

Valerie Fogleman, Professor of Law at Cardiff University, highlighted the main focus and objectives of the ELD and ECD in order to give a comparison between them. Fogleman stressed that, although the ELD and ECD have been referred to by commentators as “sister directives”, complementing each other, more differences than similarities exist concerning their scope and application.

² See EFFACE Country Report on the UK, chapter 15, available at www.efface.eu.

³ See EFFACE Country Report on France, chapter 15, available at www.efface.eu.

⁴ See EFFACE Country Report on Sweden, chapter 15, available at www.efface.eu.

First of all, the ELD establishes liability for preventing and remedying “environmental damage” caused by an occupational activity carried out by an “operator”; whereas in the ECD liability is not limited to damage caused by an operator.

Concerning the damage, the term “significant” in respect of environmental damage in the ELD probably does not have the same meaning as “substantial” damage in the ECD. Both terms refer to result of an activity or conduct, but the term “significant” in the definition of land damage in the ELD refers to human health; on the contrary the ECD uses the term “death or serious injury” and not the word “substantial” in respect of human health. Moreover, the ELD includes criteria to determine whether the biodiversity damage is significant, while no criteria are provided in this respect in the ECD but references to specific environmental legislation.

As to the scope of land (soil) damage - it is worth noting that term “land” in the ELD is not the same as term “soil” in the ECD; the ELD will rarely apply to agricultural land due to requirement for negligence, on the contrary, ECD specifically applies to agricultural land. Moreover, while the ELD requires a risk to human health, ECD requires a substantial damage to the quality of the soil itself.

With regard to the scope of water damage, the ELD provides for severe limitations on liability for water damage in some Member States due to the requirement for damage to a “water body” not “waters”; as a consequence, the ECD has a wider application to waters than the ELD.

Concerning the scope of biodiversity damage, the ELD does not include “animals” and “plants”, but is limited to species and habitats protected under the Birds and Habitats Directives and, at the option of Member States, equivalent national legislation. The ECD includes animals and plants as well as species and habitats protected under the Birds and Habitats Directives and provides more protection in Natura 2000 sites than outside them due to reference to any conduct causing their significant deterioration.

With regard to the application of the ELD in Member State national law, Fogleman noted that, concerning land damage and water damage, liability exists in most Member States; as to biodiversity damage, virtually all existing legislation imposes liability only when there has been an unlawful act, and is limited to primary liability except for complementary liability in Germany. As to the application of the ECD in Member State national law, the ECD complements /supplements administrative/ civil sanction regimes for environmental damage.

Lucas Bergkamp, Partner of Hunton & Williams, addressed the issue of the Defences and Criteria of Allocation of Liability.

Barbara Pozzo, Professor of Private Comparative Law at the University of Insubria - Como, focused on the remedies and sanctions established by the ELD. After having introduced the preventive action (Art. 5 ELD), which can be taken when an environmental damage has not yet occurred but there is an imminent threat of such damage occurring, Pozzo presented the remedial action (Art. 6 ELD) - which presupposes that environmental damage has occurred-, the determination of remedial measures (Art. 7 ELD) and the prevention and remediation costs (Art. 8 ELD). Pozzo gave special attention to the analysis of Annex II of the ELD. This Annex on remedying environmental damage sets out a common framework to be followed in order to choose the most appropriate measures to ensure the remediation of damage to water or

protected species or natural habitat, and the remediation of land damage. The damage to water and biodiversity is defined with reference to previous EU legislation, while the damage to land is defined with reference to risk to human health. In particular, Pozzo underlined that remedying of environmental damage, in relation to water or protected species or natural habitats, was achieved through the restoration of the environment to its baseline condition by the means of primary, complementary and compensatory remediation. According to Pozzo, the ELD provides innovative guidelines as far as remedies and sanctions are concerned, and *restitutio in integrum* is always preferable.

Compared to the ELD, in the ECD a very different legislating technique is used, considered that Art. 5 and Art. 7 ECD simply refer to the fact that Member States shall take the necessary measures to ensure that the offences taken in consideration by the Directive are punishable by effective, proportionate and dissuasive criminal penalties. Indeed, according to Pozzo, at the national level the interpretation of «effective, proportionate and dissuasive» does not necessary mean a preference towards *restitutio in integrum*, i.e. taking measures that bring the environment back to its previous state, but, on the contrary, it generally means a preference towards monetary compensation.

Environmental Liability Directive and the Industrial Emissions Directive

Luciano Butti, Partner at Butti & Partners and Lecturer in International Environmental Law at the University of Padova, introduced the Baseline Report obligation introduced by the Industrial Emissions Directive (2010/75/EU) and focused on the Guidelines for the Baseline Report recently issued (6 May 2014) by the European Commission. He stated that specific guidelines on the Baseline Report have been issued in France (February 2014), Germany (August 2013) and guidelines are under preparation in Italy.

Butti highlighted that the remediation of contaminated sites is one of the few areas of environmental law where a common European legislation is missing; several attempts to create a framework at the European level have so far been unsuccessful. Then he discussed if and how the Baseline Report could give new life to the efforts aimed at introducing an EU regulation of contaminated areas. According to him, the next challenge at EU level is to set up practical and legally admissible criteria regarding the obligation to return the site to the state described in the initial baseline report.

Butti also investigated the consequences that the introduction – at a European level – of the Baseline Report could have for the environmental crimes connected to the omitted or delayed remediation of contaminated areas.

In his final remarks, he stressed that, after the introduction at a European level of the Baseline Report, the establishment of a common and comprehensive European framework on environmental liability for contaminated areas has now become a new and essential goal for Europe. According to Butti, the first step towards such a goal should be focused on the introduction of common technical standards for considering a site as contaminated under the law and for the identification of the remediation targets.

As to environmental crimes connected to the omitted or delayed remediation of contaminated areas, although different approaches exist in MS criminal law, according to Butti, the diffusion at European level of the Baseline Report could indirectly help this difficult process.

Randy Mott, CHWMEG⁵ Director for Europe, Middle East and Africa, Poland, gave an overview on the US environmental law enforcement system. From his comment, it resulted that, in comparison to US, the European penalties can be considered weak and EU scheme is not adequate to prevent environmental damage. According to him, the law should be written to address the worst actors, to anticipate their behaviours and to prosecute them.

In addition, Mott argued that the provisions for notification in the ELD used the same definitions as the remediation standards. Therefore, the notification obligation threshold is too high to be meaningful. He contrasted this situation to the U.S. rule under CERCLA that uses a "one pound" numeric standard for reportable releases under Superfund. He further contended that the under-reporting of accidental discharges to the soil under the European Pollution Release and Transfer Registry (E-PRTR) illustrates that reporting obligations for potential contamination incidents have to be strengthened, including possible penalties.

Discussion

The discussion touched upon the comparison between US and EU on the enforcement of environmental regulation. In this respect, it was stressed that the law is more strictly enforced in the United States than in European Union and this could be due to the different institutional systems of the respective countries. Indeed, in the United States the enforcement activity in environmental matters is mainly handled by federal authorities, while in Europe it is handled by national authorities.

Concerning the ELD, it was highlighted that it establishes minimum rules and it leaves many issues to the Member States' discretion; moreover, it does not prevent Member States from maintaining or enacting more stringent provisions in relation to the prevention and remediation of environmental damage. Even if the ELD brought some relevant changes, participants pointed out the importance of developing new instruments at European and national level in order to improve the effectiveness and efficiency of environmental legislation. From the debate it resulted that a priority should be the promotion of training programs for competent authorities so as to increase their expertise and raise awareness on the importance of environmental protection.

Concerning the ECD, the importance of the introduction of the liability of legal persons for environmental crimes was highlighted.

Environmental Liability and Environmental Crime

Elisabetta Rosi, Justice at the Italian Supreme Court and Vice Head Cabinet of the Italian Ministry for the Environment, speaking in her personal capacity, addressed the issue of environmental liability and environmental crime both in a diachronic and in a synchronic perspective.

With regard to the ECD, Rosi underlined the main shortcomings of this instrument. Among these are that it does not contain any provision about reparation, it is unclear on the nature of environmental crime as well as on the purpose of criminal law in the protection of the environment and it does not deal with

⁵CHWMEG, Inc. is a waste producer's organisation devoting to waste stewardship.

transnational damages. According to Rosi, the ECD only aims to enhance the prevention and the punishment of environmental crime. However, in the light of a consistent approach between the ELD and the ECD, she suggested to take into account also the reparation goal in the future developments of EU legislation on environmental crime, by the enactment of provisions on freezing and confiscating the proceeds of environmental crime – which could be considered a crime for profit purpose - in order to obtain financing for the reparation process, as well as by the enactment of provisions aiming at facilitating voluntary reparation and reparative justice. Moreover, she proposed to adopt a consistent approach on the national and transnational aspects of the issues of environmental crime and environmental damage; she also stressed the importance of strengthening consistency between the administrative and civil liability and the criminal responsibility as well as between European and international legal instruments.

Rosi stressed that even if reparation should be considered the core issue of the protection of violated environment, prevention purpose should also be pursued, through the duty/right of information on environmental issues, the involvement of public institutions and civil society, and by considering the subsidiary role of criminal law in the protection of environment.

The Polish Experience

Magdalena Bar, Partner at Jendroska Jerzmański Bar & Partners, stated that in Poland the ELD was implemented by Act of 13 April 2007, recently amended by Act of 11 July 2014 (in force since 5 September 2014). In comparison to the former liability schemes existing in Poland, the 2007 Act provided for stricter and more precise liability schemes for damage to protected species/habitats and water; moreover, it introduced a different liability scheme for land damage caused after 30 April 2007. Concerning the definition of environmental damage, Bar stressed that, according to the original 2007 Act, the definition of land damage is stricter than in the ELD and it is based on strict soil quality standards already existing; the damage to protected species/habitats covered also areas and species protected under national law; the damage to water was formulated as in the ELD and it is unclear whether the concept of damage refers to water or water bodies. In regard to the defences, they are defences to costs and not to liability but, according to Bar, this is not very important because permit defence and state-of-art defence have been not adopted in Poland. According to the 2007 Act, the competent authority shall undertake (it is worth to note that ELD says the competent authority “may” undertake such measures) remedial measures when: the liable operator cannot be identified; enforcement action against the liable operator turned out to be ineffective; immediate action is necessary because of a threat to human life or health, or a threat of causing an irreversible damage to the environment. The request for action may be brought by every person (regardless of his/her interest in the case), including environmental NGOs which may also participate in the further proceedings.

As to the implementation of the ELD in practice, Bar focused on the possible reasons of the high number of cases (over 500 reported for the years 2007-2012), such as the very broad definition of land damage and the broad right to file a request for action. Therefore, amendments of the 2007 Act were needed. According to the latest amendment, the definition of land damage is no longer based on strict quality standards and it now refers to a contamination that creates a significant risk of human health being

adversely affected (same approach of the Directive); the damage to biodiversity is limited to habitats and species protected under EU law (no longer by national law only).

In the second part of her presentation, Bar focused on the implementation of Directive 2008/99/EC in Poland. She stressed that the transposing provisions (contained in the Penal Code, the Nature Protection Act, and the Ozone-Depleting Substances Act) are rather poorly applied in practice (not many cases in courts result in a conviction). This could depend on different reasons: use of vague notions in the transposing provisions (substantial damage) which are not defined by law and there are no interpretations provided by case-law or in the literature; lack of cooperation between public prosecutors and environmental authorities; lack of trainings on environmental law for public prosecutors; errors in proceedings made by public prosecutors. It is worth to mention that in Poland the ECD provisions on liability of legal persons - although transposed - are not implemented at all in practice.

Discussion

The discussion focused on the issue of consistency between ELD and ECD. Some participants highlighted that this issue is also linked to the multilingual character of the EU legislation and does not concern only the implementation stage. Although the ELD and ECD have different purposes and objectives, they can be considered as complementary and not contradictory. An element which is relevant in both the directives is the damage and, according to the participants, it should be interpreted in a consistent way.

Another interesting issue raised during the discussion involves the consistency between ECD and other EU directives in criminal matters. For instance, it was stressed that the ECD imposes Member States to ensure that “inciting, aiding and abetting” the intentional conduct listed therein is punishable as a criminal offence, while other EU directives⁶ refer to “inciting, aiding and abetting *or attempting*”.

Participants agreed that prevention has a central role and should be pursued also through the involvement of social society. This requires adequate information on environmental crimes in order to develop strategies; however, this information can presently not be considered sufficient. Moreover, the lack of strategic use of the existing instruments as well as the issue of communication and collaboration between actors, institutions and NGOs were mentioned as issues.

Environmental Liability: Experiences and Way Forward

Hans Lopatta, Policy Officer at the European Commission, gave an overview on the ELD, stressing that it follows an administrative liability approach and leaves wide margin of discretion to EU Member States on certain important issues (scope, derogations etc.). Lopatta highlighted that the ELD pursues two main objectives: prevention in case of “imminent threat” of damage and remediation when the damage has occurred. Prevention includes information to the competent authority if threat persists; remediation obliges operator to take containment/mitigation measures, develop and propose remediation plan and take remediation measures.

⁶ See for instance Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

According to the 2010 Commission report on the ELD, there are diverging national transposing rules which could potentially create difficulties; for example, there is an uneven implementation of the permit and state of the art defences and an uneven extension of the biodiversity scope to cover species and natural habitats protected under domestic law. The European Commission has carried out an evaluation of the effectiveness of prevention and remediation of damage to the environment on the basis of gathered experience; the purpose is to suggest practical measures and/or legislative adaptations at EU level to increase effectiveness. The result is that the number of ELD cases per Member State varies considerably from 95 annual cases to less than 1 annual case; the duration of remediation varies between 1 day and more than 6 years (average duration approximately around 2 years).

The ELD provides for higher remediation standards that did not always exist previously (in particular, complementary and compensatory remediation) and it implements the polluter pays principle. However, following the MS reports, there are still some weaknesses, such as low awareness of operators and authorities; lack of expertise and resources in financial, economic and liability matters; difficulties in establishing causality and identifying liable operator; no mechanisms (insurance etc.) in place to remedy large scale damage; use of undefined legal terms.

According to the ELD Implementation Study 2012, the transposition of the ELD into national law did "not result in a level playing field but a patchwork of liability systems" due to procedural and substantive variations. In order to strengthen the practical implementation of the ELD, the study recommends some measures, such as the organisation of workshops and conferences to increase awareness of stakeholders; the development of supporting tools (guidance documents, national or EU registers of ELD cases); the development of actions to improve expertise and knowledge of all stakeholders; the introduction of databases for the collection of data on the quality of environmental sectors.

Discussion

In a final round, participants were asked to indicate what policy recommendations they consider most important. The recommendations given included the following:

- more precise legislation;
- better consistency between the directives;
- protect the environment and not the legislation;
- provide actions to improve awareness raising;
- make ELD global;
- improve training of competent authorities.



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