
CONSIDERATION OF ENVIRONMENTAL LIABILITY WITHIN THE EU

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Background I

- commitment since 1984
 - » transfrontier shipment of hazardous waste directive
- civil liability for waste proposals (89/91)
- member state law developing fast
- Council of Europe Convention (1993)
- Commission Green Paper (1993)
 - » 100+ responses, deep divisions
- European Parliament resolution (1994)

Background II

- external studies/consultations (1995-96)
- Commission debate (January 1997)
 - » opts for White Paper
- Commission resigns (March 1999)
- Prodi Commission (summer 1999)
- White Paper (February 2000)

Rationale

- help to implement Treaty principles
 - » polluter pays, prevention, precaution
- ensure decontamination/restoration
- internalise more environmental costs
- improve enforcement of other EC laws & integration into other policy areas
- avoid future divergence of MS laws
 - » no distortion yet, but differences could grow
- preferable to sectoral liability rules

Main proposals I

- strict liability
- future damage only
- broad scope
 - » “environmental damage” (sites & natural resources/biodiversity) and “traditional damage” (bodily injury/property damage)
- liability channelled to operator in control
 - » MSs can make other parties liable (Art 176)
 - » no personal liability

Main proposals II

- dangerous activities - closed list
 - » as defined under other EC law, eg:
 - discharge/emission limits to water/air
 - dangerous substances/preparations
 - IPPC & Seveso II
 - hazardous & other waste
 - biotechnology
 - transport of dangerous substances

Main proposals III

- biodiversity damage limited to Natura 2000 sites
 - » but extended to non-listed activities on fault-liability basis
- significant damage threshold for environmental damage
- some alleviation of burden of proof?

Main proposals IV

- commonly accepted defences
 - » act of God, contribution/consent of plaintiff, intervention of third party
 - » consider state of art/development risk
 - » equitable relief for permit compliance??
- site clean-up objectives
 - » best available techniques (econ/tech viable)
 - » actual/plausible future use
 - » quantitative standards where possible

Main proposals V

- enhanced access to justice
 - » environmental damage only
 - » two-tier system:
 - (1) MS duty to restore/decontaminate
 - (2) NGOs deemed to have interest in environment decision-making & right to act if State fails to do so or to do so properly
 - both administrative/judicial review and claims against polluter
 - injunctive relief & preventive costs

Main proposals VI

- access to justice (cont.)
 - » only NGOs meeting objective, qualitative criteria
 - » restoration in co-operation with public authorities
 - » in optimal/cost-effective way
 - » involving independent experts
 - » explore arbitration/mediation to minimise costs

Main proposals VII

- obligation to spend on restoration
- no lender liability, unless control
- no financial security requirement
 - » workable system important, but will develop gradually, so voluntary to begin with
 - » discussions with insurance/banking sectors
 - » cap liability for natural resources damage?
- less stringent rules for GMOs?
- product liability takes precedence

Marine pollution

- *Erika* & *Braer* important factors
- measures to complement IMO regime?
 - » “In the light of recent marine pollution accidents, it should be examined if the international regime should be complemented by EC measures. The Commission will prepare a communication on oil tanker safety (June 2000) examining, *inter alia*, the need for a complementary EC regime on liability for oil spills.”
- EU & MSs strong supporters of IMO
 - » negotiate new protocol?
 - » focus on physical controls?

Omitted from final text

- “mitigated” joint & several liability
 - » liability limited to share of causation, if proven; otherwise joint & several
- prescription periods (3 & 30 years)
- special rules for waste incidents
- MS obligation to ensure quick clean-up
- rebuttable presumption of causation
- both civil & public law - MS discretion
- duty to prevent corporate evasion

What's not new/severe

- mostly a consolidation of MS law
- no liability for historic damage
- excludes unlisted activities
- generous on defences
- even biodiversity damage already subject to some MS law
- enhanced access to justice coming anyway (MS law & Århus Conv)

What's (potentially) new

- some potentially new elements:
 - » liability for natural resources damage
 - » strict liability for personal injury
 - » wider legal standing for NGOs
 - » overlap with MS laws, which will continue alongside the EC regime
 - » possible oil spill rules
 - » civil liability rules separate from regulatory framework

Key issues I

- subsidiarity - is this better left to MSs?
- scope - should traditional damage (persons & property) be covered or not?
- cut-off between past & future damage
- omissions, failures to prevent pollution
- apportionment - rules & mechanisms
- definition of dangerous activities
- definition of liable party (operator?)

Key issues II

- defences
 - » state of the art, foreseeability, compliance?
- causation/burden of proof
- clean-up standards & procedures
- biodiversity damage
 - » expanding beyond Natura 2000?
 - » fault liability for non-listed activities?
 - » valuation methods & pre-existing state?

Key issues III

- rules for NGO access to justice
 - » bona fides, state pre-emption, scope, etc
 - » cross-undertaking in damages?
- special rules for GMOs?
- overlap with member state law
 - » what counts as “stricter”? ECJ challenges?
- insurability
- relations with international conventions
- joint funding

The debate ahead

- end-2001 target for proposal
- next stage will be more difficult
 - » little time, limited resources
- debate so far confused - needs clarity
- main inspiration so far, civil liability models
- big 3 MSs could influence the options
- more attention to public law implications?
- more attention to practical implications
 - » resources, transactions, windfalls, injunctions

Possible models I

- Lugano Convention
- Germany: UmweltHG, Bodenschutzgesetz, Länder site laws, etc
- UK: contamland regime, Camb Water
- France: site clean-up programme, waste & classified installations laws
- Neths: Soil Protection Act/New Civil Code
- Swed: Env Damage Act/new Env Code

Possible models II

- Den/Fin: Envl Damage Comp Acts, etc
- Belgium: Flemish Soil Clean-up Decree
- Spain: draft civil liability law/waste laws
- other public safety & clean-up regs
- EC: civil liability for waste proposals, IPPC & landfill post-closure reqs, habitats & birds directives, water framework directive, soil protection
- CERCLA/Superfund/BC Waste Man Act

Timetable I

- Environment Council December
- Eur Parliament Legal Affairs/Env Ctees
- external studies
 - » update legal, biodiversity, insurability, competitiveness, prevention
- possible public hearing (May)??
- drafting of a directive (early summer?)
- consultations (external & internal)

Timetable II

- end-2001 deadline?
- Commission approves directive?
- co-decision procedure (Council/EP/etc)
 - » qualified majority needed in Council
- implementing legislation in MSs
- not in force before 2004?

Prospects

- Council arithmetic (QMV)
 - » previous blocking minority (Ger, UK, Fr)
now cautious, critical
- Parliament
 - » political shift in last European election
 - » Legal Affairs taken over from Environment
- Commission majority, but details matter
- continuing industry opposition

Conclusions

- largely following, not leading, MS law
- will raise the profile of liability
- danger of muddle/uneven enforcement
- some way to go - details could change
 - » but very little time if deadline remains
- won't go away, even if defeated
 - » clauses in other directives (resisted so far)
 - » other clean-up obligations (eg, IPPC)
 - » more MS law in the wings

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