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LIABILITY FOR ENVIRONMENTAL DAMAGE FROM SHIPPING INCIDENTS IN THE EUROPEAN UNION: A SHIPOWNER'S PERSPECTIVE

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Abstract

The paper examines the worldwide environmental liability regime which governs liability and compensation for environmental damage from shipping incidents in the European Union under the umbrella of the International Maritime Organization (IMO). The arguments for this global approach rather than a specific regime under the European Environmental Liability Directive are discussed. A short overview is made of developments in European and international law that are needed to complement this 'regime' in order to fulfil its maximum potential.

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Introduction

This paper presents a critical stance with respect to the (potential) effectiveness of the EU Directive 2004/35/CE on Environmental Liability (hereafter referred to as the ELD)[2] regarding environmental damage from shipping accidents – exempt at this moment. It will be argued that the ELD is an ambitious framework that embeds some new and often challenging concepts. However, it is less well equipped to define, allocate and financially secure liability for environmental damage from the international shipping industry. This might include problems arising from jurisdiction, choice of law, standard of liability, and enforcement of judgment that typically plague cross-boundary pollution claims and which by definition often occur in the shipping industry. Quite frequently, these problems result in protracted litigation and delayed payment of damages.

These experiences demonstrate the difficulties that nations face in adopting liability systems. As a result of a lack of legislation and/or a patchwork of legislation that would apply to international shipping, the International Maritime Organization (IMO) has put in place a set of international conventions covering liability and compensation for marine pollution. This paper is divided into four main sections. The first reviews the main features of the ELD. The second outlines three arguments for a global approach rather than a specific regime under the ELD[3]. The third section explores four developments in European and international law that are needed to complement this regime to fulfil its maximum potential. The article concludes that the IMO has put in place an effective and comprehensive set of conventions covering liability and compensation for marine pollution.

The Environmental Liability Directive in short

The European Union introduced the Environmental Liability Directive to establish a framework of environmental liability ('environmental liability regime'). The European framework is based on the 'polluter pays' principle[4]. The aim of the framework is the restoration by a polluter of environmental damage caused to natural species and habitats, to water resources and to land. In the event of damage, the polluter will be required to identify and fund measures necessary to return the affected area to its pre-incident condition.

Although the Directive was adopted by the European Parliament and Council in 2004, first considerations on remediation of environmental damage date back to the 1970s. Sustainable development became a specific and identified area of concern at that time. One year after the first United Nations Conference on the Environment in Stockholm[5], the European Community adopted a five-year Environment Action Programme (EAP) (1973–1977) setting out the principles and priorities that would guide its policies in the future.

[2] Directive 2004/35/CE of the European Parliament and of the Council on environmental liability regarding the prevention and remedying of environmental damage, [2004] OJ L143/56 (Environmental Liability Directive, hereafter the ELD).

[3] This paper draws, among others, on arguments developed in various fora of the European Community Shipowners Associations (ECSA) and the International Chamber of Shipping (ICS). However, the views expressed are those of the author.

[4] For more background on the ELD, use the following weblink: https://ec.europa.eu/environment/legal/liability/

[5] Adams, B. (2019). Green development: Environment and sustainability in a developing world. Routledge

This first EAP included detailed lists of actions to be taken to control a broad range of pollution problems.

The Directive embeds some new and often challenging concepts, both in an economic and ecological sense (e.g., economic valuation of damage or compensatory remediation of damage). Before adoption of the ELD, there was only a stop pollution and supplemental clean-up (primary remediation) requirement[6]. For many Member States the additional requirements for complementary (i.e., restoration of the same or similar natural resources as close as possible to the damage) or compensatory remediation (i.e., compensation for the interim loss of natural resources between the damage and the full remediation) were new. Furthermore, differences in national legal systems in place at the time also made the Directive politically controversial.

This led to a long run-up which eventually resulted in a much narrower approach focused on administrative liability, which is better suited to tackling environmental damage in the European context. Whereas the Commission's thinking on remediation of environmental damage was long based on a civil liability approach[7], the ELD outlines the types of damages and activities for which an operator may be held liable. It holds strict liability for environmental damage caused by specified occupations carrying out 'dangerous activities', including industrial and agricultural installations needing an IPCC permit, transport of waste, carbon capture and storage and others. These operators are listed in Annex III of the Directive which provides a specific listing of those occupational activities that trigger strict liability should an incident occur. Additionally, operators engaging in other occupational activities than those listed in Annex III are liable for fault-based damage to protected species or natural habitats.

The ELD explicitly excludes monetary compensation for damage such as loss of income to fishers due to reduced fish reserves or earnings cutbacks sustained by hoteliers due to the decrease of the number of guests during the period of pollution. A two-tiered approach provides for the right of non-governmental and public interest organisations to report alleged environmental damage and demand action by the competent authority. They have the right to request the 'competent authority', i.e., in all likelihood the State where the pollution occurred, to decide about remedial action. Under the Directive, EU countries designate various public bodies as guardians of the environment. They must identify liable polluters and ensure that those responsible for causing either an imminent threat of, or actual, environmental damage undertake or finance the required preventative or remedial measures.

In a relatively short period of negotiations (2002-2004) – just before the accession of ten new Member States on 1 May 2004 – the ELD was adopted by the European Parliament and Council. The outcome gave a wide margin of discretion to EU Member States to adopt more far-reaching rules and to determine how that Directive should be shaped and implemented[8]. Examples of the discretionary power of Member States are, among many others, the decision to extend the scope of biodiversity damage to include nationally protected species and natural habitats as well, to oblige competent authorities to take preventive and remedial action where the operator is not identifiable or not

[6] For an extensive overview of the ELD's scope, refer to D. Bergkamp, L., & Goldsmith, B. (eds.). (2013). The EU environmental liability directive: a commentary. Oxford University Press.

[7] See for example the European Commission Proposal for a Directive on civil liability for damage caused by waste, [1989] OJ C251/32

[8] De Smedt, K. (2009). Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive. *European Energy and Environmental Law Review*, *18*(1), 2-18

required to bear the costs, and to exempt sewage sludge from the list of dangerous activities in Annex III entailing strict liability.

The ELD is not a classical 'framework directive' which produces several 'daughter directives' (such as the Waste Framework Directive or the Water Framework Directive). The term 'framework' is however justifiable in the sense that it just established a broad legal framework with minimum requirements, leaving the specifics to Member States. They were required to transpose and implement the ELD into their national legal systems by April 2007 and, as of July 2010, all Member States had completed this transposition. In the process of transposing the liability regime into national law, a series of issues and questions[9] has arisen, including, determining which cases fall under the ELD and which do not; how the defences and/or exceptions provided in the ELD should be applied; the role of financial security; how definitions of 'significant' environmental damage and 'operator' should be construed and applied; and how damage is best assessed and remediated, …

The Directive holds a limited set of exemptions where the ELD does not apply. In addition to the rather classical defences for strict liability such as 'activities to serve national defence or international security or protection against natural disasters', 'act of armed conflict, hostilities, civil war, insurrection' and 'natural phenomenon of exceptional, inevitable and irresistible character', there is also the exemption with regard to 'diffuse pollution', when no causal link can be assigned to individual operators. An important principle in the perspective of our further argumentation is the exemption of environmental damage arising from an incident of which liability or compensation that falls within the scope of any of the international conventions listed (in Annex IV). Examples include (mainly IMO conventions) on oil pollution, carriage of hazardous substances at sea and on land, and nuclear risks.

Arguments in favour of a global approach

This section outlines three arguments in favour of a worldwide environmental liability and compensation approach rather than a specific regime under the ELD. The ELD is less well-equipped for the definition, allocation and financially securing liability for environmental damage from the international shipping industry.

Limited effectiveness of the ELD

The ELD provides for a wide margin of discretion to EU Member States. As a result, a quite divergent situation exists across Europe. Due to these differences, EU Member States have struggled to implement consistent and predictable environmental liability laws[10]. For example, the legislation that transposed the ELD into the national law of Member States frequently creates a divide between national legislations for the remediation of land and water damage. Furthermore, many Member States take a minimum implementation approach. This might impair the effectiveness of the ELD. Doubt[11] has therefore been expressed as to whether the directive can realise the

[9] Farnworth, S.E. (2018). Liability for pollution damage from offshore oil spills: The CLC and fund conventions, the EU's Environmental Liability Directive and their implications for New Zealand law. Unpublished PhD-thesis.

[10] Stevens & Bolton LLP (2014). The study on analysis of integrating the ELD into 11 national legal frameworks, Final Report prepared for the European Commission (DG Environment).

[11] De Smedt, K. (2009). Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive. European Energy and Environmental Law Review, 18(1), 2-18

precautionary and polluter-pays principles, as well as ensure the restoration of damage to the environment. The development of a European environmental liability regime without appropriate financial security guarantees and a harmonized mandatory insurance regulation or an EU-wide compensation fund might also limit the effectiveness of the ELD, because financial security providers may find it much more difficult to offer standard products and multinational companies must adapt to various situations[12].

Comprehensive set of legislation already in place

Over the years, the IMO has put in place a comprehensive set of conventions covering liability and compensation for marine pollution (e.g., oil pollution from tankers). It created a most advanced system of liability, with three tiers of liability for compensation for damages resulting from the carriage of oil by sea in tankers. The first tier is the shipowner's liability (covered by mandatory insurance) in accordance with the International Convention on Civil Liability for Oil Pollution Damage (CLC - 1992)[13] Convention. The second tier is a compensation fund – the International Oil Pollution Compensation Fund (IOPC - 1992)[14] – covering pollution damage that exceeds the shipowner's liability. Finally, there is a third tier – the International Supplementary Fund[15] created in 2003 – covering pollution damage that exceeds the threshold of the IOPC Fund (total amount reaching approximately USD 1 billion). This system has a worldwide scope of application with 130 Contracting Parties to the 1992 CLC Convention, 120 Contracting Parties to the 1992 IOPC Fund Convention and 31 Contracting Parties to the 2003 Supplementary Fund Protocol. At the same time, other conventions accompany the tiered system. Key elements of the CLC Convention are mirrored in the international Convention on Civil Liability for Bunker Oil Pollution Damage[16] extending the liability and compensation regimes to damage caused by spills of oil when carried as fuel in ships' bunkers. This is also the case for the Hazardous and Noxious Substances (HNS) Convention[17] where the shipping, oil, gas, chemical, petrochemical and other HNS industries are committed to paying compensation through an international system (see also further).

While the ELD provides for a high level of remediation standards, including primary, complementary and compensatory remediation of ecological damage, the IMO and related conventions include less elaborate terms, such as *"reasonable measures … to prevent or minimize pollution damage"* and *"compensation for impairment of the environment … limited to costs of reasonable measures of reinstatement"*[18]. On the other

[12] Farnworth, S.E. (2018). Liability for pollution damage from offshore oil spills: The CLC and fund conventions, the EU's Environmental Liability Directive and their implications for New Zealand law. Unpublished PhD-thesis.

[13] International Convention on Civil Liability for Oil Pollution Damage 973 UNTS 3 (opened for signature 23 June 1969, entered into force 19 June 1975) and its amendments (Protocol 1992)

[14] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 11 ILM 284 (opened for signature 18 December 1971, entered into force 16 October 1978) and its amendments (Protocol 1992)

[15] International Oil Pollution Compensation Supplementary Fund (2003)

[16] International Convention on Civil Liability for Bunker Oil Pollution Damage (opened for signature 23 March 2001, entered in force 21 November 2008)

[17] Hazardous and Noxious Substances Convention (opened for signature in 2010, the Convention has still not entered into force, see further)

[18] See for example BIO Intelligence Service (2014), ELD Effectiveness: Scope and Exceptions, Final Report prepared for the European Commission (DG Environment) and the reply of ECSA to the Call for Evidence of the European Commission for an Evaluation of the Environmental Liability Directive (December 2021).

hand, the conventions include some undeniable advantages which make the international system attractive, such as strict liability for pollution damage without a significance threshold, channelling of liability to the shipowner, limitation of liability according to the tonnage of the ship[19], mandatory financial security and insurance for specific types of pollution damage (e.g. damage caused by persistent oil carried in tankers, or by dangerous chemicals carried in bulk or packaged form), and a right of direct action against the insurer making it easier to obtain compensation. Both conventions enable claims for damages to be brought in the courts of the Party State where the damage occurs, regardless of where the ship is registered. These Conventions (and their respective 1992 protocols) are effective in establishing a satisfactory regime for compensation and reparation of pollution damages. Additionally, as far as we are aware, there have been no claims for pure environmental damage resulting from shipping incidents in EU waters that were not eligible for compensation under the international conventions.

An exception is in the interest of legal principles of certainty and uniformity

The IMO conventions provide that *"no claim for compensation for pollution damage may be made against the shipowner otherwise than in accordance with the Convention(s)"*[20]. If the ELD applied to claims for environmental damage from shipping incidents, EU Member States would have to denounce the IMO Conventions to avoid breaching their international treaty law obligations. That would result in less protection for environmental damage from shipping incidents, including within the EU and severely undermine the international system[21]. Therefore, we are of the opinion that the ELD should only be of relevance for the few ship-source pollution damage liabilities where the conventions are not in force in an EU Member state. To avoid any possible conflict between EU law and international conventions, it is important, therefore, that any legislation with regard to environmental liability shall always include an exception for any damage from shipping incidents governed by international conventions[22]. Maintaining the current regime would also be in line with the reasoning behind the EU Better Regulation policy, which aims at ensuring that regulatory frameworks are simple, of high quality and used only when essential, avoiding unnecessary redundant legislation[23].

[19] The Convention on Limitation of Liability for Maritime Claims (LLMC) 1976, as amended by the 1996 Protocol allows shipowners to limit their liability for certain categories of claims, including claims arising from a pollution incident involving a seagoing ship. The LLMC can be distinguished from the other conventions as its regime recognizes the right to limit in the event of a clear liability, while all the other conventions are pure liability (strict liability with few defences) and compensation regimes.

[20] See article 3.4 of the IOPC

[21] See also the reply of ECSA to the Call for Evidence of the European Commission for an Evaluation of the Environmental Liability Directive (December 2021).

[22] The Environmental Crime Directive (Directive 2008/99/EC) (ECD) obliges EU Member States to provide for criminal penalties in their national legislation for serious infringements of provisions of EU law on environmental protection. The Commission recently have begun an initiative to review various aspects of the ECD Directive. Important to note is that there must be awareness in the review process that a more extensive criminalization through criminal sanctions could lead to an over-criminalization in the field. The option of administrative sanctions as an alternative should be studied in the review process.

[23] More information on the EU Better Regulation policy can be found through the following weblink https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en

Overview of complementing measures

As highlighted in the previous section, the IMO Conventions have proved effective in managing to strike a balance between different interests and achieving an effective compensation and reparation regime. However, they are not perfect. A short overview is made of developments in European and international law and other measures that are needed to complement this 'regime' to fulfil its maximum potential.

Remediation standards between the conventions and the ELD are to be bridged

Provisions regarding remediation of environmental damage are not as broad and comprehensive in the Conventions as under the ELD. Adjustments to the regime's approach are desirable to align it with international practice and thereby to protect the long-term integrity of the regime itself. Through working towards common understanding, the gap as regards the level of the remediation standards between the conventions and the ELD is to be bridged. For instance, the IOPC Funds have revised their 'Claims Manual'[24] to include, under 'environmental damage', measures to re-establish a biological community in areas affected by an oil spill in order to enhance the natural recovery, as well as the cost of post-spill studies, and similar developments are envisaged under other conventions, e.g., in the HNS Convention and the Bunker convention.

The HNS Convention is heading towards entry into force

During the last evaluation[25] of the ELD, the European Commission expressed concern that the 2010 Protocol to the HNS Convention had not yet entered into force. This convention, covering the transport of hazardous and noxious substances by ship, is the last piece in the puzzle needed to ensure that those who have suffered damage have access to a comprehensive and international liability and compensation regime. It also contemplates a two-tier system of liability, with shipowner liability supplemented by the second tier, the HNS Fund, financed by cargo interests.

However, since the last evaluation in 2016, five states (i.e. Canada, Denmark, Norway, South Africa and Turkey) have ratified the HNS Convention. Several other states including France, Belgium, the Netherlands and Germany are currently taking active steps towards ratification[26]. The HNS Convention will enter into force 18 months after the date on which it is ratified by at least twelve states, including four states each with not less than 2 million units of gross tonnage, and having received, during the preceding calendar year, a total quantity of at least 40 million tonnes of cargo that would be contributing to the general account. We notice commitment from EU States towards the ratification of the Convention and the industry continues to be fully supportive of its entry into force.

Enforcement of regulation by flag states

Flag State refers to the country where a vessel is registered. This country has extra-territorial jurisdiction over its vessels sailing anywhere in the world by virtue of the nationality principle. Every state has the right to sail ships under its flag and thus participate in international navigation. However, this right comes with certain

[24] Claims Manual, International Oil Pollution Compensation Funds (2019). Available through following weblink: https://www.iopcfunds.org/uploads/tx_iopcpublications/2019_Claims_Manual_e.pdf.

[25] See the 2016 Commission Staff Working Document on the Evaluation of the Environmental Liability Directive Accompanying the document Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35 on environmental liability regarding the prevention and remedying of environmental damage

[26] See https://www.hnsconvention.org/status/ for a status update on the process.

responsibilities. Flag States are responsible for enforcing international obligations with respect to their vessels, everywhere and exclusively on the high seas. Flag State Jurisdiction typically includes management of vessel registration, effective jurisdiction and control over vessels, including inspection, detention and arrest as necessary, and ensuring vessel compliance with generally accepted international rules and standards. The risk of incidents is controlled through regulation, in such a way that the risk of shipping incidents decreases and can be prevented. Phasing out single-hull tankers, state inspections by Port States and strengthening existing provisions on classification societies and controls by the classification societies are just some of the regulations that have received increasing attention in recent years.

Conclusion

This paper has examined the environmental liability regime which governs liability and compensation for environmental damage from shipping incidents in the European Union. The EU introduced the ELD, establishing a European framework of environmental liability based on the 'polluter pays' principle. The ELD embeds some new and often challenging concepts and approaches as viewed from an administrative liability focus. At the same time the Directive leaves a wide margin of discretion to EU Member States. The ELD exempts environmental damage when liability or compensation falls within the scope of a set of international conventions. It is argued that an exception for claims for environmental damage from shipping incidents is in the interest of legal principles of certainty and uniformity.

Over the years, the IMO has put in place a comprehensive set of conventions covering liability and compensation for marine pollution. These measures have proved to work well over the past decades, providing effective compensation and reparation to claimants where needed in states worldwide, including EU Member States, without the need to await the outcome of potentially lengthy legal proceedings. Since the shipowner will be held strictly liable and he knows that all claims will be channelled to him, he also must carry sufficient insurances to pay the claims. The IMO conventions ensure that compensation will be available and not defeated by, for example, insufficient assets by the shipowner to pay the liability, by requiring the ship to carry a state-issued certificate verifying that financial security or insurance is in place. On the other hand, the current regime is not perfect either. The paper argues that the regime should be complemented by a bridging of the remediation standards between the conventions and the ELD, the entering into force of the HNS Convention and that enforcement by Flag States is needed so it can fulfil its maximum potential.

Date of release: 28 March 2022