

## **Exposé**

### **Dissertation Title**

## **Liability for Biodiversity Damage in European Union Law**

Challenges and Opportunities for the Role of Environmental Administrative Liability and Environmental Criminal Liability in the Protection of Biodiversity in the European Union

Doctoral Candidate: Julika Dittrich, LL.M.

Supervisor: Prof. Dr. Friedl Weiss

Discipline: Law

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## **A. Introduction**

Over the past 40 years, the EU has adopted a diverse range of environmental measures aimed at protecting and improving the quality of the environment. Today, the EU environmental acquis consists of some 200 legislative acts. Several acts are dedicated to the protection of biodiversity in the European Union, most notably the Birds Directive<sup>1</sup> and the Habitats Directive<sup>2</sup>. Commonly referred to as the “Birds and Habitats Directives”, the two Directives constitute the two main pieces of EU legislation regulating biodiversity protection in the European Union.

The effectiveness of EU environmental law is often undermined by poor implementation and enforcement at the national level leading to substantial damage of the environment. In pursuit of better implementation and enforcement of EU environmental law, the EU has adopted two Directives, which are also relevant for the protection of biodiversity in the European Union. Directive 2004/35/EC on the Prevention and Remedying of Environmental Damage<sup>3</sup> (Environmental Liability Directive, ELD) provides for an EU system of environmental administrative liability. Based upon the polluter pays principle and established as a public law regime, the Directive sets minimum standards of financial liability for the prevention and remedying of environmental damage. Directive 2008/99/EC on the Protection of the Environment through Criminal Law<sup>4</sup> (Environmental Crime Directive, ECD), in turn, provides for minimum standards of criminal liability for environmental damage by obliging Member States to enforce a large number of EU environmental law provisions through criminal law. The Environmental Liability and the Environmental Crime Directive list the Birds and Habitats Directives as falling within their scope.

The aim of the thesis is to examine to what extent the introduction of administrative liability (ELD) and criminal liability (ECD) for environmental damage, has been able to improve the implementation and enforcement of the Birds and Habitats Directives and to identify in this

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<sup>1</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010

<sup>2</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992

<sup>3</sup> 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 L 143/56, 30.4.2004

<sup>4</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008

way challenges and opportunities for the role of environmental administrative and environmental criminal liability in the protection of biodiversity in the European Union.

## **B. Background**

In 2001 the Gothenburg European Council adopted the EU sustainability strategy, which also formulated a clear objective for biodiversity policy:

“Protect and restore habitats and natural systems and halt the loss of biodiversity by 2010.”<sup>5</sup>

In 2010, it was evident that the EU had failed to achieve this target and the Council instructed the Commission to draft a new strategy. In 2011, the European Commission adopted its EU biodiversity strategy to 2020<sup>6</sup> with the headline target of

“Halting the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, and restoring them in so far as is feasible, while stepping up the EU contribution to averting global biodiversity loss”.

According to recent data on Europe’s biodiversity, achieving this target remains a serious challenge: 60% of species assessments and 77% of habitat assessments continue to be in unfavourable conservation status.<sup>7</sup> In its 2015 mid-term review<sup>8</sup> of the European Union's 2020 biodiversity strategy, the Commission concludes that progress had been insufficient. Several stakeholders have subsequently underlined the importance of full implementation and enforcement of the Birds and Habitats Directives for meeting the headline target of the strategy. In its resolution<sup>9</sup> on the mid-term review, the European Parliament stresses that full implementation and enforcement of the Birds and Habitats Directives is a “vital prerequisite” for meeting the headline target of the strategy. And in its own mid-term assessment of the biodiversity strategy, the NGO BirdLife strongly recommends better implementation and enforcement of the Birds and Habitats Directive. This coincides with research supporting the Commission’s Fitness Check of the Birds and Habitats Directives, which concludes that the two Directives must be fully implemented and enforced if the EU is to stand any chance of

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<sup>5</sup> COM (2001) 264 final, 15.4.2001

<sup>6</sup> COM (2011) 244 final

<sup>7</sup> Report of the European Environment Agency “The European Environment-state and outlook 2015” (“SOER 2015”), available at: <http://www.eea.europa.eu/soer-2015/europe/biodiversity>

<sup>8</sup> COM (2015) 478 final

<sup>9</sup> European Parliament resolution of 2 February 2016 on the mid-term review of the EU’s Biodiversity Strategy (2015/2137(INI))

halting biodiversity loss by 2020.<sup>10</sup> Implementation and enforcement problems with the Birds and Habitats Directives are well documented by a wide range of cases brought before national courts and the Court of Justice of the European Union (CJEU).<sup>11</sup>

## **I. The Birds and Habitats Directives**

Adopted in 1979 and amended in 2009, the aim of the Birds Directive is to protect naturally occurring wild birds and their habitats within the European Union. The Directive seeks to obtain its objectives through a combination of site and species protection measures, supported by monitoring and research measures. Adopted 13 years later, in 1992, the Habitats Directive introduces similar measures and covers around 1000 other rare, threatened or endemic species of wild animals and plants and protects some 230 rare habitat types in their own right.

The Birds and Habitats Directives are also key tools in delivering on EU commitments under international conventions and agreements, such as the Convention on Biological Diversity, the Bern Convention on European Wildlife, the Convention on Migratory Species and the African Eurasian Waterbird Agreement.

The Birds and Habitats Directives require the Member States to implement two main sets of provisions:

1. The designation of core sites for the protection of species and habitat types listed in Annex I and II of the Habitats Directive and Annex I of the Birds Directive, as well as for migratory birds. These designated sites form part of a coherent ecological network of nature areas and are referred to as the European Natura 2000 Network.
2. A strict protection regime for all wild European bird species and other endangered species listed in Annex IV of the Habitats Directive, both inside and outside Natura 2000 sites.

Under Article 4(4) of the Birds Directive and Article 6(2) of the Habitats Directive Member States are required to take appropriate steps to avoid pollution or deterioration of habitats or any disturbance affecting birds and species. Also relevant here is Article 6 (3) of the Habitats Directive, which requires that any plan or project likely to have a significant effect on a Natura 2000 site is to be assessed 'in view of the site's conservation objectives'. In case of a negative assessment, a project or a plan can only be authorized if the conditions set out in

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<sup>10</sup> Milieu Ltd.et al.: "Evaluation Study to support the Fitness Check of the Birds and Habitats Directives" Draft Final Report 4 January 2016.

<sup>11</sup> For an overview: Sundseth, Kerstin; Roth, Petr: "Article 6 of the Habitats Directive: Rulings of the European Court of Justice", (European Commission Contract), 2014; European Commission: "Nature and Biodiversity Cases Ruling of the European Court of Justice", 2006.

Article 6 (4) are satisfied, namely ‘absence of alternative solutions’, ‘imperative reasons of an overriding public interest’ and ‘compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected’. The provisions under Article 6(2), 6(3) and 6(4) of the Habitats Directive also apply to the Special Protection Areas protected under the Birds Directive.<sup>12</sup>

The provisions under Article 6, particularly Article 6(3), have provoked considerable disagreement and confusion over their interpretation and implementation and have resulted in numerous interventions from the Commission and CJEU cases.<sup>13</sup>

Regarding generic species protection, articles 12 and 13 of the Habitats Directive require Member States to “take the requisite measures to establish a system of strict protection” for the animal and plant species listed in Appendix IV to the Directive. Member States are required to establish prohibitions inter alia on the killing, capturing and disturbing of individual animals belonging to species from Annex IV, and on the “deterioration or destruction of breeding sites or resting places.” Articles 5 to 6 of the Birds Directive set out similar provisions.

CJEU rulings have clarified that Member States are not only required to prohibit the acts in question but also have to take all measures necessary to ensure that the prohibitions in question are not breached in practice.<sup>14</sup>

Numerous judgments of the CJEU seem to have reduced some of the uncertainties concerning the interpretation and implementation of the Birds and Habitats Directives. However, the continuing high share of court cases in this field as well as the significant number of reported breaches under those Directives, show that a compliance deficit remains.<sup>15</sup>

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<sup>12</sup> Habitats Directive, Art 7

<sup>13</sup> For an overview: Sundseth, Kerstin; Roth, Petr: ”Article 6 of the Habitats Directive: Rulings of the European Court of Justice”, (European Commission Contract), 2014.

<sup>14</sup> See Case C-103/00 Commission v Greece [2002] ECR I-1147; Case C-518/04 Commission v Greece [2006] ECR I-42; and Case C-221/04 Commission v Spain [2006] ECR I-4515.

<sup>15</sup> Milieu Ltd.et al.: “Evaluation Study to support the Fitness Check of the Birds and Habitats Directives” Draft Final Report 4 January 2016, p.48

## **II. The Environmental Liability Directive (ELD): Administrative Liability for Environmental Damage**

On 21 April 2004, Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (“ELD”) was adopted by the European Parliament and the Council of the EU with the objective to establish a common European framework of administrative liability for environmental damage.<sup>16</sup> “Environmental damage” in the Directive is defined as damage to protected species and habitats, water and land.<sup>17</sup>

Under the ELD, any operator whose activities cause an imminent threat of environmental damage or an actual environmental damage is to be held financially liable for preventing or remedying the damage, respectively. The directive gives direct expression to the “polluter pays” principle, enshrined in Article 191 (2) of the Treaty on the Functioning of the European Union. By exposing the operator to financial liabilities for environmental damage, the EU legislator hopes to “induce operators to adopt measures and develop practices to minimize the risks of environmental damage, so that their exposure to financial liabilities is reduced”.<sup>18</sup> Ultimately, the application of the ELD regime is expected to result in reducing the number of future contaminated sites and in slowing down biodiversity loss in the EU.<sup>19</sup>

Damage to protected species and habitats is defined in the Directive by direct reference to the Birds Directive and the Habitats Directive.<sup>20</sup> The threshold at which an operator must carry out measures under the ELD to remediate ecological damage is a “significant adverse [effect] on reaching or maintaining the favourable conservation status of...habitats or species [protected by the Habitats and Birds Directive].”<sup>21</sup>

The damaged natural resources or impaired services must be restored or replaced by identical, similar or equivalent natural resources or services either at the site of the incident or, if necessary, at an alternative site.<sup>22</sup>

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<sup>16</sup> ELD recital 3

<sup>17</sup> ELD Art 2(1)

<sup>18</sup> ELD recital 2

<sup>19</sup> ELD recital 1

<sup>20</sup> ELD Arts 2(1)(a),2(2),2(3), 2(4) and Annex 1

<sup>21</sup> ELD Art 2(1)(a)

<sup>22</sup> see ELD Annex II

The regime established by the ELD is a public law regime, requiring public authorities to ensure that the polluter is held liable. The Directive does not provide for private law compensation: personal injury, damage to private property or economic loss are expressly excluded from the scope of the directive.<sup>23</sup>

An important feature of the Directive is, that NGOs and individuals are entitled to request authorities to take action against operators<sup>24</sup> and to challenge the decision as well as inaction of the authority before a court or tribunal.<sup>25</sup>

The transposition deadline for Member States to incorporate the Directive into national legislation was 30 April 2007. The ELD has no retrospective effect and therefore only applies to damage that occurred after 30 April 2007.<sup>26</sup>

The transposition process of the ELD was particularly lengthy. Only four Member States<sup>27</sup> met the transposition deadline of 30 April 2007.<sup>28</sup> Infringement procedures against 23 Member States<sup>29</sup> reduced the number of non-compliant countries, but the Commission still had to refer a number of cases to the European Court of Justice, which gave judgment against seven Member States in 2008 and 2009.<sup>30</sup> While the implementation of EU directives is well known to raise issues, the ELD appears to have created a “plethora of significant implementation problems”<sup>31</sup>. Interpretation issues and the application of optional provisions have been criticised for creating a „patchwork of liability systems for preventing and remedying environmental damage across the EU“<sup>32</sup> and bearing the risk of jeopardising the proper functioning of the Directive.

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<sup>23</sup> ELD recital 14, Art 3(3)

<sup>24</sup> ELD Art 12

<sup>25</sup> ELD Art 13

<sup>26</sup> ELD Art 17

<sup>27</sup> Italy, Lithuania, Latvia and Hungary; Source: Commission: “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/EC on the environmental liability with regard to the prevention and remedying of environmental damage”[2010]581(,EC 2010 Report’), p.3

<sup>28</sup> EC (2010) Report under Art 14(2) ELD, p.3

<sup>29</sup> EC (2010) Report under Art 14(2) ELD, p.3

<sup>30</sup> France, Finland, Slovenia, Luxembourg, Greece, Austria and UK; Source: European Commission (2010) Report under Art 14(2) ELD, p.3

<sup>31</sup> L.Bergkamp (2005) “Implementation of the environmental liability directive in EU member states”

<sup>32</sup> Stevens & Bolton LLP (2013)“The Study on Analysis of integrating the ELD into 11 national legal frameworks, Final Report prepared for the European Commission (DG Environment)”.



Preliminary rulings<sup>33</sup> on the Directive seem to have clarified some of the Directive's provisions concerning the causal link, secondary liability and remedial measures under the ELD. Following its obligation from Article 14(2) ELD and Article 18(2) and (3) ELD the Commission published two reports on the effectiveness of the ELD in 2010<sup>34</sup> and 2016<sup>35</sup> respectively.

### **III. The Environmental Crime Directive (ECD): Criminal Liability for Environmental Damage**

The Environmental Crime Directive covers acts that violate environmental legislation and cause significant harm or risk to the environment and human health. The Directive emerged in response to the growing notion among EU policy makers, that traditional forms of enforcement of environmental law through administrative sanctions were insufficient to curtail environmental crime.<sup>36</sup> The appropriate legal basis for the harmonisation of environmental criminal law in the EU was strongly contested by the European Commission and the Council and became the subject of two judgments from the ECJ<sup>37</sup>, before Directive 2008/99/EC on the protection of the environment through criminal law was finally adopted by the European Parliament and the Council of the EU on 19 November 2008. The objective of the Directive is to achieve “complete compliance with laws for the protection of the environment”<sup>38</sup> and in this way “ensure a more effective protection of the environment”<sup>39</sup>.

The Directive obliges Member States to enforce a large number of EU environmental law provisions through criminal law by requiring them to treat certain activities that breach EU environmental legislation as criminal offences. In Article 3, the ECD lists nine offences that must be considered criminal offences by all Member States if committed intentionally or with serious negligence. Artt. 3 (f) and (h) relate to breaches of the Birds and Habitats Directives,

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<sup>33</sup> *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*, Case C-378/08, [2010]; *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*, Case- C-379/08 and Case C-380/08 [2010]; *Ministero dell’Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* Case C-534/13, [2015].

<sup>34</sup> COM (2010) 581 final

<sup>35</sup> COM (2016) 204 final

<sup>36</sup> See amended proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, Com(2002)544 Final - OJ C 20E of 28/01/2003, p. 284: only “criminal sanctions for the most serious environmental offences [seem] adequate, and dissuasive enough, to achieve proper implementation of environmental law.”

<sup>37</sup> *Commission of the European Communities v Council of the European Union*, Case C-176/03; *Commission of the European Communities v Council of the European Union*, Case C-440/05

<sup>38</sup> ECD recital 3

<sup>39</sup> ECD recital 14

including the killing, destruction, possession or taking of specimens of protected wild fauna or flora species<sup>40</sup> and the significant deterioration of a habitat that form part of the Natura 2000 network<sup>41</sup>. The Directive does not determine the type and the level of sanctions. These are left to the discretion of the Member States with the only requirement that the sanctions must be “effective, proportionate and dissuasive”.<sup>42</sup>

The Directive had to be transposed by Member States by December 2010. One of the issues that arose during the implementation process is the use of a number of rather vague notions in the Directive, such as “substantial damage”, “non-negligible quantities or impacts” or “significant deterioration”, leading to different interpretations in the Member States. Moreover, the implementation of the Directive has resulted in significant differences in Member States’ systems of sanctions, concerning both the level of sanctions as well as the types of sanctions available.

### **C. Research Problem & State of Research**

Liability rules for environmental damage can have the effect of providing strong incentives to consider the impact of decisions on the environment. There are, however, divergent views on the comparative advantages of using civil, administrative and criminal penalties for addressing environmental offences. Ideally, civil, administrative and criminal law should complement each other.

Since the adoption of the ELD in 2004 and the ECD in 2008, a considerable amount of research has been published on the effectiveness of the two directives. Several implementation and evaluation studies launched by the Commission provide a wealth of data on the implementation and enforcement of the ELD directive in EU Member States. Reports by the Member States on the experience gained in the application of the ELD also contribute to the evidence base. As to the implementation and enforcement of the ECD, the EU funded research project “European Action to Fight Environmental Crime” (EFFACE) published numerous papers on the effectiveness of the ECD over the course of the last four years. Research by economists and other social scientists has also contributed to the empirical evidence concerning the effectiveness of liability rules for environmental damage.

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<sup>40</sup> ECD Art 3(f)

<sup>41</sup> ECD Art 3 (h)

<sup>42</sup> ECD Art 5

Despite the amount of research dedicated to the effectiveness of both the ELD and the ECD, only few legal scholars have endeavoured to explore their interplay and their ability, in their current design, to use the complementary aspects of administrative and criminal liability. Likewise only few analytical studies have endeavoured to investigate the potential of the ELD and the ECD to contribute to the protection of biodiversity in Europe by fostering the implementation and enforcement of the Birds and Habitats Directives.

#### **D. Aim of the thesis**

The aim of the thesis is to examine to what extent the liability rules introduced by the European Union in 2004 and 2008 respectively have been able to improve the implementation and enforcement of the Birds and Habitats Directives, curb biodiversity damage and secure remediation of the environment where damage has taken place. It will then go on to assess whether amendments in the design and wording of the Environmental Liability Directive and/or the Environmental Crime Directive could lead to better implementation and enforcement of the Birds and Habitats Directives.

#### **E. Research Questions**

In summary, it is the aim of this thesis to:

1. Identify relevant links between the Birds and Habitats Directives and the Environmental Liability and Environmental Crime Directive (“Liability Directives”) as well as other international legal instruments, such as the Convention on Biological Diversity adopted at the Earth Summit in Rio de Janeiro in June 1992, the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971; the Bonn Convention on Conservation of Migratory Species of Wild Animals, 1979; the Washington Convention on International Trade in Endangered Species, 1973; the Bern Convention on the Conservation of European Wildlife and Natural Habitats, 1979; the African Eurasian Waterbird Agreement, 1995; as well as the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998 and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, 1993.
2. Examine problems with the implementation and enforcement of the Birds and Habitats Directives, summarise key lessons learnt on the interpretation and implementation of the two

Directives from the EU case law and draw conclusions on the role of enforcement actions before national and EU courts in promoting better implementation of the Directives.

3. Assess the role of the ELD (administrative liability) and ECD (criminal liability) in the implementation and enforcement of the Birds and Habitats Directives. For this matter investigate the interplay of the Liability Directives and the Birds and Habitats Directives, especially for overlaps, gaps and/or inconsistencies that may hamper a more effective implementation and enforcement of the Birds and Habitats Directives;

4. Examine, in the context of biodiversity damage, the comparative advantages or disadvantages of administrative vs criminal vs civil remedies. Investigate to what extent the design and wording of the ELD and ECD are sufficiently integrated to use the complementary aspects of administrative and criminal liability for biodiversity damage;

5. If indicated, investigate potential gains from greater integration of the liability directives;

6. Synthesise findings and identify scope for amendments.

#### **F. Research Methodology/Approach**

The research will start with an examination of the Birds and Habitats Directives. The thesis will first discuss the scope and content of the main substantive provisions regarding the protection of species and habitats. Subsequently the focus will shift to the status of the implementation and enforcement of the Birds and Habitats Directives taking into account the extensive and growing jurisprudence of the CJEU on the Birds and Habitats Directives.

The thesis will then move on to examine the role of the ELD (administrative liability) and ECD (criminal liability) in the implementation and enforcement of the Birds and Habitats Directives. A critical mass of available data on the implementation record and difficulties with liability for biodiversity damage in some key European Member States will be researched and examined. Selected case studies are used to examine the application of the two directives and illustrate potential outcomes and scope for amendments.

Relevant international legal instruments, such as the Aarhus Convention and the Bern Convention on Biological Diversity, will be dealt with appropriately. A comparative approach is used to understand alternatives to and different outcomes of other liability regimes (e.g. US Superfund legislation).

The research will draw on:

- Literature and Case Law.
- The evidence base for the Environmental Liability Directive created inter alia by the Member States reports of 2013, the evaluation studies launched by the Commission in 2012 and 2013, the conclusions from the Commission ELD report 2010, the Commission ELD report 2010 and the accompanying Staff Working Document and the recently published Commission ELD report 2016 and accompanying Staff Working Document as well as future studies and reports hereon.
- The empirical research conducted in the context of various studies, including numerous studies conducted in the context of the EFFACE<sup>43</sup> research project, which dealt with environmental crime in the European Union.
- Comparison of law and practice on this matter outside the EU and in the Member States themselves. The comparative approach is used to understand alternatives to and different outcomes of other liability regimes.
- Studies in the field of environmental economics to the extent that it is appropriate and reasonable in a legal dissertation.

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<sup>43</sup> EFFACE – short for “European Union Action to Fight Environmental Crime”: <http://efface.eu>

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## **H. Relevant Literature**

Bergkamp, Lucas: "Implementation of the environmental liability directive in EU member states", ERA Forum, vol.6, iss.3, 2005, pp.389-400.

Bergkamp, Lucas; Goldsmith, Barbara (eds.): "The EU Environmental Liability Directive: A Commentary", Oxford, Oxford University Press, 2013.

BIO Intelligence Service: "Financial security in environmental liability directive, Final Report for the European Commission (DG Environment)", 2008.

BIO Intelligence Service: "Stocktaking of the main problems and review of national enforcement mechanisms for tackling illegal killing, trapping and trade of birds in the EU, Final report prepared for. European Commission (DG Environment)", 2011.

BIO Intelligence Service et al.: "Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents, Final report prepared for European Commission, (DG Environment)", 2012.

BIO Intelligence Service: "Implementation challenges and obstacles of the Environmental Liability Directive, Final report prepared for the European Commission (DG Environment). In collaboration with Stevens & Bolton LLP", 2013.

BIO Intelligence Service, ELD Effectiveness: "Scope and Exceptions, Final Report prepared for European Commission (DG Environment)", 2014.

Born, Charles Hubert; Cliquet, Ann; Schoukens, Hendrik; Misonne, Delphine; Van Hoorik, Geert: "The Habitats Directive in its EU Environmental Law Context. European Nature's Best Hope? Routledge, 2015

Brans, Edward and Uilhoorn, Mark: "Liability for Ecological Damage and Assessment of Ecological Damage", Erasmus University Rotterdam, 1997. Available at: <http://ec.europa.eu/environment/legal/liability/pdf/ecodamage.pdf>

Brans, Edward: "Fundamentals of Liability for Environmental Harm under the ELD", in Bergkamp et al. (eds.), *The EU Environmental Liability Directive: A Commentary*, Oxford, Oxford University Press 2013, pp.31-50.

Sandra Cassotta: "Environmental Damage and Liability Problems in a Multilevel Context. The Case of the Environmental Liability Directive", Wolters Kluwer Law & Business 2012.

Deloddere, Sophie and Ryckbost, Donatienne: "Liability for Contaminated Sites", University of Ghent 1997. Available at: <http://ec.europa.eu/environment/legal/liability/pdf/soilcont.pdf>

De Smedt, K.: "Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive", *European Energy and Environmental Law Review*, vol.18, iss.1, 2009, pp. 2–18.

European Commission: "Nature and Biodiversity Cases Ruling of the European Court of Justice", 2006.

European Environment Agency: "The European Environment — State and Outlook 2015: Synthesis Report, Copenhagen, 2015.

Gerstetter, Christiane et al.: "Environmental Crime and the EU - Synthesis of the research project "European Union Action to Fight Environmental Crime" (EFFACE)". Available at: [www.efface.eu](http://www.efface.eu), 2016.

Faure, Michael; Philipsen, Niels; Fajardo del Castillo, Teresa et al.: "Conclusions and Recommendations. Study in the framework of the EFFACE research project", 2016.

Faure, Michael: "The complementary roles of liability, regulation and insurance in safety management: theory and practice", 17 *Journal of Risk Research*, 2014.

Faure, Michael: "Instruments for Environmental Governance: What Works?", Paper presented at the Annual Colloquium of the Academy for Environmental Law of the IUCN, 2012.

Faure, Michael: "The Implementation of the Environmental Crime Directive in Europe", paper presented at the Ninth International Conference on Environmental Compliance and Enforcement, 2011.

Faure, Michael; Svatikova, Katarina: "Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe", 24 *Journal of Environmental Law*, 2012.



Faure, M.; Visser, M: "How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm", *European Journal of Crime, Criminal Law, and Criminal Justice*, vol.3, iss.4 , 1995, pp. 316-368,.

Fehr, Karl-Heinz et al.: "Liability Directive - a Useful Tool for Nature Protection?", *Journal for European Environmental & Planning Law*, vol.4 iss., 2007, pp.

Fleurke, Floor, Trouwborst, Arie: "European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats Directives", in Kotzé, Louis J.; Marauhn, Thilo (ed): "Transboundary Governance of Biodiversity". Leiden- Bosten, Brill/Nijhoff, 2014.

Fogleman, Valerie: "Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions", *Environmental Liability*, vol. 4, 2006, pp. 127-146.

Fogleman, Valerie: "The threshold for liability for ecological damage in the EU – Mixing environmental and conservation law", in: Born, Charles Hubert; Cliquet, Ann; Schoukens, Hendrik; Misonne, Delphine; Van Hoorik, Geert: "The Habitats Directive in its EU Environmental Law Context. European Nature's Best Hope? Routledge, 2015.

Garcia- Ureta, Agustin: "The ECJ Jurisprudence on Nature Protection and Ownership Rights" in Winter et al. (eds.), *Environmental and Property Protection in Europe*, Groningen 2016, pp.56-128.

Grasso, G.; Sicurella, R.; Scalia, V.: "Articles 82-86 of the Treaty on the Functioning of the European Union and Environmental Crime. Study in the framework of the EFFACE research project" Catania: University of Catania, 2015.

Hecker, Bernd; Hendl, Bernhard; Proelß, Alexander; Reiff, Peter: "Verantwortlichkeit und Haftung für Umweltschäden: 28. Trierer Kolloquium zum Umwelt- und Technikrecht vom 6. bis 7. September 2012" in: *Umwelt- und Technikrecht*, Band 119, Erich Schmidt Verlag, Berlin, 2013.

Hecker, Bernd: "Europäisches Strafrecht", 4th edition, Heidelberg 2012.

Hecker, Bernd: "Richtlinie 2008/99/EG vom 19.11.2008 über den strafrechtlichen Schutz der Umwelt – Umsetzung in Deutschland", RdU 2014/39.

Jans, Jan H. and Vedder, Hans H.B.: "European Environmental Law after Lisbon", 4th edition, Groningen, 2012.

Jans, Jan H.; Macrory, Richard; Moreno Molina, Angel-Manuel (eds.): "National Courts and EU Environmental Law ", Groningen, Europa Law Publishing, 2013

Jones, Gregory (ed.): "The Habitats Directive: A Developer's Obstacle Course?", Oxford and Portland, Oregon, 2012.

Kingston, Suzanne: "Mind the gap: difficulties in enforcement and the continuing unfulfilled promise of EU environmental law", in Suzanne Kingston (ed): "European Perspectives on Environmental Law and Governance", Routledge, 2013.

Kloepfer, Michael; Vierhaus, Hans-Peter: "Umweltstrafrecht", 2nd edition, Munich 2002.

Kotzé, Louis J.; Marauhn, Thilo (ed): "Transboundary governance of biodiversity". Leiden-Boston, Brill/Nijhoff, 2014.

Krämer, Ludiwg: "Implementation and enforcement of the Habitats Directive" in Born, Charles Hubert; Cliquet, Ann; Schoukens, Hendrik; Misonne, Delphine; Van Hoorik, Geert: "The Habitats Directive in its EU Environmental Law Context. European Nature's Best Hope? Routledge, 2015

Krämer, Ludiwg: "EU enforcement of environmental laws: From great principles to daily practice - Improving citizen involvement", Environmental Policy and Law, vol. 44, iss.1/2, 2014, pp.247-256.

Krämer, Ludwig: "Discussions on Directive 2004/35 Concerning Environmental Liability", Journal for European Environmental & Planning Law, vol.4, 2005.

Lee, Maria: "The Changing Aims of Environmental Liability", Environmental Law and Management, vol. 14, 2002, pp. 189-196.

Kloepfer, Michael; Vierhaus, Hans-Peter: "Umweltstrafrecht", 2nd edition, Munich 2002.

Krämer, Ludwig: "Discussions on Directive 2004/35 Concerning Environmental Liability", Journal for European Environmental & Planning Law, vol.4, 2005.

Lee, Maria: "The Changing Aims of Environmental Liability", Environmental Law and Management, vol. 14, 2002, pp. 189-196.

Mauerhofer, Volker: "Biodiversity damage' liability in the Environmental Liability Directive – its definition and delimitation from more stringent EU, international and national norms", Environmental law network international review (elni review), iss.1, 2008, pp. 19-24.

Mégret, Frédéric: "The Case for a General International Crime Against the Environment", 2010. Available at: <http://ssrn.com/abstract=1583968>.

Milieu Ltd., IUCN: "Experience gained in the application of ELD biodiversity damage. Final report for the European Commission, DG Environment." Brussels, February 2014.

Milieu Ltd.et al.: "Evaluation Study to support the Fitness Check of the Birds and Habitats Directives" Draft Final Report 4 January 2016.

Munchmeyer, Tanja; Fogleman, Valerie; Mazza, Leonardo and Mudgal, Shailendra: "Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues". Bio Intelligence Service, Report for the European Commission (DG Environment), 2009.

OECD: "Liability for environmental damage in Eastern Europe, Caucasus and Central Asia (EECCA): Implementation of good international practices", 2012.

Orlando, Emanuela: "From Domestic to Global? Recent Trends in Environmental Liability from a Multi-level and Comparative Law Perspective", *Review of European, Comparative & International Environmental Law*, vol.24, iss.3, 2015, pp.289-303.

Pereira, Ricardo M.: "Environmental Criminal Liability and Enforcement in European and International Law", BRILL, Leiden, Netherlands, 2015

Perman, Roger et. al., *Natural Resources and Environmental Economics*, 4th edition, Harlow, England, 2011.

Petersen, Malte; Berstermann, Andreas: „Umweltschadengesetz : Gesetz über die Vermeidung und Sanierung von Umweltschäden (Umweltschadengesetz-USchadG): Kommentar“, Köln, Carl Heymanns, 2013.

Peters, Wolfgang; Jahns-Lüttmann, Ute; Wulfert, Katrin; Koukakis, George Alexander; Lüttmann, Jochen; Götze, Roman: "Bewertung erheblicher Biodiversitätsschäden im Rahmen der Umwelthaftung", *BFN-Skripten* 393. Available at: [www.bfn.de/0306\\_umwelthaftung-schaden.html](http://www.bfn.de/0306_umwelthaftung-schaden.html), 2015.

Rehbinder, Eckard: "Implementation of the Environmental Liability Directive in Germany", *Environmental Liability* vol. 15, iss. 5, 2007, pp. 199-203.

Reindl-Krauskopf, Susanne; Salimi, Farsam: "Umweltstrafrecht – Eine systematische Darstellung des gerichtlichen Umweltstrafrechts", Vienna 2013.

Ruhs, Svenja: "Europäisierung des Umweltstrafrechts", *Zeitschrift für das Juristische Studium (ZJS)*, 2011, pp. 13-20.

Salanitro, Ugo: "Directive 2004/35/EC on Environmental Liability". Study in the framework of the EFFACE research project, Catania: University of Catania. Available at: [www.efface.eu](http://www.efface.eu), 2015.

Sautner, Lyane: "Umweltstrafrecht – Eine Zwischenbilanz", *Recht der Umwelt (RdU)*, 2009/2.

Sautner, Lyane: "Richtlinie 2008/99/EG vom 19.11.2008 über den strafrechtlichen Schutz der Umwelt – Umsetzung in Österreich", *Recht der Umwelt (RdU)* 2014/39.

Satzger, Helmut: "Der Mangel an Europäischer Kriminalpolitik – Anlass für das Manifest der internationalen Wissenschaftlergruppe „European Criminal Policy Initiative“, *Zeitschrift für Internationale Strafrechtsdogmatik ZIS* 12/2009, 691.

Slepcevic, Reinhard: "The judicial enforcement of EU law through national courts: possibilities and limits", *Journal of European Policy Law*, Vol.16, iss.3, 2009, pp.378-394

Slingenberg, Allister; Leon, Braat.; van der Windt, Henny; K, Rademaekers.; L, Eichler.; Kerry, Turner: "Study on understanding the causes of biodiversity loss and the policy assessment framework." prepared for the European Commission, 2009.

Stevens & Bolton LLP: "The Study on Analysis of integrating the ELD into 11 national legal frameworks, Final Report prepared for the European Commission (DG Environment)", 2013.

Sundseth, Kerstin; Roth, Petr: "Article 6 of the Habitats Directive: Rulings of the European Court of Justice", (European Commission Contract), 2014.

Tomuschat, Christian: "Schädigung der Umwelt als Verbrechen nach Völkerstrafrecht", in "Völkerrecht und deutsches Recht: Festschrift für Walter Rudolf zum 70. Geburtstag", Munich 2001.

Torres Rosell, Núria; Maria Marquès Banqué: "Study on the implementation of Directive 2008/99/ec on the Protection of the Environment Through Criminal Law", published within the European Network Against Environmental Crime (RSPB, Bird Life, SEO Bird Life), 2016.

Vagliasindi, G.M.: "Contribution to conclusions and recommendations on environmental crime: Environmental Liability." Study in the framework of the EFFACE research project, 2016.

Vagliasindi, G.M.: "Directive 2008/99/EC on Environmental Crime and Directive 2009/123/EC on Ship-source Pollution". Study in the framework of the EFFACE research project. Catania: University of Catania 2015.

Van Calster, Gert and Reins, Leonie: "The ELD's Background", in Bergkamp et al. (eds.), The EU Environmental Liability Directive: A Commentary, Oxford, Oxford University Press 2013, pp.9-30.

Van Den Broek, G.M.: "Environmental liability and nature protection areas: Will the EU Environmental Liability Directive actually lead to the restoration of damaged natural resources?", Utrecht Law Review, vol. 5, iss.1, 2009, pp. 117-1331

Wenneras, Pal: "The Enforcement of EC Environmental Law", Oxford, 2007.

Winter, Gerd, Jans, Jan. H., Macrory, Richard and Krämer, Ludwig: "Weighing up the Liability Directive", Journal of Environmental Law, vol. 20, iss.2, 2008, pp. 163-186.

## I. Work Plan: Outline

In addition to completing the mandatory courses stipulated in the curriculum of the Doctoral Program in Law, I intend to organize my research work over the course of the next 3 years as follows:

	Work Plan Outline
Year 1	<ul style="list-style-type: none"><li>▪ Locate and organize secondary research materials.</li><li>▪ Research foreign sources on the subject for comparative studies.</li><li>▪ Analyse research material in appropriate detail.</li><li>▪ Research and evaluate relevant case law.</li><li>▪ Categorise into key issues and sub-issues.</li><li>▪ Draft first outline of thesis.</li></ul>
Year 2	<ul style="list-style-type: none"><li>▪ Synthesize various sources, further categorize findings into issues and sub-issues.</li><li>▪ Identify suitable case studies.</li><li>▪ Assess options for amendments of current EU legislation, both at the technical legal and political level.</li></ul>
Year 3	<ul style="list-style-type: none"><li>▪ Synthesize various sources.</li><li>▪ Update and verify authorities.</li><li>▪ Draft conclusion.</li><li>▪ Defend and publish thesis.</li></ul>