



The multifaceted concept of the term “environmental damage” in the framework of the Directive 2004/35/EC on Environmental Liability (ELD)

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ABSTRACT

The “environmental damage” constitutes a multidimensional and complicated notion in the framework of environmental law. Regarding the environmental liability, in particular, it functions both as condition and as consequence of its activation. However, its multifaceted nature has created over the time important difficulties in dealing efficiently with the harmful effects of environmental disasters or degradations. The universality and the urgency of the modern environmental phenomena as well as their diffuse character without regional and temporal limits tests sorely the efficiency of the environmental liability schemes in national, European and international level. On these grounds, much ink has been spilled over the question of an effective treatment of the uncertain and no linear evolution of the modern environmental damages and risks. In the EU landscape, the adoption of the Environmental Liability Directive 2004/35/EC (ELD) by putting forward as a priority the prevention and reparation of environmental damage in European level via a regime based on administrative law has sparked new scientific discussions about the notion of “environmental damage”. However, despite the ambitious and innovative character of this initiative, its conceptual discrepancies in combination with its technical deficiencies have practically thrown up more questions than they have solved. On this basis, it is essential to reshape the design of the “environmental damage” based on the joint work of jurists, economists and experts of the natural sciences by virtue of the complicated, dynamic and multifaceted nature of environmental issues.

Keywords: Environmental damage; Environmental law

1. Introduction

A core feature of environmental problems is their sheer systemic complexity. According to John Dryzek, the interconnected and multidimensional nature of the environmental problems has a triple source [1]: firstly, the physical nature of environmental problems due to the open ended and holistic nature of the ecosystems as well as the limited scientific knowledge; secondly, the socio-political complexity of environmental issues as a result of the fact that the environment does not have a fixed value during the decision making; thirdly, the dynamic and no linear evolution of environmental problems.

Moreover, the most crucial characteristics concerning environmental problems are their collective nature and their spatial and temporal boundaries. Namely, it is undeniable that the majority of the environmental problems do not have an individual cause as a source (e.g., the climate change is the product of economic, political and societal influences). This collective dimension of the environmental issues is due to the wide range of interests and actors that are connected to them as well as to the non-commercial value of the environmental goods. Additionally, the universality and urgency of modern environmental issues and their diffuse nature leads to the inevitable interplay of the environmental rules in national, EU and international level, which may resort to heterogeneity and fragmentation of the applicable regulations.

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Furthermore, over the last 20 years, there has been an increasing appreciation that there is much uncertainty about the causes and the nature of environmental problems and particularly about the accurate assessment of the environmental harm [2]. This scientific uncertainty constitutes often a serious obstacle towards the efficient management of the environmental issues, since the updated scientific knowledge ensures the entire enforcement and the effectiveness of the environmental law.

The abovementioned interaction among the different levels of environmental law in conjunction with the inherent systemic complexity of the environmental damages leads in a number of questions regarding the main aspects of the term “environmental damage”. The adoption of the Directive 2004/35/EC on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage (hereinafter referred to as “ELD”) aspired to give answers and solutions to this issue, since it consisted a very important move, on the one hand, towards a more efficient protection of the environment and, on the other hand, towards the harmonization of the existing – fragmented – national models of environmental liability [3].

The innovative elements of the ELD can be concentrated briefly into the following points: (1) the administrative character of the measurements, (2) the fundamental duties of the competent public authority, (3) the central role of the operator as responsible party and (4) the double (both strict and fault-based) liability. The ELD is based on the Polluter Pays Principle, which requires that an operator causing environmental damage or creating an imminent threat of such a damage has to prevent and remedy the damage and bear the cost of such necessary preventive or remedial measures.

The determinant difference of this regulation concerns mainly the establishment – after long and complicated discussions among the business sector, the economic lobbies, the operators of financial security and the non-governmental organizations (NGOs) [4] – of a *sui generis* administrative law instrument¹ of prevention and remediation of the environmental damage *per se* (pure ecological damage) away of the preexisting civil law models of environmental liability [5]. The most crucial legal choice of the ELD is that the remediation consists exclusively of *in natura* measures establishing three different types of actions² and having as an overall goal the complete remediation of damaged natural resources and their services to the conditions that would have existed had the damage not happened (“baseline conditions”).

¹This means that it does not authorize individuals to bring personal injury, property damage or economic loss claims, matters which are generally dealt with by civil and/or common law actions.

²Regarding, especially, the *in natura* reparation of the damages to environment *per se* (land, water, protected species and natural habitats) – where their assessment is much more complicated – in order to enforce the triple regime of reparation elaborated in the ELD, it is essential to determinate the basis for the monetary evaluation as well as the concrete method that will be applied. According to the regulation of the ELD itself, the purpose of the primary remediation is to “restore the damaged natural resources and/or services to, or towards, baseline condition” and “where the damaged natural resources and/or services do not return to their baseline condition, then [...] the complementary and compensatory remediation is being applied by the use of resource-to-resource or service-to-service equivalence approaches” (Annex II).

Therefore, the aim of this study is to present an overview of the notion “environmental damage” within the boundaries of the ELD as well as through the lens of a comparative analysis of the different environmental liability schemes.

2. A historical comparative perspective of “environmental damage” based on the Environmental Liability

The concept of “environmental damage” is placed at the heart of the environmental liability schemes, since it constitutes the condition as well as the justification for their role. Despite the great significance of this concept, its delimitation remains a complicated and challenging task mainly because it is enshrined in a multidimensional field as it involves three levels (EU, international and national) and consists of both political and legal elements. In order to conceive the choices of the EU legislator regarding environmental damage in the framework of ELD, it is worth reviewing the definition of this term within the different environmental liability legal texts till the final adoption of the ELD.

In particular, the first significant point in this evolving course of the environmental liabilities rules was the 1993 *Lugano Convention of the Liability for Environmental Damage from Hazardous Activities*. Even though the Convention is based on tort law, it was very innovative and advanced piece of legal text for that time [6]. Part of this innovative character is due to the fact that for the very first time an international instrument provides for an extensive definition of the environment, which should be not only inclusive of abiotic resources (such as water, air, soil) and the biotic ones (flora and fauna), but also of the interactions between these same natural resources. Moreover, environmental damage is comprehensive not only of the damage directly caused to the natural resources *per se* but also to individual persons, health, property and environment, in the same line of conception of the notion of environmental damage formulated and launched by the drafters of the Explanatory Memorandum of the 1989 First Proposal for a directive on Civil Liability for Damage caused by Waste [7].

In this vein, the 1999 *Basel Protocol on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* considered not only the environmental damage to natural resources but also the damage to health, property and loss of income [8]. The Protocol contains a broad definition of environmental damage for which compensation may be sought. Furthermore, significant progress has been made by the two fundamental precursors of the ELD, the 1993 *Green Paper on Remedying Environmental Damage* [9] and the 2000 *White Paper on Liability for Environmental Damage* [10], which – despite the lack of binding nature – played an important role in the law formation process. On the one hand, the Green Paper did not provide for any definition of the “environment”, while the notion of “environmental damage” was not conceived in a unitary approach.³ On the other hand, the White Paper offered a broader definition of “environmental damage” including not only the damage to biodiversity but also the damage from polluting activities to goods and people aspiring to reshape the design of the existing environmental liability regimes.

³“Unitary approach” means to unify and include in the notion of environmental damage, also the traditional damage, and not only the damage to natural resources.

From a comparative perspective, it is also worth mentioning the example of the famous American law called CERCLA (Comprehensive Response, Compensation and Liability Act), which introduced the direct protection of the environment and referred to the environmental damage in *stricto sensu* without taking individual injuries (damages to health or property) into account. CERCLA defined “environment” in an extensive and advance manner including the ensemble of natural resources “*belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States...., any State or local government, or any foreign government*” [11]. Hence, the notion of “environmental damage” in the USA Model encapsulated the whole biodiversity and any kinds of interactions between the different media. Additionally, according to CERCLA, environment is conceived as a public good and, on these grounds, there is no provision for any compensation mechanisms in case of damage to private individual subjects.

3. The *in concreto* choices of the Directive 2004/35/EC regarding “environmental damage”

The abovementioned comparative analysis constitutes a very crucial tool for the “reconstruction” of environmental damage and liability from a legal, political and theoretical perspective [12]. That was exactly the ambition of the ELD, which includes damages to three types of specific natural resources [13]: (a) damage to protected species and habitats, (b) damage to water, (c) damage to land. Namely, the damage to protected species and habitats is quite narrow, since it must occur in one of the species of birds included in the list of the Wild Birds Directive and their habitats as well as in species listed in the Habitat Directive and any other species or habitats determined in the same way by Member States. Moreover, the damage to water is solely the damage failing into the scope of the Water Framework Directive [14], whereas damage to land (soil) arises as a consequence of land contamination, which determines a significant risk to human health or if the negative pollutants which are present in the ground affect the human health.⁴

On this basis, it is concluded that any other type of environmental damage is left out from the ELD. Additionally, given the innovative character of the Directive, which deals only with pure environmental damages, it was considered to be essential to redefine the notion of “damage”. Thus, “environmental damage” is “*a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly*” [15]. The measurability requirement is not further explained but the intent is to inject an element of objectivity into the damage concept.⁵

In contrast to the White Paper, the ELD does not include in the definition of the damage the so called traditional damages to goods or individuals. Moreover, unlike the Lugano Convention, it adopts a narrower definition of environmental damage. In comparison with the definition of environmental

damage in the CERCLA, the choice of the ELD is much more restricted especially because it excludes damages to air and – regarding damages to soil – it recognizes only the cases of existence of a negative risk to human health.

Through the legal comparative analysis between the international level and the EU level, it is clear that the ELD presents signs of regression when compared with the pre-existing legal solutions [16]. However, the EU legislator being aware of the fragmentation concerning the environmental damage in EU landscape decided to make a practical but efficient *a minima* compromise in order to promote a harmonized and applicable regime that deals for the very first time only with pure environmental damages. Though, after 11 years, the ambitious perspectives of this EU initiative have faded away revealing crucial conceptual ambiguities due to the legal, geographical, economic and ecological diversities as well as to the inherent complexity of the term “environmental damage”.

4. The special features of the “environmental damage”

The particularity of the “environmental damage” comprises its very special attributes, which are not found cumulatively in the other types of damages. Firstly, it should be mentioned its multidimensional nature, since from the same environmental phenomenon (disaster or degradation) may arise a variety of different damages. In this framework, it is very complicate to isolate the separated damages and to find the most appropriate solution for each of them.

According to Fig. 1 [17], it is depicted the basic distinction between the damages to the environment *per se* and the damages to persons and property via environmental goods or services. Namely, the first category contains the damages to natural resources (water, land, natural habitats) and to the protected species regardless of the harmful effects to persons. These damages fall into the administrative law rules of the ELD. On the contrary, within the second category are included, firstly, the harmful effects to private (economic, corporal or moral) interests via environment as well as the collective environmental injuries concerning a specific type of damages that affect personal interests but at the same time outreaching their narrow or limited individual nature (e.g., moral interest of a NGO) [18].

Furthermore, the interdisciplinary character as well as the dynamic nature of the environmental damage constitutes basic constraints for its efficient management. Depending on the fact that the society becomes more and more complicated and the risks – as a result of “thousands individual micro-decisions” [19] – more and more diffuse particularly in the field of environmental law, the effective legal treatment of the environmental damage demands a joint work of jurists, economists and experts of the natural sciences in order to identify the different damages, to determine the extent of the harmful effect and to specify the appropriate restorative measures for each damaging case [20]. Thus, the development of a comprehensive plan of *in natura* reparation and prevention requires that the spatial and temporal extent of the damage or resource loss as well as the degree of the damage or the service loss would be estimated by the use of chemical, toxicological, biological, geographic or economic data [21].

⁴It is about an anthropocentric approach which is really hard to understand/justify.

⁵A change is measurable if there is a pre-existing measurement of the natural resource or service and a post-incident measurement that shows an adverse change; both these measurements must be available for the measurability requirement to be met.

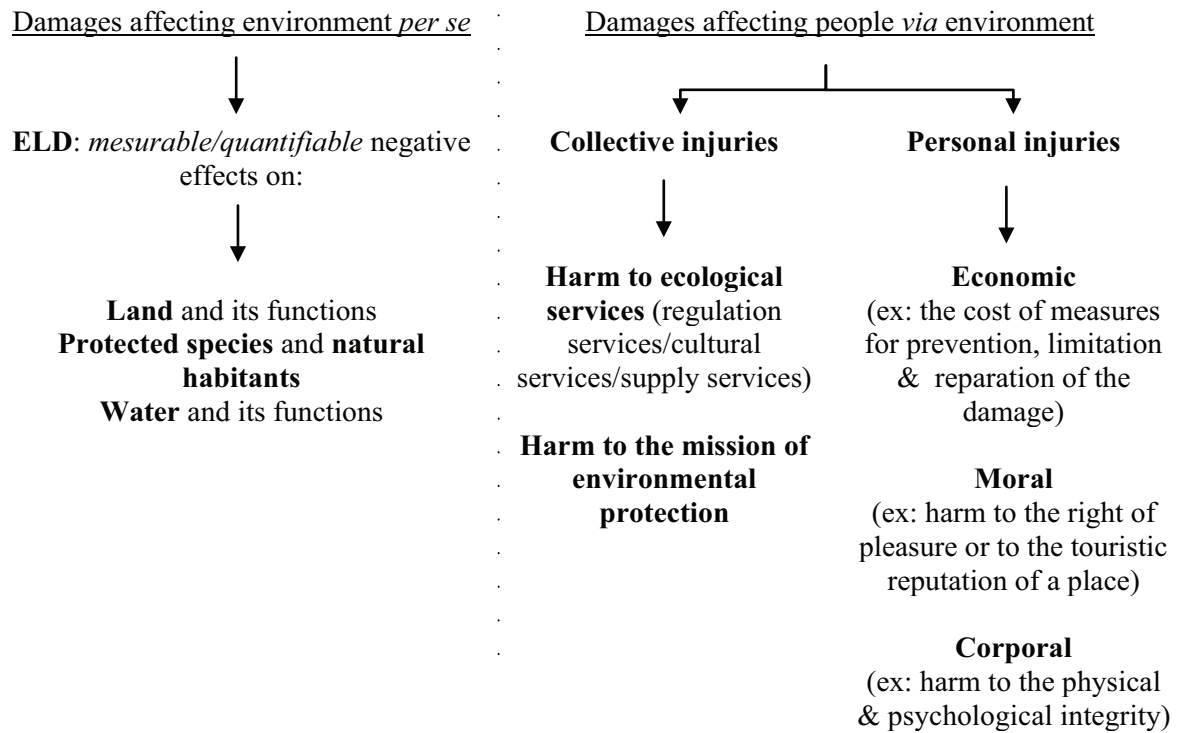


Fig. 1. Types of environmental damages.
Source: *Nomenclature des préjudices environnementaux*, p. 86–89.

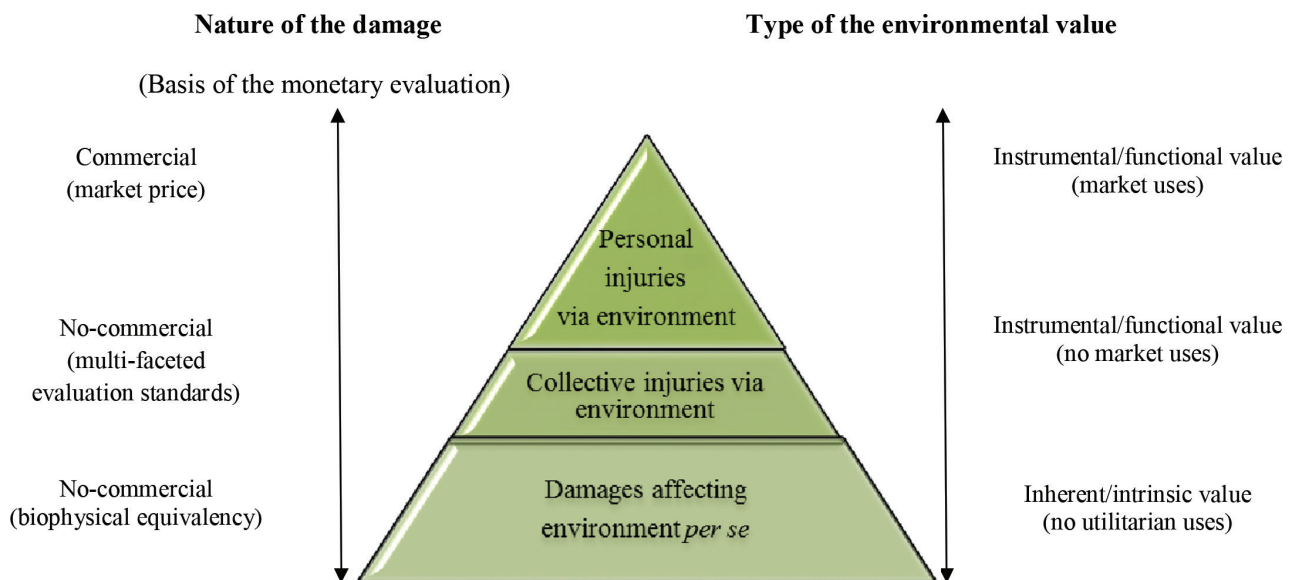


Fig. 2. Assessment of environmental damages.
Source: *Nomenclature des préjudices environnementaux*, p. 89.

However, the qualitative and quantitative determination of *in natura* remediation measures turns out to be a baffling due to the dynamic and no linear evolution of the environmental damage. Namely, this is a very complicated procedure by virtue of the difficulty to measure the damage to

the natural resources as well as the ability of the nature for self-regeneration [22]. Moreover, the problems deriving from the scientific uncertainty concerning the influence of the time on the development of the damage [23,24] – in addition to the lack of clarity regarding the fulfillment of the required

legal thresholds – hinder substantially the determination and evaluation of the environmental damage, which includes the calculation of the interim losses and the total debits as well as of the gains of the remediation taking into account the variable outcomes of the equivalency analysis.

Last but not least, given that the term “*reparation or restoration*” means the return to the original state, the realization of such measures aims to the re-establishment of the *status quo ante*, which depends on the evaluation of the supervening harmful effect with reference to the initial baseline condition [25]. This process seems to be essential concerning the assessment and the final imputation of the environmental damage, which does not have a monetary or commercial nature. Hence, due to the provisions of the ELD only for *in natura* prevention and remediation of these damages in combination with the monetary character of the modern society, it is really very complicated to estimate, calculate and allocate their costs.

Thus, it is essential to develop specific methods in order to perceive the inherent/intrinsic value of the environment in comparison with its instrumental/functional value, which is mainly expressed only by the use of the environmental goods or by their commercial price. Fig. 2 depicts schematically the difficulty to assess the damages to environmental goods because it is impossible (and impractical) to recourse to traditional economic or commercial data for such an evaluation [17].

5. The inefficient regulation of the Directive 2004/35/EC

Despite its ambitious and innovative character, the ELD has finally thrown up more questions than it solves dealing with environmental damages. Its limited application in combination with the practical ambiguities regarding its implementation has impaired its significance.⁶ Firstly, in the light of the analysis of the national cases emerges expressively the difficulty to reach the threshold set by the ELD in order an environmental damage to fall within its scope especially regarding land and water damages [26]. An indicative example comes from the UK and concerns the Rye Harbour spill [27]. In that case of water damage, the relevant Environmental Agency concluded that the requirement under the D – that the environmental damage should affect the entire surface water body – was not exceeded.

Moreover, an important weakness of the ELD concerns the restricted scope of the occupational activities listed in the Annex III, giving rise to damages for which apply strict liability. Namely, by the national transposition choices some Member States have extended the scope of the occupational activities of the Annex III by adding new activities to that list. This was exactly the case of France, where in the light of the *Coussouls de Crau* case [28] – regarding an oil leak in a nature reserve – they were added to the aforementioned Annex III the activities of oil transportation by pipeline. A similar

example is recorded in Latvia concerning the addition of the transport of chemical substances through pipelines. In this direction of reshaping the design of the notion “environmental damage” within the framework of discretionary power given by provision of the ELD, its expansion can also occur either by imposing strict liability for biodiversity damage on non-Annex III activities according to the article 2(3)(c) like in Greece or by establishing a general provision of strict liability regardless of the type of activity from which the damage originates, as in Denmark and Finland [29].

In this vein, there have already been discussions of a potential expansion of the “environmental damage” within the ELD. By way of illustration, it is essential to broaden its scope, since there are not currently included in the Directive damages to air, flora and fauna that are not protected by the Birds or Habitats Directives, to cultural buildings and ancient monuments as well as to landscapes – although landscapes may be already partially included if they are located in Natura 2000 sites or include waters covered by the Water Framework Directive [30]. The main objection concerning the air damage is that it cannot be remediated by removing pollutants like the damages in land and water. Despite this difficulty related mainly to remedial measures, the inclusion of air in the ELD scope can activate measures to prevent harm to natural resources from airborne pollutants. This is not something insignificant, if we consider that 30% of greenhouse gases going to the atmosphere come from agriculture (deforestation/fertilizers). Concerning any extension of the ELD to cultural buildings and ancient monuments, or landscape would, however, need to be very carefully considered due to the difficulties in establishing thresholds for such damage as well as the insurance implications of such an extension [30].

Furthermore, it was also suggested – mainly from Spain [31] – that the costs of extinguishing a fire be considered for inclusion, since the cost of these measures would potentially not covered by the ELD, unless they were carried out in order to prevent an environmental damage covered by the ELD’s scope. Finally, other categories such as odor and noise can be considered for inclusion due to their potential impact on human health, although it is not necessarily easy to determine and measure such a negative effect on fauna and flora [30]. In general, the principle deterrent in all these suggestions for any potential extension of the scope of “environmental damage” is related to the need of adaption of the insurance policy coverage.

6. Conclusion

Given that “*the most tenacious problem in EU Environmental Law is not the absence of adequate laws, but the flawed and belated Member States transposition (of directives) as well as insufficient application and enforcement of those rules*” [32], it is essential to highlight the significance of the environmental damages beyond their affect to human beings [33] and to elaborate an effective methods based on equivalency analysis in order to enforce the *in natura* remediation and to monitor and report their effectiveness. In this vein, it must be strengthened, firstly, the active information sharing by authorities and operators and, secondly, the transparency via public accessible databases on environmental incidents. In addition, regarding the practical implementation of the ELD, it could

⁶As stated by the European Commission “the Commission (...) identified 16 cases treated under the ELD at the beginning of 2010, and estimates the total number of ELD cases across EU may now be around 50”. See Report by the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, under the Art. 14(2) of the Directive 2004/35/CE, para 2.2, COM(2010) 581 final, available: eur-lex.europa.eu.

be very useful to establish at EU level registers of damage cases, which will limit the regional dispersion in ELD application and will contribute to the consistent application of the criterion of “the significant threshold”.

In a more general perspective, the idea of creating common EU guidelines regarding the identification and evaluation of environmental damages based on the national experience and problems concerning the implementation of the ELD seems to be very attractive,⁷ since it would offer predictability, stability and coherence in regard to the more efficient management of the multifaceted ecological aggravation. However, such an initiative should have an complementary or advisory nature and can only work as a common reference guidance among the Member States without binding character, given that the EU and the Member States have shared competence with regard to the environmental protection and the harmonization is minimum.⁸ Indeed, according to the interpretation of the articles 191-193 TFEU “it must be observed that the European rules do not seek to effect complete harmonization in the area of the environment” [34].

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⁷According to the European Commission “the Commission (...) identified 16 cases treated under the ELD at the beginning of 2010, and estimates the total number of ELD cases across EU may now be around 50”. Also, see Report by the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, under the Art. 14(2) of the Directive 2004/35/CE, para 2.2, COM(2010) 581 final, available at: eur-lex.europa.eu.

⁸Minimum harmonization can be defined as a form of European legislation which leaves Member States competent to adopt more stringent environmental standards than the European ones according to the article 193 TFEU. In this framework, a “more stringent measures” clause is being enshrined in article 16 (1) of the ELD.