

LIABILITY FOR ENVIRONMENTAL HARM IN EUROPE: TOWARDS A HARMONISED REGIME?

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Introduction

In April 2004, Directive 2004/35 was promulgated establishing a framework for environmental liability based on the 'polluter pays' principle, with a view to preventing and remedying environmental damage.¹

The Directive is the result of a long-running discussion on the usefulness of civil liability as a means of allocating the responsibility for environmental costs,² on the various options to be taken into consideration,³ and on the various legislative systems that needed to be analyzed in order to have a comparative law perspective.⁴

This paper aims to sum up from an historical point of view:

- the situation at national level before the entrance into force of Directive 2004/35 (I);
- the institutional steps taken by the European Commission in order to elaborate the text of the Directive (II);
- the main features of the Directive (III); and
- the process of assessing the remaining differences at national level (IV).

I. The Situation at National Level before the Entrance into Force of Directive 2004/35

1. Introduction

During the 1980s, the question of liability for environmental harm emerged as a critical question in various legal systems, as well as at supranational level. A trend emerged aimed at the re-evaluation of civil liability as an instrument for the prevention of damage arising from pollution activities potentially dangerous to mankind and the environment. In particular, it is important to remember that since the beginning of the '80s attention paid to environmental

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¹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April, 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 30.4.2004, L 143/56.

² Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on remedying environmental damage, COM (93) 47 final, Brussels, 14 May, 1993.

³ White Paper on environmental liability COM (2000) 66 final, Brussels, 9 February, 2000.

⁴ Both the Green Paper of 1993 and the White Paper of 2000 based their analysis on comparative law research.

problems and to the instruments to be used to protect the environment have been increasing. In the United States, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) was enacted in 1980, which established the conditions under which the Federal State, the States, and other public trustees could claim damages regarding natural resources. At the same time, in Europe, some national legislators decided to introduce a particular civil liability regime which would take into consideration the specific needs of the environmental sector. In some countries, like Germany and Italy, specific statutes were promulgated in order to cope with these problems, while in France and Great Britain there were no specific legislative rules, while old private law remedies were adapted in order to cope with liability problems related to pollution cases.⁵ In Europe, the situation was then very fragmented, also because the choices made by European legislators were not in agreement, differing both on the object of protection and on the criteria for liability.

2. The Italian Law of 1986

As for Italy, in 1986, the Parliament enacted a new statute, Law No.349/1986, concerning liability for environmental damage.⁶

The two main features of the Italian statute were:

- to provide general and direct protection of the environment as a whole; and
- to dictate a fault liability principle.

In more detail, the Italian Law introduced the notion of 'environment' as an object of protection in its own right, independently of violation of private property or human health. In fact, Art. 1 of the Law stated: 'It is the duty of the Ministry to ensure . . . the promotion, the conservation, and the recovery of the environmental conditions in accordance with the fundamental interests of the general public and with the quality of life, as well as the conservation and the enhancement of the national natural patrimony and the defence of natural resources from pollution.'⁷

As a consequence of this approach, the Italian Law of 1986 had to provide specific criteria in order to quantify damage to the environment, taking into consideration the non-market value of environmental goods.⁸ Article 18.6 introduced a rule, where the judge, in the case that it was impossible to precisely quantify the damage, could determine the amount on an equitable basis, taking into account the severity of individual fault, the cost required for recovery, and the profit obtained by the injurer as a result of his behaviour that damaged the environmental goods.

Another problem that the Italian statute had to solve was the standing issue. As the 'environment' *per se* did not correspond to the individual interest of anybody to stand in Court, it was foreseen that the State, the Regions, and other territorial entities could take action for

⁵ B. Pozzo, 'The liability problem in modern environmental statutes', in *European Review of Private Law*, 4: 111-144, 1996.

⁶ Law No.349 of 8 July, 1986, Istituzione del Ministero dell'Ambiente e norme in materia di danno ambientale.

⁷ On the Italian Law, see Morbidelli, *Il danno ambientale nell'art. 18 l.349/86. Considerazioni introduttive*, in: Riv. crit. dir. priv., 1987; Albamonte, *Danno ambientale nella L. 349/86*, in Cons.Stato, 1988, III, p.1927; Bigliuzzi Geri, *Quale futuro per l'art. 18 Legge 8 luglio 1986, n. 349?*, in Riv. crit. dir. priv., 1987, anno V, p.685.

⁸ These criteria were stated in Art. 18.6 of Law No.349 of 8 July, 1986.

compensation for environmental damage. Environmental associations had—under certain conditions—standing in Court as well.

Concerning the liability issue, Art. 18 of Law No.349/1986 provided a fault liability principle. In fact, as regards the injurer's behaviour, it was necessary to prove a 'fraudulent or faulty acts in violation of statutory provisions or of measures adopted according to the law'. For reasons related to the genesis of the rule, the Italian choice stands out as following criminal law schemes. The above-mentioned rule, in fact, recalls Art. 42 of the Italian Penal Code, when it defines the faulty act as that deriving from 'non-observance of laws, rules, ordinances, or regulations'.⁹ The fault liability approach was also confirmed by the criteria according to which the Italian judge was supposed to assess and quantify environmental damage. According to Art. 18.6, in order to quantify environmental damage, the Court had to take into consideration 'the gravity of individual fault'.¹⁰

According to the Italian Law, anybody could be considered liable, without taking into consideration the kind of activity exercised.¹¹

3. The Portuguese Basic Law of 1987

On April 7, 1987, the Portuguese Parliament enacted the Basic Law on the Environment¹²: *Lei de Bases do Ambiente*. This is a very comprehensive statute, sketching out the general framework for environmental law, whose main purpose is proclaimed in Art. 1: 'Every citizen has the right to a human environment that is ecologically balanced and has the duty to defend it.'

The Law does not deal with liability issues only, but it contains a Chapter VII that is fully dedicated to the issue. The two main features of the Portuguese liability regime were:

- to provide direct protection of the environment, conceived in a very broad way; and
- to introduce a strict liability regime.

The concept of 'environment' taken into consideration by the Law was very broad. Article 6 of the Law in fact defined the components of the environment as 'air, light, water, soil, underground, flora, and fauna'.

The Portuguese Law further introduced in Art. 41 a strict liability regime for any considerable damage to the environment with a very general formula: 'The person responsible for considerable damage to the environment which is caused by particularly dangerous activities is held responsible for repairing them independently of any fault, even in the absence of a violation of a norm in force.'¹³

⁹ Bajno, *Profili penalistici nella Legge istitutiva del Ministero dell'Ambiente*, in *Studi parlamentari e di politica costituzionale*, anno 19, n.71, 1° trim., 196, p.81.

¹⁰ Pozzo, *The liability problem in modern environmental statutes*, cit., p.131 f.

¹¹ Art. 18.1 stated: 'Any malicious or negligent act in violation of provisions of law or of measures taken pursuant to law impairing the environment, causing damage to it, by altering, spoiling, or destroying it in whole or in part, obliges the author of the fact to pay damages to the State'.

¹² Lei n.º 11/87 de 7 de Abril, *Lei de Bases do Ambiente*. Law 11/87, April 7, 1987, subsequently amended by Law 13/2002, February 19, 2002. This law establishes the environmental general legal framework.

¹³ Artigo 41. Responsabilidade objectiva:

1- "Existe obrigação de indemnizar, independentemente de culpa, sempre que o agente tenha causado danos

Further on, the Portuguese statute of 1987 introduced an obligation for all businesses running activities highly dangerous to the environment to obtain insurance coverage.¹⁴

4. The German Law of 1991

A very different approach was taken by the German Law of 1991, called *Umwelthaftungsgesetz* (Law on civil liability in environmental matters).¹⁵

The two main features of the German statute were:

- to provide a direct protection of persons, health, and property in case of environmental pollution and therefore only indirect protection of the environment; and
- to introduce a strict liability regime.

Damage taken into consideration by the German statute was only damage caused to health and to the integrity both of persons and of things which were the consequences of harmful emissions into the environment.¹⁶ Only selected traditional goods (health, property, etc.) were protected, while no direct protection of the environment was taken into consideration. Consequently, the German Law did not have to provide specific criteria to quantify environmental damage. Traditional damage would be assessed according traditional criteria.

Concerning the liability issue, it is important to specify that the German Law charges only the owners of those plants that are specifically enumerated in one of the appendixes to the Law¹⁷: only industrial plants whose activities are considered potentially harmful to the environment appear in that list. Such liability is extended to industrial plants that are not yet working, as well as those that are no longer operational.¹⁸

Further on, the rules established by the German law are particularly strict and articulated.

significativos no ambiente, em virtude de uma acção especialmente perigosa, muito embora com respeito do normativo aplicável.

2- *O quantitativo de indemnização a fixar por danos causados no ambiente será estabelecido em legislação complementar”.*

¹⁴ Artigo 43. Seguro de responsabilidade civil

“Aqueles que exerçam actividades que envolvam alto grau de risco para o ambiente e como tal venham a ser classificados serão obrigados a segurar a sua responsabilidade civil”.

¹⁵ On the enactment of the German statute, see Feldmann, *Umwelthaftung aus umweltpolitischer Sicht - zum Inkrafttreten des Gesetzes über die Umwelthaftung am 1. Januar 1991*, in UPR 1991, p.45; Hager, *Das neue Umwelthaftungsgesetz*, in NJW, 1991, p.136; Höhne, *Umwelthaftungsgesetz - Markt statt Zechprellerei*, in Ecolex 1991, p.669. For a general comment on the Law see Schmidt-Salzer, *Kommentar zum Umwelthaftungsrecht*, Heidelberg, 1992; Landsberg/Lülling, *Umwelthaftungsrecht*, Köln-Stuttgart, 1991. See further Pozzo, *La responsabilità per danni all'ambiente in Germania*, in Riv. dir. civ., 1991, I, p.599.

¹⁶ The English version of the German Act establishes in § 1 as follows: 'If a person suffers death or injury to his body or health, or if property is damaged, due to an environmental impact that issues from one of the facilities named in Appendix I, then the operator of the facility shall be liable to the injured person for the damage caused thereby.'

¹⁷ Appendix I.

¹⁸ §2. *Liability for non-operating facilities:*

(1) If the environmental impact issues from a facility that is not yet completed and arises from circumstances forming the basis of the hazard posed by the facility after completion, then the operator of the not-yet-completed facility shall be liable pursuant to § 1.

(2) If the environmental impact issues from a facility that is no longer in operation and arises from circumstances forming the basis of the hazard posed by the facility prior to its ceasing operations, then the operator of the facility at the time of the ceasing of operations shall be liable pursuant to § 1.

The Umwelthaftungsgesetz foresees a strict liability regime that includes the so-called development risk (in German: *Entwicklungsrisiko*), according to which damage may be due to the employment of certain substances whose toxic and harmful characteristics one could not have known, given the state of science and technology up until the moment at which the damage occurred.

A plant that had functioned according to the rules of law (so-called *Normalbetrieb*), that is, a plant that had operated after having obtained the authorisation that might be required and respecting the standards fixed by the laws, was also subject to this type of liability. The *Normalbetrieb* was only facilitated in the sense that against it, the presumption of causality established in § 6¹⁹ would not apply.²⁰

The German Law finally provided in § 19 the obligation to obtain insurance coverage for all activities considered extremely dangerous to the environment and named in a specific Appendix II of the Law itself.²¹

An interesting provision aimed at rendering more stringent the provision on insurance coverage established that the competent administrative agency could prohibit, in whole or in part, the operation of a facility considered extremely dangerous to the environment, if the operator did not comply with his duty to obtain coverage and failed to prove, within a reasonable time to be set by the competent agency, that coverage had been obtained.²²

5. The Convention of the European Council on Civil Liability for Environmental Damage Due to Hazardous Activities of 1993 (Lugano Convention)

At supranational level, it is important to recall the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, adopted in

¹⁹ §6. *Presumption of causation*

(1) If a facility is inherently suited, on the facts of the particular case, to cause the damage that occurred, then it shall be presumed that this facility caused the damage. Inherent suitedness in a particular case is determined on the basis of the course of business, the structures used, the nature and concentration of the materials used and released, the weather conditions, the time and place at which the damage occurred, and the nature of the damage, as well as all other conditions which speak for or against causation of the damage in the particular case.

²⁰ §6 (2) Paragraph (1) shall not apply if the facility has been properly operated. A proper operation is present if the special operational duties have been complied with and no disruption of operations has occurred.

²¹ §19. *Provision of coverage*

(1) The operators of facilities named in Appendix 2 shall ensure that they are able to fulfil their legal obligation to provide compensation for damages that arise from a person suffering death or injury to his body or health, or from property being damaged, as a result of an environmental impact that issues from the facility (provision of coverage). If a facility that is no longer in operation presents a special hazard, the competent administrative agency may order the person who operated the facility at the time of the ceasing of operations to provide for coverage for a period of up to ten years.

(2) Coverage may be provided:

1. in the form of liability insurance issued by an insurance company licensed to do business in the territory in which this Act applies;
2. in the form of an indemnity agreement or guarantee made by the Federal Government or by a state; or
3. in the form of an indemnity agreement or guarantee made by a credit institution licensed to do business in the territory in which this Act applies if such agreement or guarantee provides security comparable to that provided by liability insurance.

(3) The persons named in § 2 (1), Nos. 1 to 5 of the Compulsory Insurance Act as published 5 April, 1965 (BGBl. I p.213), last amended by the Act of 22 March, 1988 (BGBl. I page 358), are exempt from the duty to provide for

Lugano in 1993. The Convention contained a regime for environmental liability that covered all types of damage (both traditional damage such as personal injury and property damage and impairment of the environment as such), when caused by a dangerous activity.

In particular, according to Art. 2.10. of the Convention, the definition of 'environment' included:

- natural resources both abiotic and biotic, such as air, water, soil, fauna, and flora and the interaction between the same factors;
- property that forms part of the cultural heritage; and
- the characteristic aspects of the landscape.

Dangerous activities in the field of dangerous substances, biotechnology, and waste were further defined. The scope was open in the sense that other activities than those explicitly referred to may also be classified as dangerous. In this sense, the Convention seems to find a good compromise between the German solution, which is based on a specific list of activities, and the open solution of the Italian or Portuguese legislations.

The Convention has comprehensive coverage, taking into consideration all types of damage resulting from dangerous activities, presenting a coherent system of liability.²³

A very interesting and innovative solution introduced by the Lugano Convention concerned the way the environment could be restored from damage. Article 8 of the Convention gave a definition of 'Measures of reinstatement,' that included 'any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. Internal law may indicate who will be entitled to take such measures'.

Comparing the regime of the Lugano Convention with the environmental liability regimes of the Member States, it appears that the Convention went further than most Member States that had enacted specific liability regimes for environmental harm.

6. Conclusions

By the beginning of the '90s, the idea of using civil liability to cope with environmental damage was taken into account by several national legislators as well as by national Courts, in

coverage.

²² §19 (4) The competent administrative agency may prohibit, in whole or in part, the operation of a facility named in Appendix 2 if the operator does not comply with his duty to provide for coverage and fails to prove, within a reasonable time to be set by the competent agency, that coverage has been provided for.

²³ According to Art. 7 of the Convention, 'Damage' means:

- a. loss of life or personal injury;
- b. loss of or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity;
- c. loss or damage by impairment of the environment in so far as this is not considered to be damage within the meaning of sub-paragraphs a or b above provided that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to the costs of measures of reinstatement actually undertaken or to be undertaken;
- d. the costs of preventive measures and any loss or damage caused by preventive measures, to the extent that the loss or damage referred to in sub-paragraphs a to c of this paragraph arises out of or results from the hazardous properties of the dangerous substances, genetically modified organisms or micro-organisms or arises or results from waste.

very different and heterogeneous ways.

These differences concerned various aspects such as the object of protection, the criteria for apportioning liability, the rules concerning causal linkage, and the way to assess damage.

On this ground, the European Commission launched proposals to achieve harmonisation in this field.

II. *The Institutional Steps Taken by the European Commission in Order to Elaborate the Directive*

1. Introduction

The Community has for decades based its legislation on traditional instruments of environmental policy, those based on the 'command-control' model, and—only more recently—more flexible instruments have been considered.

This revised approach stems from an investigation conducted by the European Agency for the Environment in the early '90s entitled 'Environment in the European Union at the turn of the century',²⁴ in which it was pointed out that the massive number of environmental directives that had been published until then had not achieved the desired results of environmental protection.

The reasons offered in this regard by the Report were many: the limited national transposition of European standards, the limited enforcement of the same, and, therefore, the limited justiciability by citizens of the rules protecting the environment.²⁵

In the Fifth Environmental Action Programme adopted by the Commission in 1992 entitled 'Towards Sustainability',²⁶ there was the idea of broadening the range of environmental policy instruments, among which we find for the first time liability for environmental harm. The following year, the Commission published a Green Paper concerning the possibility of introducing at European level a harmonised liability regime for environmental harm.

2. The Green Paper of 1993

In 1993, the European Commission published the Green Paper 'on remedying environmental damage'.²⁷

The Green Paper examined the usefulness of civil liability as a means for the prevention and remediation of environmental harm. The approach of the EU Commission to this problem was to recognise civil liability as an instrument for imposing a standard of behaviour and therefore achieving a preventive effect. Civil liability was further presented as a concretisation of the 'polluter pays' principle, introduced at European level by the First Action Programme on

²⁴ The publication may be found on the website of the European Environmental Agency at the following address: <http://www.eea.europa.eu/publications/92-9157-202-0>.

²⁵ As pointed out by Grimeaud in 'The integration of Environmental Concerns into EC Policies: A Genuine Policy Development?', in *European Environmental Law Review*, 2000, p.207 f.

²⁶ 18 March, 1992

²⁷ Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on remedying environmental damage, COM (93) 47 final, Brussels, 14 May, 1993.

the Environment, dating back to 22 November, 1973.²⁸

The Commission's initiative pointed out the need to harmonise the different liability regimes existing within Member States. The presence of different regimes of civil liability, which were very heterogeneous regarding the criteria for assessing environmental damage and the object of protection, could interfere with the free play of competition between firms within the European market. One of the primary purposes of the Commission's initiatives was therefore to provide a minimum common basis between the Member States so as to develop a coherent policy at Community level.

The need for an effective functioning of the internal market implied that in each Member State, the polluters had to bear all costs arising from environmental degradation caused by their own activities, in order to avoid distortion of the conditions for a competitive market.

The 'polluter pays' principle had to be interpreted in the sense that environmental liability regimes should be forged in order to attain internalisation of environmental costs.

In the Green Paper, various liability standards were analysed. The negligence rule is pointed out as heralding innumerable problems for the victims in proving the defendant's faulty behaviour.²⁹

Strict liability was indicated as being a more effective way to create incentives to avoid damages.³⁰

Another issue that was discussed by the Commission in the Green Paper of 1993 was the 'capital' importance of a legal definition of environmental damage, 'because this definition will determine the type and degree of intervention and remedial costs that are recoverable through civil liability'. The Commission further pointed out that the legal definitions can often be at odds with the concepts in current use of environmental damage, 'but are necessary to ensure legal certainty'. The definition of 'environment' and 'environmental damage' should therefore be considered essential in the building of a system of liability, which should be harmonised at European level.

Therefore, the definition of environmental damage, the degree of impact on the environment considered as damage, and who has the right to decide have been central to the debate developed by the Commission.

It is also important to remember that the concept of 'environment' had not been defined by the EC Treaty. This gap at EU level reflected different concepts and definitions of 'environment' that had developed, as we have seen, in different national contexts. Some jurisdictions introduced an 'ecocentric' definition of environment, designed to include natural resources as such, like in Italy and Portugal. In others, like in Germany, the system was characterised by a definition that was more 'anthropocentric', where only selected activities that had the potential to cause damage to property or human health were taken into consideration.

Even in EU secondary legislation, it was not possible to find a general definition of 'environment'. A first attempt to define 'environment' as a whole was done with Directive 85/337 on environmental impact assessment of certain public and private projects³¹, which

²⁸ OJ C112/1 of 20.12.1973.

²⁹ Green Paper 2.1.1.

³⁰ Green Paper 2.1.2.

³¹ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L175, 5.7.1985, p.40-48.

introduced a very broad definition of environment, including 'human beings, wildlife, flora, soil, water, air, climate, and landscape; interaction between the factors mentioned in the first indent; and material values and natural heritage'.

Then, the problem of defining the concept of environment became more urgent in the context of developing a Community regime on environmental liability.

3. The White Paper of 2000

On 9 February, 2000, the European Commission published a White Paper on environmental liability.³² The document explored the possible ways to shape an EC-wide environmental liability regime, in order to improve application of the environmental principles in the EC Treaty and implementation of EC environmental law, and to ensure adequate restoration of the environment.³³ Here, again, the Commission examines how and under what conditions environmental liability obliges the causer of environmental damage (the polluter) to pay for remedying the damage that he has caused.

The White Paper pointed out some general conditions that have further characterised liability in the future Directive: a liability regime can be really effective only where polluters can be identified, damage is quantifiable, and a causal connection can be shown. It is therefore not suitable for diffuse pollution from numerous sources.

The Commission also illustrated the reasons for introducing an EC liability regime, which include improved implementation of key environmental principles (like the 'polluter pays' and prevention and precaution principles) and of existing EC environmental laws, the need to ensure decontamination and restoration of the environment, better integration of the environment into other policy areas, and improved functioning of the internal market.

According to the White Paper, liability should enhance incentives for more responsible behaviour by firms and thus exert a preventive effect, although much will depend on the context and details of the regime.

The White Paper finally analysed the possible main features of a Community regime. The liability rules envisaged by the Commission should not be retroactive³⁴; must cover both environmental damage (site contamination and damage to biodiversity) and traditional damage (harm to health and property)³⁵; and needs to have a close scope of application linked with EC environmental legislation.

Finally, a double standard for liability was foreseen: a strict liability regime for damage caused by inherently dangerous activities, and fault-based liability but only for damage to biodiversity caused by a non-dangerous activity.³⁶

³² White Paper on environmental liability, COM (2000) 66 final, 9 February, 2000.

³³ Pozzo, 'Towards Civil Liability for Environmental Damage in Europe: the "White Paper" of the Commission of the European Communities', in *Global Jurist*, vol.1, Issue 2, 2001, Article 2.

³⁴ White Paper, p.16.

³⁵ White Paper, p.17.

³⁶ White Paper, p.18.

4. The Path towards a Directive for Environmental Liability: The Challenges of a Multilingual Legislation

The legislative process that led to the enactment of the Directive inevitably had to deal with problems arising out of the multilingual context in which legal concepts are forged. This has become especially evident when it comes to identifying a liability regime that could form a lowest common denominator in Europe.

Since the Green Paper, and then again in the White Paper, the Commission has always pointed out with great clarity a preference for a double track of responsibility: responsibility of an objective type for riskier activities regarding the environment, which should be specifically selected, and fault-based liability for non-potentially hazardous activities which could damage the most vulnerable natural resources.

From a definitional point of view, however, things are not as clear. And these difficulties need to be analysed very carefully, considering that this is one of the cornerstones of the environmental liability regime in Europe.

The first difficulty in agreeing on the criteria for allocating responsibility and providing a single definition appeared in the Commission communication on 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development', prepared by the Commission for the European Council in Gothenburg in 2001.³⁷ Indeed, while in the English version of this Communication it can be read that one of the measures that the EU must adopt by 2003 will be 'EU legislation on environmentally strict liability',³⁸ other linguistic versions seem to depart from the technical meaning generally attributed to the term 'strict liability', that is to say, liability without fault.

The French, Italian, and Spanish versions seemed to deal with a general idea of establishing a more stringent liability, but without making reference to a strict liability regime in the technical sense:

- "Mettre en place, d'ici à 2003, la législation de l'UE sur la responsabilité environnementale de plein droit"³⁹;
- "Adottare una legislazione UE su una rigida responsabilità ambientale entro il 2003"⁴⁰;
- "Adoptar la normativa comunitaria sobre un régimen ambiental estricto de responsabilidad para el año 2003"⁴¹.

Only the German version seems to make appropriate reference to a liability regime without fault, by establishing the "*Annahme der EU-Rechtsvorschriften über die verschuldensunabhängige Umwelthaftung bis zum Jahr 2003*".⁴²

In the preparation of the Draft Directive,⁴³ the Italian version turned to a more precise target and specifically considers the political will to introduce a 'strict liability' regime for

³⁷ COM (2001) 264 final of 15 May, 2001.

³⁸ COM (2001) 264 final English version p.12.

³⁹ COM (2001) 264 final French version p.13.

⁴⁰ COM (2001) 264 final Italian version p.13.

⁴¹ COM (2001) 264 final Spanish version p.13.

⁴² COM (2001) 264 final German version p.14.

⁴³ Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 23.1.2002, COM (2002) 17 final.

environmental damage.⁴⁴ The same cannot be said of the French version, which refers to a *responsabilité stricte*, using a very peculiar terminology generally unknown in the French legal lexicon.⁴⁵ Similar considerations can be made regarding the Spanish version of the Draft Directive.⁴⁶ Finally, the German version of the Draft Directive uses technical and appropriate terminology (*verschuldensunabhängige Haftung*).

An extensive study on the different liability regimes for environmental damage in different Member States, published by the EU Commission in 2001,⁴⁷ clearly illustrates the problem of classifying and dealing with different liability regimes in Europe. The distinction between liability for negligence and strict liability, far from being considered in the same terms in all Member States, must be analysed in the light of the various options that different legal systems can offer in developing a concrete framework. Therefore, a system of strict liability, which offers extensive exemption from liability, may be less rigorous than a system of liability for negligence, where the required standard of care is very strict.

It should therefore come as no surprise that, in preparing the final text of the Directive, every allusion to strict liability disappears completely, giving way to legislation that aims to regulate—from a practical and factual point of view—the obligations of the operator, who ‘bears the costs of preventive actions and remedial actions taken pursuant to this Directive’.

III. *The Main Features of the Directive*

Finally, the 30 April, 2004 Directive 2004/35 (Environmental Liability Directive; hereafter, ELD) was published in the Official Journal. Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage establishes a framework based on the ‘polluter pays’ principle to prevent and remedy environmental damage.⁴⁸ Article 1 of the Directive states: ‘The purpose of this Directive is to establish a framework of environmental liability based on the ‘polluter pays’ principle, to prevent and remedy environmental damage’.

The ELD sets out new definitions as far as damage, liability, the standing issue, and the methodologies to assess damage.

1. **Notion of Environmental Damage**

The Directive, in its whereas clause, emphasises that not all forms of environmental damage can be remedied through civil liability, noting that in order for the latter to be effective, there must be one or more identifiable polluters and stating that the damage should be concrete and quantifiable and that a causal link between the damage and the identified polluter should be established.⁴⁹

⁴⁴ Compare the Italian version of the proposal, p.2.

⁴⁵ Compare the French version p.2.

⁴⁶ Compare the Spanish version, p.2.

⁴⁷ Clarke, *Update Comparative Legal Study on Environmental Liability*, available at: http://ec.europa.eu/environment/legal/liability/pdf/legalstudy_full.pdf.

⁴⁸ The ‘polluter pays’ principle is set out in the Treaty on the Functioning of the European Union (Art.191(2) TFEU).

⁴⁹ Whereas Clause 13: Not all forms of environmental damage can be remedied by means of the liability mechanism.

Whereas Clause 14 of the Directive specifically excludes traditional damage: ‘This Directive does not apply to cases of personal injury, to damage to private property, or to any economic loss and does not affect any right regarding these types of damage.’

The concept of “environment” is further defined by Art. 2 of the Directive that limits the notion to three components. In particular, it takes into account:

- the preserved and natural wildlife habitats (covered by Directives 92/43/EEC and 79/409/EEC);
- the waters (as defined by Directive 2000/60/EC); and
- the ground, but only to the extent that contamination of the soil may create a significant risk of adverse effects on human health as a result of the direct or indirect introduction in, on, or under land of substances, preparations, organisms, or microorganisms.

It must be noted that the definition of land damage shows heterogeneous aspects of the concept of environment, reflecting the different approaches to the problem in national contexts. While the first two categories of species and natural habitats on the one hand and the waters on the other hand assume significance as they are already covered by previous legislation, the land is taken into account only to the extent that its contamination creates a risk to human health.

Finally, we must observe how the air, which is only indirectly taken into account by Directive 2004/35 in the 4th article,⁵⁰ enters fully into the notion of environment expressed by law and—more generally—by the policies of the European Community in the environmental field.

2. The Liability Regime

The ELD aims to ensure that the financial consequences of certain types of harm caused to the environment will be borne by the economic operator who caused this harm. It defines ‘operator’ as ‘any natural or legal, private, or public person who operates or controls the damaging occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity’⁵¹.

The ‘occupational activity’ taken into consideration by the Directive means ‘any activity carried out in the course of an economic activity, a business, or an undertaking, irrespective of its private or public, profit or non-profit character’⁵².

As far as the liability principle is concerned, Art. 3 of the Directive distinguishes between two different liability schemes.⁵³

For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.

⁵⁰ Whereas Clause 4: Environmental damage also includes damage caused by airborne elements as far as they cause damage to water, land or protected species or natural habitat.

⁵¹ Art. 2.6.

⁵² Art. 2.7.

⁵³ Art. 3 *Scope*: 1. This Directive shall apply to: (a) environmental damage caused by any of the occupational

The first liability scheme is based on non-fault (strict) liability and applies to the dangerous or potentially dangerous occupational activities that are specifically listed in Annex III to the Directive.⁵⁴

The second liability scheme applies to all occupational activities other than those listed in Annex III to the Directive, but only where the damage, or the imminent threat of damage, concerns 'species or natural habitats' protected by Community legislation. In this second case, the Directive requires a different liability regime, based on the negligent or faulty behaviour of the operator.

The Directive further provides for the necessity of a well determined causal link: 'This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.'⁵⁵

It is important to note that according to the Directive, Member States may excuse the operator from bearing the cost of remedial actions where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

- (a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied on the date of the emission or event; or
- (b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time at which the emission was released or the activity took place⁵⁶ (state-of-the-art defence).

3. Standing

As the Directive does not take into consideration traditional damage, but only purely ecological damage, it was necessary to define a new subject with legal standing.

According to Art. 11, Member States have to designate the competent authority (ies) responsible for fulfilling the duties provided for in the Directive.

In particular, the competent authority has the duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage, and to

activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities; (b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

⁵⁴ These are mainly:

- agricultural or industrial activities requiring a licence under the Directive on integrated pollution prevention and control;
- activities which discharge heavy metals into water or the air;
- installations producing dangerous chemical substances;
- waste management activities (including landfills and incinerators); and
- activities concerning genetically modified organisms and micro-organisms.

⁵⁵ Art. 4.5.

⁵⁶ Art. 8.4.

determine which remedial measures should be taken with reference to Annex II.

For these purposes, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary.

The competent authority may initiate cost recovery proceedings against the operator within five years from the date on which the measures have been completed or the liable operator has been identified, whichever is the later.

In case of multiple-party causation, Art. 9 of the Directive leaves it to the Member States to decide how the costs will be allocated—on a proportional basis or jointly and severally—among the various operators concerned.

Article 12 further takes into consideration the role of natural or legal persons affected or likely to be affected by environmental damage, or having a sufficient interest, or whose rights have been impaired. These subjects may request the competent authority to take action under the Liability Directive. They shall also have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts, or failure to act of the competent authority.

4. Restoration

The Directive foresees preventive action⁵⁷ as well as remedial action.⁵⁸

Preventive action provides that where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures and, in certain cases, inform the competent authority of all relevant aspects of the situation, as soon as possible.

Where environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take: (a) all practicable steps to immediately control, contain, remove, or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services, and (b) the necessary remedial measures, in accordance with the relevant provisions of a specific Annex II.

Annex II provides different rules for the case of damage to water and protected species on the one hand, and damage to soil on the other hand.

Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition. The aim of the Directive is to ensure that the environment be physically reinstated. This is achieved through the replacement of the damaged natural resources with identical or, where appropriate, equivalent or similar natural components, or, as appropriate, through the acquisition/creation of new natural components. If measures taken on the affected site do not allow a return to the baseline condition, complementary measures may be taken elsewhere (for instance, an adjacent site). In any case, the scale of the remedial measures should be determined in such a manner as to compensate interim losses, that is, losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the environment is restored. Any significant risk

⁵⁷ Art. 5.

⁵⁸ Art. 6.

of human health being adversely affected must also be removed.

In more detail, according to Annex II, remedies for environmental damage or imminent threat to water or protected species and natural habitats may take three forms:

1. primary remediation at the site;
2. complementary remediation; and
3. compensatory remediation.

With 'primary remediation', the Directive intends immediate actions designed to stop the incident, minimise it, contain it, prevent further damage, and clean up the damage. These are also referred to as emergency (or immediate) remedial measures (and mostly precede the actual primary remediation). It also includes more medium- to long-term remediation actions on the damaged site that are designed to return the damaged environment to the baseline state in which it would have been if the damage or threat had not occurred ('restoration in kind').

'Complementary remediation' is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services. If primary remediation is not sufficient to bring the environment back to the state in which it would have been if the damage had not occurred (so-called baseline condition), further improvements can be made to the damaged site. If this is not feasible or too costly, such remediation can take place in another site.

'Compensatory remediation': If primary remediation (and complementary remediation if required) takes some time to remedy the damage to nature, compensatory remediation must be implemented to account for the losses incurred over time (interim losses).

As for damage to soil, Annex II establishes that the necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained, or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health.

5. Temporal Application of the Directive

Finally, Art. 17 establishes the rules concerning the 'Temporal application' of the Directive. The Directive shall not apply to

- damage caused by an emission, event, or incident that took place before the entrance into force of the Directive;
- nor to damage caused by an emission, event, or incident which takes place subsequent to the entrance into force when it derives from a specific activity that took place and finished before the said date,
- nor—finally—to those damages if more than 30 years have passed since the emission, event, or incident, resulting in the damage, occurred.

IV. *Process of Implementation*

1. Introduction

In order to achieve a better understanding of the implementation process of the Liability Directive in the various national contexts, it would be wise to recall from the very beginning two general principles contained in the Treaty on the Functioning of the European Union (TFEU) as well as in the Directive itself.

The first principle is contained in Art. 288 of TFEU: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' In this provision lies a certain discretion to Member States as to how the Directive is to be implemented.⁵⁹

From this perspective, it is necessary to underline that, from the very beginning, EU environmental legislation had to cope with profound differences in legislation of the Member States, which showed different perceptions of environmental problems, as well as different degrees of awareness and environmental education, thus giving rise to different answers to the same environmental challenges.

A major concern in Community policies from the outset was to ensure that States which already had advanced measures in the environmental field should not be forced, because of the enactment of subsequent legislation, to reduce the level of environmental protection already implemented at the national level. On the contrary, the legislation had to be forged in such a way as to enable the least developed countries to increase the degree of environmental protection without imposing a lowest common denominator on those countries that already had more ambitious objectives of environmental protection.⁶⁰

Full harmonisation is therefore not an aim in its own right in the environmental field.⁶¹

The other provision that it is important to mention in this regard is Art. 16 of the ELD, which establishes that: 'This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties.'

The idea was then that the ELD did not mean to replace national liability regimes but to complement them.

With these premises, it should not come as a surprise if the implementation process gave birth to very different solutions at national level.

The Directive itself, in Art. 14,⁶² foresaw the assessment of the 'effectiveness of the

⁵⁹ Jan H. Jans and Hans H. B. Vedder, *European Environmental Law* (Europa Law Publishing, 2012), p.139 ff.

⁶⁰ Ludwig Krämer, 'Differentiation in EU Environmental Policy', in *European Environmental Law Review*, 2000, p.133.

⁶¹ Barbara Pozzo, *Environmental Protection in EU Law*, in *Environmental law in action: EU and China Perspectives*, Marina Timoteo (ed.) (Bologna: Bononia University Press, 2012), p.259, particularly p.282.

⁶² Article 14 Directive 2004/35: 'The Commission, before 30 April, 2010, shall present a report on the effectiveness of the Directive in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security.'

Directive in terms of actual remediation of environmental damage and the availability at reasonable costs of, and conditions for, financial security' by 2010.

The First Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions was published in October 2010.⁶³ It examines the transposition process of the ELD, which entered into force on 30 April, 2004. Only four Member States⁶⁴ met the transposition deadline of 30 April, 2007. The transposition of the Directive remained slow thereafter, so that the Commission had to start infringement procedures against 23 Member States. During this procedure, the number of non-compliant countries was reduced, but the Commission still had to refer a number to the European Court of Justice, which gave judgment against seven Member States in 2008 and 2009.⁶⁵

In the 2010 Report, the Commission mentioned four main reasons for the transposition delays:

1. *Pre-existing legal frameworks*: Member States that already had advanced liability rules on environmental issues had to fit the new legislation into these existing legal frameworks.
2. *Challenging technical requirements* such as the need for economic valuation of environmental damage, the different types of remediation, and damage to protected species and natural habitats, which were novel concepts to most Member States.
3. *Framework character of the ELD*, which leaves a wide margin of discretion to the Member States, with options that can only be decided upon during transposition; this led to delays, as the range of options needed to be debated at national level.

The Commission further reported that the slow transposition of the Directive had resulted in a very limited number of cases being treated by the competent authorities at national level⁶⁶ and in the difficulty in examining the effectiveness of the Directive.⁶⁷

By 2013, a new Report was published,⁶⁸ which analysed in a more extensive way the implementation process of the ELD.

The heterogeneity of solutions adopted in the Member States was further enhanced by other conditions that characterise environmental legislation at national level: differences were found depending on the structure of the State (Federal States vs. centralized States), on the structure of national environmental legislation (that could be codified or fragmented), and on the different types of liability regimes already existing (administrative, civil, or criminal liability).

It is important to recall in particular that there is significant variance in the structure of

⁶³ *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions*, under Art. 14(2) of Directive 2004/35/CE on the environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 12.10.2010, COM(2010) 581 final.

⁶⁴ Italy, Lithuania, Latvia, and Hungary.

⁶⁵ France, Finland, Slovenia, Luxembourg, Greece, Austria, and UK.

⁶⁶ COM (2010) 581 final, p.4 s.

⁶⁷ According to the Report of 2010, the most significant obstacle to an examination of the effectiveness of the ELD is the fact that not much is known about the characteristics of these cases. Compare COM (2010) 581 final, p.5.

⁶⁸ BIO Intelligence Service (2013), *Implementation Challenges and Obstacles of the Environmental Liability Directive (ELD)*, Final Report, European Commission—DG Environment.

environmental legislation in European Member States: some have an Environmental Code which codifies most, if not all, environmental legislation in the particular Member State. In many Member States, though, there is no Environmental Code, but rather a smaller number of primary or secondary pieces of legislation.⁶⁹

A few examples will illustrate the peculiarities of some specific implementation processes.

2. The German *Umweltschadensgesetz*

In Germany, the ELD was implemented by a single act: the *Umweltschadensgesetz* of 2007.⁷⁰ The *Umweltschadensgesetz* did not abrogate the *Umwelthaftungsgesetz* that was previously enacted in 1992⁷¹ and both statutes now contribute to rule the various aspects of damage arising out of polluting activities.⁷² The Act of 1992 concerns traditional damage, while the new Act of 2007 concerns pure ecological damages.⁷³

The *Umweltschadensgesetz* of 2007 was sufficient to fully transpose the ELD in Germany. Given the federal structure of the State, the *Länder* received a specific competence in further implementing the statute. In particular, they were authorised to enact legislation on the settlement of, or exception from and reimbursement of, costs, any permit and state-of-the-art defences, and the designation of competent authorities. Until now, the *Länder* have designated competent authorities, but have not enacted any optional provisions of the ELD such as the permit and state-of-the-art defences (Art. 4.5 of the Directive).

In case of multiple-party causation (Art. 9 of the Directive), Germany has adopted a regime of joint and several liability for indivisible environmental damage.

One peculiarity of the German system also concerns the existence of a specific statute governing soil protection, which is generally covered by the ELD. The German Federal Soil Protection Act, the *Bundes-Bodenschutzgesetz*,⁷⁴ makes a general distinction between harmful soil changes and contaminated sites, therefore taking in consideration a broader scope than that introduced by the *Umweltschadensgesetz* of 2007 as far as soil contamination is concerned. The regulation set by German Federal Soil Protection Act was further completed by the Federal Soil Protection and Contaminated Sites Ordinance (the *Bundes-Bodenschutz- und Altlastenverordnung*),⁷⁵ which governs the key elements of contaminated site management.⁷⁶

⁶⁹ *Implementation Challenges and Obstacles of the Environmental Liability Directive (ELD)*, cit. p.24.

⁷⁰ *Gesetz zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden*, of 10 May, 2007 (Bundesgesetzblatt, 2007), Teil I, Nr. 19, 14 May, 2007.

⁷¹ See *supra*, under I. 4.

⁷² Compare Elke Bruns, Carolin Kieß, and Wolfgang Peters, *Anforderungen an die Erfassung, Bewertung und Sanierung von Biodiversitätsschäden nach dem Umweltschadensgesetz*, in *Natur und Recht*, 2009, p.149.

⁷³ Compare B. Pozzo, *Il recepimento della direttiva 2004/35/CE sulla responsabilità ambientale in Germania, Spagna, Francia e Regno Unito*, in *Rivista Giuridica dell'Ambiente*, Anno XXV, Fasc. 2 - 2010 p.217 ff.

⁷⁴ *Gesetz zum Schutz vor schädlichen Bodenveränderungen und zur Sanierung von Altlasten (Bundes-Bodenschutzgesetz - BBodSchG)* of 17 March, 1998 (BGBl. I S. 502).

⁷⁵ *Bundes-Bodenschutz- und Altlastenverordnung* of 12 July, 1999 (BGBl. I S. 1554), recently modified by Art. 102 of the *Verordnung* of 31 August, 2015 (BGBl. I S. 1474).

⁷⁶ In particular, it brings together regulations relating to the examination and assessment of potentially hazardous sites, admissible remediation methods, and supplementary regulations relating to remediation examination and planning. It contains detailed annexes on sampling, analysis, and quality assurance to prepare site surveys, on the derivation of

Even in this case, the federal structure matters as the implementation of these regulations is in the hands of the *Länder*, which are responsible for the identification, the risk assessment, and the clean-up of contaminated sites.

3. The French Implementation Process of the ELD: The Loi Relative à la Responsabilité Environnementale of 2008.

In France, before the implementation of Directive 2004/35, there was no specific law on the issue, but certain judicial activism promoted a very interesting solution in case of environmental pollution.⁷⁷ With the *Loi relative à la responsabilité environnementale*,⁷⁸ France has transposed the ELD by enacting primary legislation that introduced a new title (Title VI) into its Environmental Code (*Code de l'Environnement*) named: *Prévention et Réparation de certains dommages causés à l'environnement*. The French Law has further modified various articles of the Code itself and other existing laws.⁷⁹ The statute was accompanied by a decree⁸⁰ which sets out the content of the ELD regime.

Unlike in Germany, the French Act has introduced a state-of-the-art defence, which applies in the absence of fault or negligence. In case of multiple-party causation (Art. 9 of the Directive), France does not provide joint and several liability.⁸¹

On the other side, the French legislation has extended strict liability to non-Annex III activities and in particular to the transport of oil in pipelines.⁸²

4. The Spanish Implementation Process: Ley 26/2007, de 23 de Octubre, de Responsabilidad Medioambiental

The ELD was introduced in Spain by Ley 26/2007,⁸³ which seems to go much further than Directive 2004/35 in establishing a strict liability regime for environmental harm. With respect to the definition of environmental damage, Ley 26/2007 covers not only those species of fauna and flora protected by EU directives, but also those that are protected under national or regional Spanish legislation.

pathway values for measures, tests, and prevention, and on requirements for remediation examination and planning.

⁷⁷ L. Neyret, *La réparation des atteintes à l'environnement par le juge judiciaire*, Recueil Dalloz, 2008, n.3, p.170 ss.

⁷⁸ Loi n° 2008-757 du 1er août 2008 relative à la responsabilité environnementale et à diverses dispositions d'adaptation au droit communautaire dans le domaine de l'environnement, JORF n° 0179 du 2 août 2008 page 12361, texte n° 2.

⁷⁹ F. Nesi and D. Guihal, in *Le nouveau dispositif de responsabilité environnementale et le droit commun*, in *Droit de l'environnement*, n.151, 2007, p.230.

⁸⁰ Décret n° 2009-468 du 23 avril 2009 relatif à la prévention et à la réparation de certains dommages causés à l'environnement, JORF n° 0098 du 26 avril 2009 page 7182 texte n° 1.

⁸¹ Barbara Pozzo, *Il recepimento della direttiva 2004/35/CE sulla responsabilità ambientale in Germania, Spagna, Francia e Regno Unito*, cit. p.236.

⁸² *Implementation Challenges and Obstacles of the Environmental Liability Directive (ELD)*, cit. p.46.

⁸³ Ley 26/2007, de 23 de octubre, de *Responsabilidad Medioambiental*, BOE núm. 255, Miércoles 24 octubre 2007, 43229. For a general comment on the Spanish law, see Natalia Alvarez Lata, *La responsabilidad civil por daños al medio ambiente*, in *Tratado de Responsabilidad Civil*, L. Fernando Reglero Campos (Coordinador), Tomo III, Parte Especial, p.36 ss.

Further, concerning the activities that will cope with strict liability, the Directive establishes that the activities will be those listed in Annex III to the Directive itself. The Spanish law refers to the corresponding Spanish legislation. Where the national legislation covers more activities than the EU legislation, damage caused by such activities will also fall under a strict liability regime.

One particular feature is also that the Spanish Law foresees a specific presumption of causality.⁸⁴ In case of multiple tortfeasors, joint and several liability is introduced.⁸⁵

As far as defences are concerned, Ley 26/2007 allows the state-of-the-art defence⁸⁶ as in the French legislation.

Other distinctive figures of the Spanish legislation is that it specifically foresees a liability regime for corporate groups⁸⁷ and a compulsory financial guarantee scheme for those activities listed in Annex III.⁸⁸

5. The Implementation of the ELD in the UK

The implementation of the ELD in the UK was particularly complex due to environmental matters having been devolved to the separate Administrations of England, Wales, Scotland, and Northern Ireland. Gibraltar has also issued separate regulations.⁸⁹

Although there are many similarities between the regulations, there are also significant differences. Just to quote few examples, England, Wales, and Northern Ireland have extended the liability regime of Directive 2004/35 to nationally protected biodiversities, while Scotland has not. Further, while England, Wales, and Northern Ireland have adopted joint and several liability, the Scottish rules have indicated a more complex provision with joint and several liability as a default if liability cannot be allocated on a proportionate basis.⁹⁰

Another issue that seems important to underline is that the UK has a separate complex liability system for remediating contaminated land. In England, this is contained in Part 2A of the Environmental Protection Act 1990 (EPA 1990).⁹¹ The primary legislation is accompanied

⁸⁴ Art. 3, 1, 2: “*Se presumirá, salvo prueba en contrario, que una actividad económica o profesional de las enumeradas en el anexo III ha causado el daño o la amenaza inminente de que dicho daño se produzca cuando, atendiendo a su naturaleza intrínseca o a la forma en que se ha desarrollado, sea apropiada para causarlo*”.

⁸⁵ Artículo 11. *Pluralidad de responsables de un mismo daño*. En los supuestos en los que exista una pluralidad de operadores y se pruebe su participación en la causación del daño o de la amenaza inminente de causarlo, la responsabilidad será mancomunada, a no ser que por ley especial que resulte aplicable se disponga otra cosa.

⁸⁶ Art. 8, 4, b.

⁸⁷ Artículo 10. *Responsabilidad de los grupos de sociedades*. En el supuesto de que el operador sea una sociedad mercantil que forme parte de un grupo de sociedades, según lo previsto en el artículo 42.1 del Código de Comercio, la responsabilidad medioambiental regulada en esta ley podrá extenderse igualmente a la sociedad dominante cuando la autoridad competente aprecie utilización abusiva de la persona jurídica o fraude de ley.

⁸⁸ Art. 24.

⁸⁹ Barbara Pozzo, *Il recepimento della direttiva 2004/35/ce sulla responsabilità ambientale in Germania, Spagna, Francia e Regno Unito*, cit. p.240.

⁹⁰ *Implementation Challenges and Obstacles of the Environmental Liability Directive (ELD)*, cit. p.28.

⁹¹ Part 2A was enacted as Part IIA of the EPA 1990. The Department for Environment, Food and Rural Affairs (DEFRA), which issued the Statutory Guidance, subsequently referred to it as Part 2A. There is a separate, although broadly similar, regime for remediating land contaminated by radioactive substances. See Department of Energy & Climate Change, Environmental Protection Act 1990: Part IIA, Contaminated Land—Radioactive Contaminated Land Statutory Guidance (April 2012).

by regulations⁹² and statutory and non-statutory guidance (collectively Part 2A).⁹³ The Statutory Guidance, the current version of which was issued in April 2012, sets out most of the details of the contaminated land regime including most aspects of the liability system. Part 2A also applies to Wales and Scotland.⁹⁴ There are, anyway, differences in the regulations⁹⁵ and in the statutory and non-statutory guidance⁹⁶ in the devolved jurisdictions.

6. The Implementation of the ELD in Italy: The New Environmental Code of 2006

The Italian Parliament enacted in April 2006 a new Environmental Code, whose Part VI implements the liability regime for environmental harm foreseen in the ELD.

With the Environmental Code, the existing liability regime for environmental damage introduced by Law No.349 in 1986 was repealed, though—at the beginning—no strict liability regime was introduced in Italy and the fault liability regime established in the old law was still followed.

For this reason, the Commission initiated an infringement procedure against Italy on 31 January, 2008⁹⁷ for ‘not correct transposition of Directive 2004/35/EC on environmental liability with regard to the prevention and repair of environmental damage’. In order to cope with the requests of the Commission, a series of new legislative dispositions came into force in Italy.⁹⁸ It is not necessary to recall all the details of this Reform that are difficult to trace back even for an Italian lawyer.⁹⁹ The important aspect that needs here to be underlined is that with a first Reform of 2009¹⁰⁰ and a further Reform in 2013,¹⁰¹ introduced to meet new allegations made by the Commission against Italy,¹⁰² several important innovations were introduced in Part Six of Legislative Decree No.152/2006,¹⁰³ which—as we have seen—implements Directive 2004/35 in Italy.

⁹² Contaminated Land (England) Regulations 2006, SI 2006/1380, as amended.

⁹³ Department for Environment, Food and Rural Affairs, Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance (April 2012) (Statutory Guidance).

⁹⁴ Part 2A has not been brought into force in Northern Ireland. See Waste and Contaminated Land (Northern Ireland) Order 1997, SR 1997/2778, part III (not in force).

⁹⁵ Contaminated Land (Wales) Regulations SI 2006/2989, as amended; Contaminated Land (Scotland) Regulations SI 2005/658, as amended (Scottish Statutory Instrument).

⁹⁶ Welsh Government, Guidance Document, Contaminated Land Statutory Guidance—2012 (WG19243); Natural Scotland, Scottish Executive, Environmental Protection Act 1990: Part IIA Contaminated Land Statutory Guidance: Edition 2 (May 2006, Paper SE/2006/44).

⁹⁷ Infringement Procedure No.2007/4679.

⁹⁸ In response to this Infringement Procedure, the Italian government introduced by decree Law No.135 of 25 September, 2009, and then converted it with amendments by Law No.166 of 20 November, 2009, Art. 5 bis (Implementation of Directive 2004/35/EC—Infringement Procedure No.2007/4679, Art. 226 EC Treaty).

⁹⁹ Compare on this issue B. Pozzo, *Misure di riparazione del danno ambientale in capo al proprietario non colpevole e applicazione ratione temporis della direttiva 2004/35: note a margine della recente sentenza 4 marzo 2015, nella Causa 534/13*, in *Rivista Giuridica dell’Ambiente*, 2015, 1, p.41 ff.

¹⁰⁰ Law 20 November, 2009, No.166, in particularly Art. 5 bis.

¹⁰¹ Law of August 6, 2013, No.97.

¹⁰² The Commission considered that Law No.166 of 2009 had failed to change Art. 303.1, letter i), so that the Italian legislation still provided an explicit exception to the Directive in the case of ‘polluted sites for which procedures for remediation are actually initiated, or have been initiated, or remediation has already intervened’. According to the Commission, the Italian legislation kept in force an exclusion not specifically provided for in the Directive, significantly reducing its scope.

In particular, one innovation needs to be examined more carefully, because it is different from all other solutions adopted at national level and it concerns the applicability of the remediation measures foreseen by Directive 2004/35 as well as facts that happened before the entrance into force of the Directive itself, in opposition to the rules established by Art. 17 of the Directive.

To this end, it must be recalled that before the implementation of Directive 2004/35 in Italy environmental damages were ruled by Art. 18 of Law No.348 of 1986, establishing a fault liability system for environmental harm and specific remediation criteria, and included monetary compensation.¹⁰⁴

The Reform of 2009 introduced a new disposition¹⁰⁵ in Legislative Decree No.152/2006, establishing that the criteria for determining compensation measures envisaged by Directive 2004/35 and set out in Art. 311, Paras. 2 and 3 of the abovementioned Legislative Decree shall also apply to claims of compensation for environmental damages proposed or to be proposed in accordance with Art. 18 of Law No.348 of 1986, with the exception of decisions that have become final (*res judicata*).

This provision was subsequently the object of a judgment of the Corte di Cassazione, the Italian Supreme Court,¹⁰⁶ in which the Italian judges interpreted Law 166/2009 in the sense that the criteria originally established by Law No.349 of 1986 to assess the remediation measures for environmental damages had been overwhelmed and substituted by the new criteria which were to apply to all pending cases, with the only barrier of the *res judicata*. The Reform of 2013 reconfirmed this point of view.¹⁰⁷

So, at the time being, the Law of 1986 will be applied to activities dating back a moment prior the entrance into force of the Directive *only* as far as the liability regime is concerned, which is a fault liability regime.

As far as compensatory measures are concerned, after the Reforms of 2009 and 2013, the same measures will apply on all claims proposed or to be proposed under the Law of 1986 or under Legislative Decree 152/2006.

That is to say, that the compensatory measures foreseen in Directive 2004/35 will always apply, independently, from the moment the activity was exercised.

Conclusions

Since the publication of the Green Paper on environmental damage in 1993,¹⁰⁸ attention

¹⁰³ First, it provided new criteria for the restoration of environmental damage, which reflected mainly those contained in Directive 2004/35, in particular by changing the rule in Art. 311, second paragraph of the abovementioned law. Then, it established that Art. 311, Para. 3 should be amended to require the adoption of criteria for determining compensation for environmental damage in accordance with the provisions of Section 1.2.3 of Annex II of Directive 2004/35/EC. It further introduced, in the third paragraph of Art. 311, the principle that in cases of competition in the same event of damage, each should respond within the limits of their own personal responsibility.

¹⁰⁴ On the application of the old remediation criteria according to Law 349/86 in Italy, see B. Pozzo, *Il danno ambientale*, Milano, Giuffrè, 1998.

¹⁰⁵ Art. 303.1, letter f).

¹⁰⁶ Corte di Cassazione 22 marzo 2011, n.6551.

¹⁰⁷ B. Pozzo, *Misure di riparazione del danno ambientale in capo al proprietario non colpevole*, cit., p.45.

¹⁰⁸ See, supra, the Communication from the Commission to the Council and Parliament and the Economic and Social

has been focused on the necessity of harmonising the environmental liability rules.

Notwithstanding the significant efforts of the Commission in setting common standards in order to cope with environmental liability issues, it appears that a series of difficulties, of various kinds, is hindering the harmonisation of rules in this field.

As we have seen, these obstacles may derive from questions connected with the linguistic and terminological differences arising out of a multilingual context such as the European one.

Others might have to do with the diversified backgrounds and differences in administrative and judicial systems.

The fact that the ELD was sometimes implemented as stand-alone legislation while in other cases was incorporated into pre-existing legislation added further differences to the picture.

The European Commission has also underlined that, among operators and other stakeholder groups, there is little awareness as far as the ELD is concerned, and this has—inevitably—led to very few cases where Directive 2004/35 has been applied.

For the future, a new strategy will be needed if the Commission wants to achieve a harmonised liability regime.

Committee: Green Paper on remedying environmental damage, COM (93) 47 final, Brussels, 14 May, 1993.