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# Weighing up the EC Environmental Liability Directive<sup>†</sup>

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and Ludwig Krämer\*\*\*\*

## 1. Historical Background: From Civil to Administrative Law

One of the most surprising changes which the EU Directive on environmental liability underwent in its final stages of development was the shift from a civil law to a public law compensation scheme. Directive 2004/35<sup>1</sup> essentially provides for a system that requires public authorities to ensure that the polluter restores the damaged environment. All damage which is suffered by private persons, and in particular physical injury and economic loss—the so-called ‘traditional damage’<sup>2</sup>—is not covered. This administrative approach is significantly different from the line of discussion which had prevailed at Community level during the years of preparation of the Directive and which was largely based on a system of private law compensation.

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- 1 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L 143/56.
- 2 See Directive 2004/35, recital 14 and art 3 para 3.

The first Commission proposal on environmental liability in the waste sector<sup>3</sup> and the 1993 Green Paper on the restoration of environmental damage<sup>4</sup> discussed individual and collective compensation mechanisms under a civil law system. The White Paper on environmental liability (2000)<sup>5</sup> differentiated between damage to biodiversity and the contamination of sites<sup>6</sup> and traditional damage. Traditional damage should 'remain under the Member States' jurisdiction', though the planned EC system should include basic provisions on compensation of traditional damage for reasons of coherence and of the close connection between the protection of human health and the environment. In contrast, it should be the task of the EC to put Member States under a duty to ensure restoration of biodiversity damage and decontamination.

In its conclusions, the White Paper stated;

...the Commission considers as the most appropriate option that of a Community framework directive on environmental liability, providing for strict liability – with defences – with respect to traditional damage (namely damage to health and property) and environmental damage (contamination of sites and damage to biodiversity in Natura 2000 areas) caused by EC-regulated dangerous activities.<sup>7</sup>

This means in substance that the White Paper wanted to introduce two things: to *acknowledge*, with regard to traditional damage, the existing national law of Member States which provided for a civil law mechanism, and to *introduce* an administrative law system for damage to biodiversity and to contaminated land. Restoration of the impaired environment was to be an administrative task, and was strongly influenced by the situation in the USA, where at Federal level environmental clean-up was in the hands of the Environmental Protection Agency. The Green Paper,<sup>8</sup> the White Paper,<sup>9</sup> and, in great detail, the explanatory memorandum to the proposal for a directive on environmental liability<sup>10</sup> extensively compared the US situation with that of a future EU

3 Commission (EC), 'Proposal for a directive on toxic and hazardous waste' 19 August 1976 OJ C 194/2; Commission (EEC), 'Amended proposal for a regulation (EEC) of the Council on the supervision and control of transfrontier shipment of hazardous wastes within the European Community' COM (83) 386 final, 12 July 1983 OJ C 186/3; Commission (EC), 'Proposal for a Council Directive on civil liability for damage caused by waste' COM (89) 282 final, 4 October 1989 OJ C 251/3.

4 Commission (EC), 'Green Paper on remedying environmental damage' COM (1993) 47 final, 14 May 1993.

5 Commission (EC), 'White Paper on environmental liability' COM (2000) 66 final, 9 February 2000.

6 Ibid, s 4.5.2: 'Contaminated sites include the soil, surface water and groundwater'.

7 Ibid, s 8.

8 Commission (n 4), in particular annex II.

9 Commission (n 5), in particular s 7.

10 Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage' COM (2002) 17 final, 23 January 2002 OJ C151E, in particular s 4.

system. The Commission thought that the administrative law approach in the USA was reasonable; it only tried to avoid the very high litigation costs in the USA.

To this extent, the White Paper did not meet much criticism from Member States which were much more concerned with the issue of traditional damage which touched upon their national systems of tort law that had been built up and shaped by jurisprudence over decades and even centuries. Each Member State wanted its national system to remain untouched, with differences between common law and civil law approaches added to the difficulties of achieving a common approach. The White Paper received little support from tort lawyers, who argued mainly in the context of their national legal systems. European professional groups were opposed to any EC legislation on environmental liability, while European environmental organisations often lacked the detailed legal know-how to allow their full participation in the debate. In summary, hardly anybody publicly favoured an EC system on liability for traditional damage while the restoration of the impaired environment was generally considered to be a public responsibility.

This discussion finally caused the Commission to renounce any proposals on the approximation of the national systems on tort law with regard to traditional damage and to limit its legislative proposal to introducing administrative responsibility for the prevention and restoration of environmental damage. As a consequence, the Commission even considered deleting the word 'liability' from the title of the proposal,<sup>11</sup> but decided to retain the term because of the political attractiveness of the notion of 'environmental liability'. As Member States had, for obvious reasons, no objection to the proposal's limited field of application, the Commission's approach was followed, despite some attempts by the European Parliament to have traditional damage re-instated in the Directive.

## **2. Terminological Disentanglement**

European Community law has to be created against a background of different legal traditions, and this has proved particularly complex in dealing with issues concerning liability where all national systems already have well developed approaches. Terms such as 'civil liability', 'public liability', 'administrative liability' and 'environmental liability' peppered the debates and discussion papers, but often in an ill-defined way, even though they may well resonate rather differently from jurisdiction to jurisdiction. This lack of clarity as to precisely what was being considered at any particular time certainly did not always assist a clear development of the Directive.

11 Commission (EC), (n 10) 132.

The way in which particular categories of law are classified can differ from jurisdiction to jurisdiction, especially between civil law and common law traditions. It may be obvious to a lawyer from a civil law tradition that the concept of 'civil liability' is confined to liability under private law, and to dealing with wrongs that are equivalent to torts in a common law jurisdiction. In contrast, clean-up and cost recovery powers available to public authorities would seem clearly to fall within the realm of public or administrative law. Yet a common lawyer would not necessarily make such a clear distinction where categories of law have often been based on the law administered by different courts rather than the fundamental nature of the rules themselves.<sup>12</sup> There is no distinct set of administrative courts or tribunals in a country such as the UK with the result that what might be described as administrative areas of law are often handled by ordinary civil or criminal courts. To take one example in the environmental field, the Environment Agency has statutory powers to carry out remediation work in respect of water pollution and to recover the costs of doing so from the polluter.<sup>13</sup> Any such recovery is taken in the ordinary civil courts as a civil claim, and could be considered as a form of civil liability but one owed to a public authority.

Even where the Commission's White Paper clearly moved away from its focus on civil liability in the narrow sense to public liability, confusion can still reign. Thus in a standard British work on environmental law, the chapter headed 'Civil liability for environmental damage' is focused mainly on traditional torts and private law liability but then concludes with a section on the Commission's White Paper.<sup>14</sup> To take another example, to the civil lawyer, the whole field of criminal law may legitimately be considered to fall within the scope of 'public law' as an area involving the state and citizen. To the common law lawyer the term 'public law' does not necessarily include criminal law but is focused on administrative and constitutional law.<sup>15</sup> Even the term 'liability' can present different resonances. German law, for example, distinguishes between 'liability' (Haftung) implying the liability to compensate and 'responsibility' (Verantwortlichkeit) indicating a broader range of obligations including that of carrying out remediation. In that context the Directive might have been more accurately entitled the Directive on Environmental Responsibility. Common law usage, however, would not make such a clear formal distinction between the two types of obligation, and terms such as 'liability, or 'liable for' could encompass both types, depending on context.

12 R David and J E C Brierley, *Major Legal Systems in the World Today* (3rd edn Stevens & Sons, London 1985) 81.

13 Water Resources Act 1991, s 161.

14 Hughes et al, *Environmental Law* (4th edn Butterworths, London 2002) 147.

15 Walker (ed) *Oxford Companion to Law* (Oxford University Press, Oxford 1980) 1014: 'Criminal law and procedure are sometimes included in public law, and are at least akin to public rather than to private law, but are sometimes considered distinct from both'.

It may well be that old divisions between private and public law have to be reconsidered in the light of contemporary environmental and other social challenges.<sup>16</sup> Certainly the reference to ‘Environmental Liability’ in the title to the Directive in itself gives little clue as to the final focus of the Directive on administrative liabilities or responsibilities, and indeed may add to the confusion for a national lawyer or non-legal expert. One of the lessons to be learnt from the lengthy period of development of the Directive is the continual need to be absolutely clear as to the concepts being used, and to be alive to the possibility of confusion that can arise from the loose use of linguistic terms that may resonate differently in different jurisdictions. In the context of the subject matter of the Directive, a more robust basis for discussion would be to acknowledge that the concept of ‘environmental liability’ can encompass at least three distinct categories of liability: civil liability under private law; criminal liability; and administrative responsibility,<sup>17</sup> and to be explicit in any discussion as to which concept is being referred to.

### 3. Added Value from the Directive

Compared to some of the initial aspirations, the final Directive is clearly limited in scope, and can all too readily be criticised as having little real significance or added value. But a closer examination indicates significant new elements that have been introduced by Directive 2004/35 as compared with the existing legislation of many Member States. Our perspective is from that of the EC law maker who may find that some of the new elements are already present in one or more national legal orders but lacking in others. This may be considered reason enough to introduce harmonising and indeed proactive legislation at the EC level. The following elements can be identified as filling loopholes in most or at least some of the national liability regimes.

#### 3.1 Environmental Damage

The Directive’s most significant innovation is that liability is extended to environmental damage as such.<sup>18</sup> In contrast to most civil liability schemes, liability is not dependent on whether the environmental good belongs to someone’s property. The water, habitat or soil damaged may be in private ownership but does not have to be. The Sandoz case could have been handled better under

16 See F Cafaggi, ‘A Co-ordinated Approach to Regulation and Civil Liability: Rethinking Institutional Complementarities’ in Cafaggi (ed) *The Institutional Framework of European Private Law* (Oxford University Press, Oxford 2006).

17 The main divisions in a recent recent UK legal text book, B Jones and N Parpworth, *Environmental Liabilities* (Shaw and Sons, London 2004).

18 See the definition of environmental damage in art 2(1).

the new approach. The ecosystem of the Rhine was polluted by toxic spill-overs from a Swiss chemical installation, but any duty to compensate was difficult to justify because the ecosystem was nobody's property. Now authorities could (provided Switzerland transposes the directive) order the operator to take remedial measures. On the other hand if the environmental damage causes additional damage to a person's property the directive does not provide liability for this.<sup>19</sup> Instead, any existing civil law remedies in national law would have to be relied upon.

### 3.2 Making the Operator Liable

Although the Directive does not touch upon duties of operators in the horizontal dimension (i.e. in relation to other private interests), it does establish operator duties in relation to the public interest. Operators are obliged to prevent, notify and manage environmental damage.<sup>20</sup> This is a fairly clear formulation of the causation principle.<sup>21</sup> Although the principle was already contained in the Commission proposal, this had made the operator's obligations to take preventive, informative or management measures largely dependent on related requirements being first made by the public authorities.<sup>22</sup> On the Council's insistence, the operator now bears a primary responsibility to prevent, notify or manage damage even without being ordered to do so. Establishing basic obligations independent from administrative command is an innovation in legal doctrine for many Member States.<sup>23</sup> It contributes to an entrepreneurial culture which takes environmental protection as a matter of self-responsibility rather than exclusively of bureaucratic command.<sup>24</sup>

19 See recital 14 and art 3(3).

20 Article 5(1) and (2), art 6(1).

21 The approach could have been perfected by extending the basic duty to also remediate damage. Under the present Directive [art 7(2)] the operator can wait for administrative orders in that respect.

22 Articles 5(1) and 6(1) of the Commission proposal (n 10). A primary responsibility of the operator was foreseen by art 5(2) in relation to preventive action.

23 For instance, in the German administrative law tradition operators are free to act as long as they are not ordered by administrative act to do otherwise. Therefore, an operator was entitled to pollute the environment if this remained within the conditions set by his authorisation. Since the 1970s, environmental laws have employed the technique to formulate so-called basic operator duties (Grundpflichten), such as in s 5 Federal Immissions Act (Bundesimmissionsschutzgesetz, BImSchG). For example, the operator is obliged to constantly adapt his installation to best available techniques (s 5 para 1 n 2 BImSchG). Such rules of good practise are not sanctioned but rather aimed at the organisational culture of the enterprise.

24 See M Führ and G Roller, EG-Umwelthaftungs-Richtlinie und Biodiversität, *Natur und Recht* (2006) 67–75, 74



### 3.3 Extensive Primary Obligations of the Operator

The Directive distinguishes between the primary duty of the operator to act (or follow a related administrative order) and the secondary duty of bearing the cost (or having a claim to recompense from the state or third parties).<sup>25</sup> The operator is freed from the primary duty only if the activity was authorised in the public interest in accordance with Article 6(3) and (4) or Article 16 of Directive 92/43, Article 9 of Directive 79/409 and Article 4(7) of Directive 2000/60.<sup>26</sup>

In the other cases the operator must by himself prevent, notify and manage any damage, and he may be ordered to do so. This applies even in those situations where the damage was caused by a third person, resulted from an instruction of a public authority, was caused in accordance with an authorisation in his private interest, or was caused by an activity deemed safe according to the state of knowledge (the so-called third party, instruction, authorisation and state-of-the-art situations).

Regarding the secondary duty, however, in the third party and instruction situation the operator must be dispensed from bearing the costs he may have incurred, while in the authorisation and state-of-the-art situations Member States may dispense him from the costs.<sup>27</sup> This secondary relief reverts back to the primary duty in that the authority is entitled (but not obliged) to take the necessary measures by itself.<sup>28</sup>

From a civil liability perspective this may sound unfamiliar, because even in strict liability schemes the said exceptions are normally accepted. In administrative law, however, this is not necessarily so. In cases of accidental significant damage, sectoral administrative law or general police power law in some Member States<sup>29</sup> establish responsibility of persons causing damage or having command over a damaged site without regard to situations of third party intervention, instruction, authorisation or state of the art. Any undue hardship for the operator can be taken account of by application of the proportionality principle.

Although the cascade of responsibilities (i.e. the duty of the operator to notify, prevent and manage—the power of the authorities to order prevention, management or remediation—and the power of the authorities to take preventive, managing or remediative measures by themselves) appears as logically coherent, there remain doubts in relation to environmental damage which is

25 Likewise G Betlem, 'Scope and defences of the 2004 Environmental Liability Directive: Who is Liable for What?' *ERA Forum* (2005) 6(3), 376.

26 Article 1(1) (a) (2) and (b).

27 Article 8(3) and (4).

28 Articles 5(3) (d), 6(3).

29 For instance, see on the German law D Greinacher, 'Bahnbrechend Neues oder alles wie gehabt? – Umsetzung der Umwelthaftungsrichtlinie in deutsches Recht' *Produkthaftpflicht International* (2007) 1, 6.



not accidental but intended by authorisation or even instruction. In these cases, if the adverse effect is to be abated according to the provisions of the Directive, the authorising or instructing administrative act must in some way be altered with a view to readjusting its legalising effect. The Directive leaves it to the Member States to solve this intricate question.

### 3.4 *Repairing the Damage*

Another important new feature of the directive is its focus on repairing damage.<sup>30</sup> Member State legislation often does address the issue of environmental damage by giving powers to administrative authorities to intervene. This is settled law in civil law countries though common law countries may sometimes require the administrative agency first to obtain an order from a court.<sup>31</sup> These powers, though, tend to be confined to stopping the damaging activity and normally do not encompass requirements to remediate existing damage. Only in specific cases, for instance where the environmental damage continues to cause further harm (such as contamination of land causing continuous toxic evaporations or leakages into the groundwater) do special environmental laws or general police law in some Member States provide for powers to order the clean-up of the site.

### 3.5 *Requiring Cost Recovery of Remedial Action*

If the operator fails to comply with the obligations to take remedial action and the competent authority has taken the necessary measures itself, the authority may and shall recover the costs from the operator.<sup>32</sup> This possibility is already provided by police power laws of some Member States, but if so this is generally framed as only a right. The Directive makes it an obligation following the EC's interest in preventing Member States subsidies.

Cost recovery must be distinguished from fines for administrative infringements. The latter are provided by current rules in most Member States. But they presuppose that the act causing the damage resulted from the intentional or negligent breach of law. In contrast the Directive is largely independent of illegality and blame.

30 Article 7.

31 For powers of issuing statutory notices, and ways to improve those as part of a more sophisticated system of sanctions see R B Macrory, *Regulatory Justice: Making Sanctions Effective* (Cabinet Office, London 2006). <<http://www.cabinetoffice.gov.uk/regulation/penalties>> accessed 21 February 2008. In many areas of environmental law, however, administrative bodies have powers to serve various forms of notices requiring compliance or clean-up which may be appealed against to the courts.

32 Article 8(2).

Yet another kind of payment operated by many Member States is charges on the causation of environmental damage, such as the charge on the emission of waste water into public waters. The goal there is different however: the charge is most often calculated to give an incentive not to pollute while the recovery of costs exactly mirrors the costs incurred by the remedial action.

### 3.6 Making Public Operators Liable

Directive 2004/35 provides that public administrations that cause environmental damage are in no way to be treated differently from private operators.<sup>33</sup> This is an innovation in the legal orders of some Member States. Administrative agencies that render services and thereby cause environmental damage are generally not subject to the supervisory powers of other agencies. If they breach environmental laws it is normally expected that they rectify the breach on their own initiative.<sup>34</sup> In contrast, in common law countries the administration is (except for some prerogative powers of the Crown) treated like a private person, and when rendering public services is still obliged to act within the law.

### 3.7 Pushing Supervisory Agencies to Act

A major achievement of Directive 2004/35 consists of the right of interested natural and legal persons to request action and invoke legal review of inaction.<sup>35</sup> This provides individual persons and Non-Government Organisations (NGOs) with a significant means to drive passive agencies to make use of their powers of preventing and remedying environmental damage. It is true that some Member State legal orders already allow for such third party intervention,<sup>36</sup> but normally such rights do not lead far because courts concede supervisory agencies a more or less broad discretion as to whether and how

33 See the definition of 'operator' in art 2(6).

34 For Germany see Christoph Gusy, *Polizeirecht* (5th edn Mohr Siebeck, Tübingen 2003) 66–69.

35 Articles 12 and 13.

36 For instance in the Netherlands, see, e.g. K de Graaf and J Jans, 'Liability of Public Authorities in Cases of Non-enforcement of Environmental Standards' 24 *Pace Environmental Law Review* (2007) 377 and A B Blomberg and F Michiels, 'Between Enforcement and Toleration of Breaches of Environmental Law - Dutch Policy Explained' in T Etty and H Somsen (eds), *The Yearbook of European Environmental Law* (vol. 4, OUP, Oxford 2005) 181–208. In Germany third parties can invoke the administrative courts to order an administrative authority to intervene if the third party has a subjective right, i.e. if the polluter has acted in breach of a norm which is aimed at the protection of the third party. This has been the constant jurisprudence of German courts since the landmark decision of the Federal Administrative Court of 18 August 1960, BVerwGE 11, 59. Associations representing a collective interest are however denied such right.

to take action.<sup>37</sup> Yet nowhere has this right been as clearly codified as it is in the Directive.

## 4. Drawbacks of the Directive

As we have indicated, Directive 2004/35 contains important innovations that provide added value to existing environmental liability and remediation laws in many Member States. But not all are positive, and this section identifies a number of problematic areas which have been left unresolved in the final version.

### 4.1 *Scope of Application*

Liability does not apply to damage caused by ‘a natural phenomenon of exceptional, inevitable and irresistible character’.<sup>38</sup> This is in principle acceptable because the overall approach of the Directive is to address damage induced by humans. However, a major problem may arise with the growing frequency of extreme climatic events. As they are generally considered to be caused or induced by emissions of man-made climate gases, they can hardly anymore be regarded as ‘natural’. However, it is unlikely that any individual operator can be identified as causative—a situation called orphan damage. Therefore, the Directive should have made administrative agencies liable to take remedial action in such circumstances. This had been proposed by the Commission but, driven by Member State concerns about incurring costs, the Council decided otherwise.

### 4.2 *Exemption of International Treaties*

Directive 2004/35 excludes from its application environmental damage from accidents of sea and land transport causing spills of oil and other dangerous substances. The reason for this is that these risks are considered to be sufficiently taken care of by a number of international conventions to which most of the Member States are signatories.<sup>39</sup> However, the remedies provided by the conventions are much less refined in respect of who is obliged to take measures, what measures must be taken, who bears the costs, and—most

37 For instance in the Netherlands it was explicitly acknowledged by the government in the Explanatory Memorandum to the implementing Bill (*Memorie van Toelichting*, Kamerstukken 30 920, pp. 9–10) that the ‘standard’ discretion normally available to public authorities is not available here.

38 Article 4(1) (b).

39 Article 4(2) and Annex IV.

importantly—how inactive administrations can be urged into action.<sup>40</sup> The Directive's assumption that these Treaties provide a satisfactory alternative is therefore questionable.

### 4.3 Scope of 'Environmental Damage'

Environmental damage is defined in the Directive as damage to species and habitats, water and land. Species and habitats are only included insofar as they are protected by Directives 79/409<sup>41</sup> and 92/43,<sup>42</sup> though Member States can go further and include species and habitats outside this narrow scope. The Directive should have introduced a fuller harmonisation by extending the notion of environmental damage to all species and habitats protected under Member State national law, and given the cross-border interrelatedness of species and habitats, we believe this would have been compatible with the subsidiarity principle.

In relation to land damage it is perplexing that damage to land other than contamination (such as land erosion) was not addressed by the directive. Moreover, land contamination is only considered as damage if creating a significant risk to human health.<sup>43</sup> This restriction is hardly justifiable. Protected species, habitats and waters are protected under the Directive as such, not just when damage to them creates risk of human health. Why should this principle not be equally applicable to land contamination? The soil is not a lesser environmental component than species, habitats and waters, and indeed could be considered an even more important underlying environmental resource.<sup>44</sup>

### 4.4 Discretion and Obligations of Authorities to Intervene

According to the Directive<sup>45</sup> the competent authority may at any time require the operator to prevent damage, to control and manage the contaminants and

40 See the related comments of the Economic and Social Council in its opinion on the 'Communication from the Commission to the Council and the European Parliament on European contract law' COM (2001) 398 final [2002] OJ C 241/162, [3.2]. The qualification in art 4(3) '... which is in force in the Member State concerned' at least makes the Directive applicable on those Member States which have not ratified and incorporated into their national law the said international conventions.

41 Council Directive (EC) 79/409 of 2 April 1979 on the conservation of wild birds [1979] OJ L 103/1.

42 Council Directive (EC) 92/43 of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.

43 Article 2(1) (c).

44 See for example Royal Commission on Environmental Pollution, *Sustainable Use of Soil* (19th Report HMSO, London 1996)—'The way we exercise our stewardship of soil will be of critical importance in determining whether sustainable development can be achieved' ([1.19]).

45 Article 5(3) (b) and (c) and art 6(2) (b) and (c).

other damage factors, or take remedial measures. This must first of all be noted as a major achievement—in particular in relation to those legal systems which do not provide authorities with powers to serve notices but rather refer them to the courts. Moreover, the authority is now not only entitled but even under an obligation to require that such preventive or remedial measures are taken by the operator.<sup>46</sup> Alternatively the authority may take preventive or remedial measures itself provided the operator fails to comply with his obligations, cannot be identified, or is not required to bear the costs.<sup>47</sup> A drawback involved here is that the administrative authority is not obliged (but only entitled) to take such measures itself, if orders addressing an operator appear futile. This means that in many cases environmental damage will remain unabated or untreated because public authorities will refer to budgetary restrictions and the difficulty of recovering costs from non-complying or unidentifiable operators.

#### 4.5 *Standing to sue for NGOs*

The Directive provides NGOs with the right to submit to the competent authority any observations concerning environmental damage and to request action. The authority must make a decision in response to the request.<sup>48</sup> Standing for this right depends on whether the NGO has ‘a sufficient interest in environmental decision making relating to the damage’.<sup>49</sup> Reiterating a formula contained in Directive 2003/35<sup>50</sup> which in turn repeats the same formula of Article 9(2) of the Aarhus Convention<sup>51</sup> the Directive specifies what sufficient interest shall mean in the case of NGOs:

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c).<sup>52</sup>

This provision considerably broadens the scope of procedural rights of environmental NGOs. However, by providing that ‘this Directive shall be without prejudice to any provisions of national law which regulate access to justice...’

46 Article 5(4) first sentence and art 6(3) first sentence.

47 Article 5(4) second sentence and art 6(3) second sentence.

48 Article 12.

49 Article 12(1) (b).

50 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17, art 3(7) and 4(4).

51 Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark, on 25 June 1998.

52 Article 12(1) (3).

Article 13(2) allows Member States not to extend this broad version of standing in administrative complaint proceedings to court proceedings.<sup>53</sup> This is a significant retreat from recent progress made on the European level in relation to NGO rights to judicial review.

## 5. Transposition by Member States

It is not the aim of this section to give a comprehensive account of the state of transposition of the Directive into Member States' law, but a number of examples will highlight problems of implementation which have emerged in some States. While the Directive allows Member States to maintain own systems if they meet its minimal standards, some States may have already fulfilled most of the Directive's requirements and even go beyond them. Others may have substantially to amend their legislation in order to bring it up to standard. A third group may even be tempted to take the shortcomings of the Directive as an excuse to draw back from stricter standards.

### 5.1 Germany

Germany has promulgated a federal 'Act on Environmental Damage' (Umweltschadensgesetz, USchadG) that entered into force in December 2007—i.e. eight months late. As the federal law leaves the introduction of an authorisation and state-of-the-art excuse to the Länder (states), additional Land legislation may be enacted in the future. However as these topics concern exceptions from rules set by the Bund, the Bund law will be applicable even if the Länder remain inactive.

In general, German legislation had largely already attained the standard of the Directive before the latter was enacted. This is due to the fact that environmental and general administrative law—the main focus of the Directive—is well developed in Germany. Thus, powers of ordering causers to prevent and remediate environmental damage on a non-fault basis were already widely available to administrative agencies. For instance, according to Bund and Land nature protection legislation, any adverse effect of projects on Natura 2000 sites could be prohibited and ordered to be remediated.<sup>54</sup> The same is true for damage caused to water<sup>55</sup> and the soil.<sup>56</sup>

53 In the Commission Proposal this proviso was not then included: see the related art 15(2) of the proposal.

54 See, for instance, ss 5 and 26b Nature Protection Law Baden Württemberg.

55 For an explicit power to order remedial measures in case of water pollution see art 68a Water Act Bayern.

56 The Federal Law on Soil Protection lays on the causers extensive duties of prevention and remediation, and the authorities with corresponding powers to command, see s 4 and 10.

Nevertheless, in some respects German law had to be and was improved. In relation to nature and water protection (but less so in relation to soil protection) the basic obligations of operators to investigate, notify, prevent, manage and remediate damage are somewhat fragmentary. The new USchadG provides a more systematic catalogue both of basic obligations and of administrative powers.

This has three consequences: first, in cases of imminent or existing damage, operators are now under a comprehensive duty to inform the competent authority of all relevant aspects of the situation. Second, in the present system authorities, although having powers to act against those causing damage, have often taken remedial action themselves, rarely looking for compensation of costs from the former. The new system refers them to making causers act in the first instance. Finally, thus far administrative agencies had only powers but not obligations to order operators to take action. Under the new law they are obligated to make use of their powers.

Before, they could also hardly be taken to court to act. On the basis of the Directive, Germany had not only to establish third party rights of complaint but even to introduce the association action much disliked in the German tradition of confining legal protection to individual rights. Following this reticence, the USchadG has introduced a somewhat hinged version of association action. Associations are given standing to sue inactive administrative agencies only if the relevant legal provisions claimed to be breached protect individual persons.<sup>57</sup> This is hardly in line with what the Directive means when it says that 'such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c)'.<sup>58</sup> However, as stated above, unfortunately Article 13(2) dispenses Member States from this requirement.

A further point of improvement concerns the relationship between the duty to act and the bearing of costs. The German USchadG establishes a basic obligation on the operator to prevent, notify and manage environmental damage. Although there may be doubts as to the interpretation of the Directive in this respect<sup>59</sup> the USchadG obliges operators to take measures even if the Article 8(3) and (4) exceptions apply—in other words, even if the activity was authorised or corresponded to the state of the art and the law.<sup>60</sup> They have to do this in the first instance and may then, if the law explicitly so provides, recover their costs from the state or other responsible persons. That this rather far-reaching concept was accepted by the German legislator is somewhat astonishing, because not only the civil liability tradition but also

57 Section 11 (2) UmwSchG referring to art 2 para 1 no 1 Act on Environmental Legal Remedies (Umweltrechtsbehelfsgesetz).

58 Article 12(1) (4) sentence 2. The formula is the same as that contained in Directive 2003/35 (n 50). Its transposition by the German Umweltrechtsbehelfsgesetz is widely regarded to violate the directive.

59 See chapter 3.3 above.

60 Sections 5 and 6 USchadG.



environmental law generally involve the authorisation and state-of-the-art exceptions. The reason for this further step is that German police power law establishes responsibility of causers of damage irrespective of whether the activity was authorised. For example, if a tank crashes on the road spilling oil onto the neighbouring field, the operator must remove and clean the contaminated soil irrespective of whether the truck and transportation was fully licensed. Police power law is, however, largely confined to cases of accidental and very serious damage. The new law extends this to creeping and 'normal' (albeit significant) damage. Land legislation will have to come up with a prudent delimitation in this respect.

In some respects the Directive goes less far than the German law as it stood. This is particularly true for the definition of damage to soils. The confinement to damage to human health was not applicable under then valid German law. The legislator has later on not lowered its standard. This means that if damage to soil is imminent or has occurred the causer is responsible for preventing or remediating this even if there is no danger to human health.<sup>61</sup>

Inversely, the German law has not taken the opportunity of the Directive to extend the previous liability scheme. For instance, the definition of damage to nature was restricted to Natura 2000 sites and species and not extended to national protected areas, biotopes or species. This is not to say however that these are not at all protected against damage. Specific legislation in that respect does exist but without the somewhat more conclusive clout the Directive provides.

## 5.2 The Netherlands

The Dutch legislator has failed to implement the Directive in time, and a draft Bill is currently being discussed in Parliament.<sup>62</sup> Finalisation of the parliamentary process is expected sometime in 2008. The draft bill will add a complete new section to the *Wet milieubeheer* (WM) (Environmental Management Act) specifically devoted to the implementation of the Directive. The main argument for choosing implementation within the *Wet milieubeheer* rather than the Dutch Civil Code was that it was felt that the Directive had a more public rather than a private law character.<sup>63</sup> The main reasons for implementation within a general piece of legislation rather than in different sectoral pieces (such as the Surface Waters Act and the Flora and Fauna Act) were related to transparency, consistency, uniformity and legal clarity. The idea of more defragmented sectoral implementation was therefore rejected.

61 R Brinktrine, 'Der Bodenschutz im Umweltschadensgesetz', *Zeitschrift für Umweltrecht* (2007) 337–346, 345.

62 Kamerstukken 30 920.

63 Cf. also E H P Brans, 'Het wetsvoorstel tot implementatie van de EU richtlijn Milieuaansprakelijkheid (2004/35/EG)', *Tijdschrift voor Milieu en Recht*, 2007/9, 536–545.

The prevailing implementation policy in the Netherlands at the moment is that implementation should be restricted to do what is necessary to comply with the minimum requirements of the Directive. This doctrine is reflected in the bill (and its Explanatory Memorandum) quite clearly. 'Gold plating' is avoided; no use of Article 176 EC was being envisaged in the original proposal. The following example is illustrative. There is an explicit statement in the Explanatory Memorandum that the Netherlands will not make use of their power to extend the scope of application to other activities. However, during the debate in Parliament it was argued that the scope of the implementing bill should cover *all* activities which might cause environmental damage and not to restrict the scope to Annex III activities only. The government acknowledged that it was prepared to discuss this matter in the future.<sup>64</sup>

Given this context, it is hardly surprising that the Dutch government opted to follow all the exclusions mentioned in Article 4 of the Directive. Furthermore, with respect to the key provisions in the directive (e.g. 'environmental damage') there is either a direct reference to the corresponding definition in the Directive, or the text of the Directive is copied into the implementing legislation. This means that the legislator uses distinct terminology only for reasons of internal consistency with other pieces of legislation [for instance, other sections in the WM or when there is conflict with the terminology of the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*)].

As to implementation of Article 8(4) of the Directive (licence defence; state-of-the-art defence), one could say that the Dutch legislator does go beyond just meeting the minimum requirements of the Directive. These optional clauses will be implemented in Dutch legislation (Article 17.16 WM) albeit in a mitigated manner. The competent public authority may decide not to recover the costs (provided there is a successful licence or state-of-the-art defence) when a decision to do so would be *unreasonable*. That means that the threshold for not having to pay for the costs is higher than required by the Directive. It is however not quite clear under which circumstances such a full recovery would amount to *unreasonableness*. The Explanatory Memorandum speaks of 'exceptional circumstances' and that the burden of proof lies with the operator. It is however clear that the concept of *unreasonableness* is only applicable vis-à-vis the licence or the state-of-the-art defence. Additional circumstances (possible bankruptcy, economic consequences in general, consequences for the employment) are not taken into account.<sup>65</sup>

64 Cf. for the original documents *Kamerstukken II* 2006/2007, 30 920, no 3, p 4 and 7, no 13 and 17.

65 It could be argued that the threshold of *unreasonable* is necessary to have this provision being able to be interpreted in conformity with the proportionality principle (enshrined in art 3:4(2) *Algemene Wet bestuursrecht*; Dutch General Administrative Law Act, GALA). In general, Dutch administrative law—with respect of recovery of costs by public authorities in enforcement issues (art 5:25 GALA) has a similar threshold.

### 5.3 Poland<sup>66</sup>

The Environmental Liability Directive has been transposed into Polish law through the Act of 13 April 2007 on prevention and remedying of environmental damages, published on 26 April 2007,<sup>67</sup> and in force since 30 April 2007. The majority of the Directive's provisions seem to be transposed correctly, and in some cases the Polish legislator adopted even more stringent measures than the minimum required by the Directive. For instance, the Act defines damage to protected species and habitats as damage to all species and habitats protected under the Polish Nature Conservation Act of 2004 and not only to those protected under the Habitat and Birds Directives. In addition, the Act does not provide for the operator to rely on a 'permit defence' or a 'state-of-the-art defence' provided for by Article 8(4) of the Directive. It is noteworthy that such defences were included in the first draft of the Polish act, but were deleted later in the legislative process. The decision not to include such defences, especially the 'permit defence', corresponds well with the traditional approach towards liability for environmental damage in Poland. Already in the period 1960–80 the courts in series of verdicts (with a landmark verdict of the Polish Supreme Court in 1970/III CZP 17/70) made it clear that compliance with environmental standards, and particularly with permits, did not exclude civil liability for environmental damage. Furthermore, it should be noted that the rights under Article 12 of the Directive are granted to 'everyone', and not just to 'affected' persons.

The main problem with transposition concerns a specific exception from the liability rules which was introduced by Article 5(2) of the Act. Under this provision the Act does not apply to the 'forest management carried out in compliance with the rules of sustainable forest management as referred to in the Forest Act of 1991'. This exception was not provided for by the Government in any of the various drafts of the Act, but was introduced at the very last stage of the legislative procedure by the Higher Chamber of the Parliament (Senate). The exception means that the whole legal regime of the Act does not apply to damage caused by activities related to forest management—so, for example, damage to protected species caused by use of biocidal products may be exempted from the scheme if use of such products is envisaged by a forest management plan. However, such an exclusion does not seem to be allowed by the Directive.

### 5.4 Spain<sup>68</sup>

Spain transposed Directive 2004/35 into national law by Ley 26/2007 which entered into effect the day after its official publication (partially with

66 This section relies on the papers by Jerzy Jendroska, Magdalena Bar and by Barbara Iwanska presented at the avosetta conference. See [www.avosetta.org](http://www.avosetta.org)

67 Polish Journal of Laws no 75, item 493.

68 The section relies on the paper by A. Moreno and A. García Ureta presented at the avosetta conference. See [www.avosetta.org](http://www.avosetta.org)

retroactive effect) on 30 April 2007. Prior to this legislation, Spanish law, fragmented and split up in numerous national and regional legislative provisions, was essentially based on three pillars. First, damage to private property—a private forest or private land—caused by public acts gave victims the right to ask for compensation. If this was denied, the responsible agency could be sued before the administrative courts. Second, damage to private property that was caused by private persons was regulated in particular by Articles 1902–1908 Spanish Civil Code. Litigation went to the civil courts. Third, damage to the natural environment, such as damage to natural habitats, water, soil or the air was to be dealt with by the administration under administrative law. Where a private person is found to have violated a specific regulatory act, the administration may ask that person to stop the polluting activity and to restore the damaged environment. It may also impose on that person a financial penalty—independent of the restoration costs—and the obligation to pay for the damage caused.<sup>69</sup> Against any such decision, the private person may appeal to the administrative court.<sup>70</sup> Local authorities may—the legislation even declares that they have the obligation to do so—take action against polluters, where the environment—soil, mountains, air and so on—of their territory is impaired. And if they do not act, local citizens may substitute them in such action.<sup>71</sup>

The new Ley 26/2007 almost exclusively addresses the third part of this system, though it does not delete or abrogate the liability or procedural provisions of any of the three parts of the existing system. The interdependency between the existing rules, in particular of the third part, and the new provisions was not addressed by Ley 26/2007 and will thus have to be clarified by the courts.

Current Spanish law allows the administration to order restoration or the payment of damages, when the responsible undertaking acted by fault. The system of *strict* liability, imposed on operators of activities that are listed in Annex III of the Directive—and annex III of Ley 26/2007—constitutes a new, significant step in making the restoration of the environment or the payment

69 See in particular arts 130(2) and 98 of Ley 30/1992, of 26 November, on the Régimen Jurídico de las Administraciones Públicas y del Procedimiento Común.

70 As an illustration the mining accident of Aznalcollar of 1998 may be quoted. In this case, the Spanish Government restored itself the damaged environment and asked the responsible company to pay (i) an administrative penalty for the infringement of the existing legislation (601.012 €), (ii) the costs for the restoration of the damaged environment that had been extended by the Spanish Government (41, 6 million €) and (iii) for the damage caused to the aquatic environment (2,870 181, 66 €).

71 See generally on the Spanish law on environmental liability prior to the Directive B Lozano Cutanda, 'La Responsabilidad por danos ambientales: la situación actual y el nuevo sistema de responsabilidad pública que introduce la directiva 2004/35/CE' *Revista Electrónica de Derecho Ambiental* no 12, 13, December 2005. <<http://vlex.com/vid/286018>> accessed 21 February 2008.

of damages in Spain easier. Overall, Ley 26/2007 also goes further than Directive 2004/35 in the following respects:

- it covers not only those species of fauna and flora that are protected by EC directives, but also those that are protected by national or regional Spanish legislation, in particular those that are listed in national or regional lists of endangered species;
- it also covers species that are protected by international Treaties ratified by Spain, which stay permanently or temporarily on Spanish territory, and thus, in particular migrating species;
- it also covers habitats that are protected by national or regional Spanish legislation;
- it includes habitats that are protected by international Treaties which have been ratified by Spain;
- it concerns environmental damage to species and habitats, water and the soil, as in Directive 2004/35, but deals with damage caused to all these elements by activities other than those enumerated in Annex III to the Directive, and not, as in Article 3(1) (b) of the Directive, with damage to species and habitats;
- Annex III to the Directive lists the activities for which it introduces a non-fault liability, by referring to EC directives and regulations; Ley 26/2007 refers to the corresponding Spanish legislation. Thus, where this national legislation covers more activities than the EC legislation, damage caused by such activities also comes under the strict liability system;
- it establishes a rebuttable legal presumption that an activity under Annex III has caused a damage, when the activity is capable of causing such a damage.<sup>72</sup>

Ley 26/2007 almost literally transposes the Directive with regard to the so-called ‘instruction defence’ (Article 8(3) of the Directive): the operator is not liable, when he proves that he complied with an order or instruction by a public authority. It is expressly specified that a general permit or the approval of a project by an administration does not constitute an order or an instruction (Article 14(1) and (2) of Ley 26/2007); where the damage was caused in compliance with a specific permit, the burden is on the operator to prove that he fully complied with the permit and with the existing legislation.

The exclusion of development risk (Article 8(4) (b) of the Directive) is included in Ley 26/2007, though the operator has to prove that the activity, emission or the use of a product was not considered to be potentially damaging

72 ‘It shall be presumed that an economic activity... has caused the damage... when, in view of its intrinsic nature or the form in which it was deployed, it was capable of causing the damage’, art 3(1) of Ley 26/2007.

for the environment.<sup>73</sup> In any case covered by Article 14 of Ley 26/2006, the operator remains obliged to prevent or restore damage to the environment. In such cases, he may recover the costs from third persons or public authorities.<sup>74</sup>

Environmental organisations may trigger administrative activities concerning the restoration of the damaged environment, following Article 12 of the Directive. Such organisations must be legal, non-commercial persons, have in their statutes the objective to protect the environment, must have existed for at least two years, and be active in the geographical area where the damage or the threat of damage occurred; the Spanish regions may authorise other organisations (Article 41). Apart from that, owners of the land where the restoration is to take place also have this right.

Where several operators have caused damage (Article 9 of the Directive) they are jointly liable. Operators who come under Annex III of Ley 26/2007 are obliged to establish a financial security in order to cover the risks of environmental liability. This risk is to be determined on a case-by-case basis by the public authorities. The maximum amount is €20 million. No insurance obligation exists where the damage is likely not to exceed €300,000, and where the likely damage is situated between €300,000 and €2 million, the operator is exempted, provided he comes under the EC-EMAS or the ISO 14001 regimes. The system of financial security will come into effect when the Government so decides, but at least before May 2010.

Overall, it appears that the provisions of Directive 2004/35 were integrated into the Spanish legal system without too many legal, conceptual or institutional difficulties. The existing legal provisions on liability were practically all left untouched by the new provisions, though it is too early to assess any long-term effects on the Spanish system of liability.

## 5.5 UK

UK has missed the deadline for transposing the Directive, and only launched a final consultation on draft regulations in February 2008.<sup>75</sup> The Department of Environment, Food and Rural Affairs, which has taken the lead policy responsibility on the Directive, issued an initial consultation document on policy options in November 2006, and explained the delay was due to the way the provisions of the Directive overlap with those of domestic regimes in a complex way.

73 'The operator shall prove that the environmental damage caused by an activity... was, at the moment when the damage occurred, not considered to be dangerous for the environment, in view of the scientific and technical knowledge which existed at that moment', art 14(2) of Ley 26/2007, art 14(2).

74 Article 14(2) and 15 of Ley 26/2007.

75 DEFRA (2008) Consultation on Draft Regulations and Guidance implementing Directive 2004/35 on Environmental Liability, available at <[www.defra.gov.uk/corporate/consult/env-liability-regs/consultation-eld-pdf](http://www.defra.gov.uk/corporate/consult/env-liability-regs/consultation-eld-pdf)> accessed 21 February 2008.



Principles of civil liability for damage to those parts of the environment subject to private interests are largely developed by the judiciary through case law with some degree of fault or reasonable foreseeability normally an ingredient of liability. Remediation powers available to public authorities, however, are to be found in various specialised environmental laws, with little in the way of harmonising principle, and their use and scope has to be determined from the particular legislation under consideration. Many of these powers can only be invoked following the commission of an environmental offence under the particular law, though it must be remembered that the UK makes extensive use of so-called strict liability offences, meaning that conviction is possible without proof of intention, recklessness or even negligence.<sup>76</sup> For example, following conviction for damage to a designated nature protection site, a court may order the person convicted to carry out restorative operations.<sup>77</sup> Similarly, on conviction of an offence under IPPC controls, the regulator may take steps to remedy the effects of pollution caused by the offence, and recover the costs from the operator under civil law.<sup>78</sup> Where waste has been deposited illegally, the regulatory authority may serve a notice on the occupier of the land requiring its removal and the taking of steps to eliminate or reduce the consequences of the illegal deposit.<sup>79</sup> There are two main remediation powers which are not dependent on a prior illegality as such. In respect of water pollution, the environment regulator may carry out remedial works including restoration of the waters and its aquatic environment, and recover the costs from the person who caused or knowingly permitted the pollution.<sup>80</sup> In respect of contaminated land, a new and highly complex regime was introduced in 1995 which allows for contaminated land to be remediated. The costs of remediation initially fall on the person who originally caused or allowed the contamination, even if this was legally permitted at the time; if that person cannot be found, the costs fall on the current owner or occupier, subject to financial hardship provisions.<sup>81</sup>

76 Corporate bodies can also be held liable for such offences where an employee has carried out the illegal action, and there is no need to identify a controlling mind in the company as being involved.

77 Wildlife and Countryside Act as amended by the Countryside and Rights of Way Act 2000 s 30. If the person does not carry out the required works, the regulatory authority may carry out the work themselves and recover the costs as a civil debt.

78 The Pollution Prevention and Control (England and Wales) Regulations 2000 SI 2000/1983 reg 26(2).

79 Environmental Protection Act 1990 s 59. Although the waste must be deposited illegally before these powers can be used, no conviction in a court is a necessary precondition for their use. An innocent occupier who did not knowingly permit the deposit will escape liability under these provisions—see s 59(3).

80 Water Resources Act 1991 s 161. Under s 161A inserted in 1995 the authority may serve a notice on that person requiring them to carry out the remedial works first, thus avoiding the need for authorities to carry out expenditure first without knowing for certain that this will be recoverable. Strictly there is no permit defence under these provisions in that they could apply even though the pollution discharge was authorised by a consent.

81 Part IIA Environmental Protection Act 1990, introduced by Environment Act 1995.



The requirement to transpose the Environmental Liability Directive could have provided the opportunity to review and rationalise the existing remedial powers available to public authorities. However, as in the Netherlands, there is a current governmental obsession running across all areas of policy not to gold-plate when it comes to transposition.<sup>82</sup> The policy against gold-plating in the absence of exceptional circumstances was repeated in the Government's 2006 Consultation document on the Directive,<sup>83</sup> and permeates its analysis. The 2006 document identified three key areas where there was considerable discretion concerning implementation: (i) whether to bring in all sites that were protected under national nature protection laws as well as those falling under European protection (Article 2.3)—the preferred policy was not to extend the scope to national sites; (ii) whether to adopt the permit and state of knowledge defences (Article 8(4))—the Government indicated that it wished to take advantage of these provisions and (iii) whether to limit the strict liability provisions in line with the Directive—the preferred policy was not to extend strict liability.

The consultation process has been criticised by bodies such as the UK Environmental Law Association as failing to give sufficient attention to the questions concerning access to justice. As to financial security (Article 14(1)), the consultation document stated that the Government 'is not proposing to require operators to hold financial security in order to meet any liabilities that may arise under the Directive. The Government believes that businesses are best place to take decisions about all aspects of their operations, including the optimum means of covering liabilities'.<sup>84</sup> It is questionable whether this approach is in line with the provisions of Article 14(1) which require Member States to take measures to 'encourage the development of financial security instruments and markets'.

Existing environmental laws contain various provisions allowing public bodies to require environmental remediation in defined circumstances, and if necessary to carry out the works themselves and recover the costs from those responsible. In respect of the Environmental Liability Directive, it is clear that to date the Government has adopted a minimalist approach, and does not intend to use the opportunities provided to strengthen and harmonise national

82 See HM Government Dept for Business Enterprise and Regulatory Reform (2007) *Transposition Guide: How to Implement European Directives Effectively*. The document is intended as a guide to government policy-makers and lawyers involved in transposition of EC Directives. Para 3.24 states clearly, 'It is government policy not to go beyond the minimum requirements unless there are exceptional circumstances justified by a cost benefit analysis and following extensive stakeholder engagement'.

83 'Department of Environment, Food and Rural Affairs', *Consultation for Options for Implementing the Environmental Liability Directive* (HMSO, London 2006).

84 UK Environmental Law Association, 'Memorandum to Select Committee on Environment Food and Rural Affairs ELD/03' in House of Commons Environment, Food and Rural Affairs Committee (2007), *Implementation of the Environmental Liability Directive, Sixth Report of Session 2006–07* (HC 694 Stationary Office, London 2007).

legislation concerning liability for environmental damage. In the summer of 2007, a House of Commons Parliamentary Select Committee carried out a special inquiry on the Directive and the Government's approach to implementation, and its report was generally highly critical of the Government's slow and minimalist approach. It noted, for example, that 'the only instances where the Government proposes to exercise the national discretion permitted by the Directive is where this would remove a burden on business'.<sup>85</sup>

The Government's own response to this Report, published in October 2007, indicated that it was still considering a number of critical policy options and that its conclusions and reasoning would be explained in a further consultation document on the draft implementing regulations. This consultation document was published in February 2008, and in general the Government continued to promote its policy of not going beyond the minimum requirements of the Directive unless there were exceptional circumstances justified by a cost-benefit analysis and following extensive stakeholder engagement. However, clearly stung by the Parliamentary criticisms, it has proposed to extend the requirements to national nature conservation sites ('Sites of Special Scientific Interest'). As initially proposed, the Government intends to take full advantage of the state of the art and permit defences.<sup>86</sup> The various remedial powers under existing legislation will continue in force and, where these impose additional obligations, these will apply in parallel to any under the regulations transposing the Directive.

## 6. Legal Protection Before National Courts

The previous paragraphs made it clear that the road towards full transposition, implementation and enforcement of the Directive is still a long and winding one. This alone triggers the question to what extent:

- provisions of the Directive are directly effective and can be relied upon by interested parties before national courts;
- provisions of the Directive can be used by national courts to interpret their domestic law in conformity with directive (consistent interpretation) and
- this lack of full compliance can result in Member States being liable to pay for damages (*Francovich* liability).

85 House of Commons Environment, Food and Rural Affairs Select Committee (2007) (n 84), Summary, 3.

86 Though, the Welsh Assembly is proposing that such defences would not be applicable in the case of GMOs in Wales, an interesting example of the effect of devolution in the UK.

## 6.1 Direct Effect

Provisions of Community directives are directly effective if they are 'unconditional and sufficiently precise'.<sup>87</sup> Furthermore, national courts are required to examine whether the national legislature has remained within the limits of discretion allowed by the directive.<sup>88</sup>

However, directives do not produce horizontal or third-party effects in the sense that, in the absence of national implementing measures, they directly result in obligations for private individuals.<sup>89</sup>

Applying the case law on the no-horizontal effect to the Environmental Liability Directive, it is quite clear that many of its key provisions are not directly invocable in national courts at all. For instance, Article 5(1) 'Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures' cannot result in an enforceable obligation for the operator in the absence of national implementing provisions. For the same reason it must also be assumed that Article 5(3) (powers of competent authority to require action by operator) is not directly effective. In other words, the directive is in itself not sufficient to serve as a legal basis for competent authorities to require the operator to provide information, to take the necessary preventive measures, give instructions to the operator or to take itself the necessary preventive measures. National implementing measures are a *conditio sine qua non* for the exercise by the competent authorities of the powers ex Article 5(3).

The same applies to the obligation to take remedial action (Article 6(1)) and the corresponding powers of the competent authorities in Article 6(3), the obligation to identify potential remedial measures and to submit them to the competent authorities (Article 7(1)). Also, it must be feared that—when there are no other legal grounds available in national law—a failure to implement the Directive will make it impossible for the competent authority to recover the costs for the preventive and remedial actions taken pursuant to the Directive (Article 8).

More complicated is the question of the possible direct effect of Articles 12 and 13 of the Directive. On the basis of Article 12, certain<sup>90</sup> natural or legal persons 'shall be entitled to submit to the competent authority any

87 Case C-236/92 *Comitato di coordinamento per la difesa della Cava v Regione Lombardia* [1994] ECR I-485. For more general comments on the direct effect of directives see e.g. S Prechal, *Directives in EC Law* (OUP, Oxford 2005) 234 and J H Jans *et al.*, *Europeanisation of Public Law* (Europa Law, Groningen 2007) Ch 3 and, more specifically on the direct effect of *environmental* directives, J H Jans and H H B Vedder, *European Environmental Law* (Europa Law, Groningen 2007) Ch 5.

88 Case C-72/95 *Kraaijeveld* [1996] ECR I-5403. Cf. also *Waddenzee*, where it became clear that even where there is no implementing legislation, the decisions of an administrative authority must also remain within those limits, and that the national courts must examine whether or not this is the case: Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee* [2004] ECR I-7405, [65].

89 Case 152/84 *Marshall I* [1986] ECR 737.

90 See however the conditions mentioned in art 12(1) under (a), (b) and (c).

observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware'. This right vis-à-vis the competent authorities seems to be sufficiently precise and unconditional to satisfy the test of direct effect. In other words, even in the absence of corresponding implementing provisions persons do have the right to submit their observations to the competent authorities.

However, Article 12(1) contains another right for those persons as well—they 'shall be entitled to request the competent authority to take action under this Directive'. In our opinion, the possible direct effect of this provision is a much more complicated matter. Of course, 'the right to request action to be taken' seems directly effective in the same manner as the right to submit observations. However, it seems very unlikely that from this provision a directly effective right can be deduced to require from the competent authority that action should be taken by them vis-à-vis the operator. This would constitute an *inverse direct effect*, which the Court does not accept.<sup>91</sup>

Admittedly, the *Wells*<sup>92</sup> case made it clear that certain horizontal legal effects between individuals can be accepted, and demonstrated that, where a third party successfully invokes the direct effect of the Directive, this may put the permit holder at a disadvantage. However, in the terminology of the Court in *Wells*: 'mere adverse repercussions on the rights of third parties' do not constitute inverse direct effect. In *Wells* the effects for the permit holder have to be seen as flowing from the rights which the third party has obtained under the directive vis-à-vis the competent authorities and were not 'directly linked'<sup>93</sup> with obligations of the permit holder. The adverse consequences of direct effect for the permit holder do not stem from the directive, but from the fact that the authorities have failed to fulfil their obligations under it. If the directive had been correctly implemented, the authorities would not have granted the authorisation in the first place. In so far as the additional burden results from the authorities' failure to fulfil their obligations under the directive vis-à-vis other individuals, this cannot be regarded as horizontal effect. However, *Wells* seems to indicate as well that whenever the obligations of the authorities are *directly linked* with obligations of individuals stemming from the (non-implemented) directive, this would amount to inverse direct effect. Arguably this is the case with Article 12 of the Environmental Liability Directive. In our view the obligations of public authorities under Article 12 can be seen as being directly linked with the obligations of individuals, like the one in Article 5 and 6. This seems to exclude the possibility of third parties using the *Wells* doctrine to rely directly on the Liability Directive vis-à-vis public authorities to enforce the obligations of Article 5(1), since this would

91 Case C-201/02 *Wells* [2004] ECR I-723.

92 n 91.

93 Case C-201/02 *Wells* [2004] ECR I-723, [56].

create, in absence of national implementing legislation, a direct obligation for individuals instead of 'mere repercussions' as in *Wells*.

In any event, the Environmental Liability Directive illustrates the need for further case law to be developed in order to establish a clear line between 'mere adverse consequences' and creating obligations for individuals.

## 6.2 Consistent Interpretation

Under the doctrine of consistent interpretation the national courts are required to interpret the national law as far as possible in conformity with the directive.<sup>94</sup> The qualification *as far as possible* indicates that the requirement is not unlimited. In *Kolpinghuis* the Court of Justice observed that the obligation to interpret national law in the light of EU law is limited 'by the general principles of law and in particular the principle of legal certainty'.<sup>95</sup> Although opinions may differ as to the precise meaning of the phrase *as far as possible*, national law must presumably be sufficiently flexible to allow such an interpretation. Therefore, the extent to which the doctrine of consistent interpretation is capable of remedying faulty implementation is of necessity dependent on there being an existing body of relevant national law available to the competent national court. In Member States where no formal transposition has been taken place at all, consistent interpretation will prove very difficult indeed, as the national court may not have anything at all in national law that can be interpreted in line with the Directive without trespassing on the boundaries of legal certainty. However, in Member States where there has been some sort of transposition (but faulty, partial or otherwise not complete and full) the doctrine could prove to be useful. In that respect we must note that the duty of national courts to interpret national law in the light of Community law applies not only to relations between the State and the individual, but also to relations between individuals.<sup>96</sup> In such cases, some indirect horizontal effects would seem to be acceptable.

## 6.3 State Liability

Finally, there are the possibilities of using the *Francovich* doctrine as an alternative remedy for the failures of Member States implementing the Directive. As is well known, under the *Francovich* rule Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.<sup>97</sup> Equally familiar are the

94 Case C-106/89 *Marleasing* [1990] ECR I-4135; See further J H Jans *et al.*, *Europeanisation of Public Law* (Europa Law/Groningen 2007) Ch 4.

95 Case 80/86 *Kolpinghuis* [1987] ECR 3969, [13].

96 Case C-106/89 *Marleasing* [1990] ECR I-4135.

97 See further. J H Jans *et al.*, *Europeanisation of Public Law*, (n 94) Ch 8.

conditions under which such liability is established. Individuals who have suffered damage have a right to reparation where three conditions are met:

- the rule of law infringed must have been intended to confer rights on individuals;
- the breach must be sufficiently serious;
- there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

Proving that the breach is sufficiently serious will not cause the most problems, in particular where a Member State has failed to take any legislative measures at all. The biggest hurdle probably will be that the rule of law infringed must have been intended to confer rights on individuals. Can we really say that the Environmental Liability Directive is intended to do that? Article 1 states that the ‘purpose of this Directive is to establish a framework of environmental liability based on the ‘polluter-pays’ principle, to prevent and remedy environmental damage’. Article 2 defines the concept of environmental damage,<sup>98</sup> and in view of these provisions, probably the first line of defence for a Member State confronted with a claim for damages would be to argue that most of the substantive key obligations of the directive are not *specifically* intended to protect individual rights, but to protect the environment as a whole and in general. In particular this line of defence can be expected when a Member State has failed to implement Articles 5 and 6 (the obligation for the operator to take preventive and remedial action). There is substantial backing in the case law of the Court of Justice for this manner of reasoning, and from this in particular the judgement in *Peter Paul*—we must assume that it is not sufficient that the rule infringed *also* protected the interests of the claimant, but that it should *specifically* have the objective to protect individuals.<sup>99</sup> This amounts to introducing a rather strict *Schutznorm* requirement into European state liability law.

If our interpretation of the Court’s case law is correct and European law requires that for a successful claim the rule of law infringed must be *specially* aimed at protecting individual rights, it is difficult to see how an infringement of, for example, Articles 5 and 6 of the Directive would qualify. However, Article 12 of the directive (the right for individuals to submit observations to the competent authorities and/or request action) could qualify as being intended to protect an individual right under the *Francovich* doctrine.

In such cases, however, we might encounter problems with the third condition; the requirement that there must be a ‘direct causal link’ between the

<sup>98</sup> See chapter 4.3 above.

<sup>99</sup> Case C-222/02 *Peter Paul and others v Germany* [2004] ECR I-9425. However, the case law of the Court of Justice does not seem to be consistent in all respects; cf. Case C-201/02 *Wells* [2004] ECR I-723, [66]. For an opposite view, see P E Wenneras, *The Enforcement of EC Environmental Law*, (OUP, Oxford 2007), 154–155.

rule infringed and the damage caused. The problem here of course is that it is not easy to construct that the damage to the environment is caused by an infringement of Article 12. In other words, in general the damage to the environment will be caused by the operator and/or competent authorities not taking adequate preventive and remedial action (infringement of Articles 5 and/or 6).

There is a final problem in applying the *Francovich* doctrine to the Environmental Liability Directive. It is unclear to what extent *Francovich* embraces reparation for environmental damage other than mere pecuniary damage.<sup>100</sup> Future case law will have to clarify the situation—*Francovich* and subsequent case law, after all, concerned only the detrimental financial consequences of the State's failure to act.

## 7. Conclusions

It is clear that we are unlikely to know for some years the real implications of the Environmental Liability Directive both in terms on its impact on national legal systems and its contribution to the protection of the environment in practical terms. The Directive had a long and difficult gestation period, which was not helped by an apparent failure to appreciate how even some of the basic legal terminology and classifications being used often had distinct resonances in difference jurisdictions. Even the final title of the Directive does not really reflect its eventual legal focus on public law remediation powers. There are lessons to be learnt here in future developments in European legislation which touch on fundamental legal concepts and principles. The Directive was clearly subject to challenging political pressures, and perhaps more so than many environmental directives agreed at European level. The logic for the final choices that were made as to its scope and structure can only be explained by the demands of political compromise rather than environmental needs. *Parturiunt montes, nascetur ridiculus mus?* The mountains have indeed laboured and, compared to the early ambitions for the Directive, the eventual result could be readily dismissed as a mouse—as overly modest, and adding little to the future development of environmental law.

Yet, in our view this would be an overly critical view of the Directive. It is clear that in the current national laws of many Member States there exist various powers concerning environmental remediation. One immediate value of the Directive is to require a re-evaluation of these powers and the extent to which they are used in practice by public authorities. The Member States are required to develop their existing bits and pieces into a clearer system of prevention, information, management and remediation, both as obligations

100 Cf. P E Wenneras, (n 99), 155.



of operators and as powers and obligations of public authorities. Although the Directive could have gone further in many respects, our analysis indicates it does contain innovative features which have not usually been present in national systems to date.

When it comes to implementation, the Directive gives significant discretionary powers to Member States concerning issues such as the permit defence, and a key policy choice for Member States is whether to confine the implementation of the Directive to its admittedly fairly narrow scope, and take advantage of the discretionary provisions to minimise its impact. Some Member States are clearly adopting such a policy. But even where this is done, it seems unlikely that such an approach can be sustained in the longer term. A national system where for example, non-governmental environmental organisations have legal rights to pressurise public authorities to take actions in respect of European protected nature conservation sites but not nationally protected sites appears incoherent in principle, and will be difficult to justify and sustain. The way in which the Directive seeps over and affects the development of national approaches to environmental remediation powers may prove its real influence in the longer term.