

The Future Directive on Environmental Liability – A tool to implement the precautionary principle?

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Strict liability – as foreseen by the future European Directive on Environmental Liability¹ – can set a strong incentive for the potentially liable parties to invest in measures to minimise risk. Strict liability may therefore trigger precautionary measures that go beyond the legal requirements. This paper analyses to what extent the future EC Directive on Environmental Liability sets such an incentive. Where appropriate, reference will be made to the current situation in Germany.

1. Background

The future EC Directive on Environmental Liability has quite a long history. It began in 1993 when the European Commission published a Green Paper on environmental liability² which, after the European Parliament requested a Community Directive in 1994, was followed by a White Paper in 2000.³ To prepare the White Paper, numerous background studies were commissioned in order to explore the need for European legislation on environmental liability and the different options for Community action. After a lively public consultation on the White Paper, the Commission concluded that a Directive would be the most appropriate option for Community action. The Commission's proposal for a Directive was preceded by a working document prepared by DG Environment⁴ that was submitted to public consultation. The final legislative proposal was adopted by the Commission in January 2002⁵ and forwarded to the Parliament one year later. After a first reading in Parliament in May 2003, the Council of Ministers adopted a Common Position in September 2003 that was commented on by the Commission. The European

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¹ The article is based on the Common Position No 58/2003 adopted by the Council on 18 September 2003 with a view to the adoption of a Directive on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2003, C 277 E/02.

² COM(1993) 47 final.

³ COM(2000) 66 final.

⁴ Working Document on the Prevention and Restoration of Significant Environmental Damage (Environmental Liability), <<http://europa.eu.int/comm/environment/liability/consultation.htm>>.

⁵ OJ 2002, C 151 E/132.

Parliament held its second reading in December and demanded four minor changes to the council's first-reading common position. However, in January 2004, the Council of Ministers rejected the parliamentary demands, causing further delay before the law can be finalised. The Council and Parliament will now hold conciliation talks to overcome their differences.

2. How can strict liability trigger precautionary measures?

Beyond the implementation of the “polluter pays” principle, a strict liability regime can contribute to minimise the risk of damage. The danger of being held liable, irrespective of whether there is fault or not, should be a strong incentive for the operator to invest in preventive and precautionary measures. The legislator wants the operator to make a calculation: as long as one euro spent on preventive measures is likely to avoid damage whose restoration would cost more than one euro, he should invest in preventive measures. Thus, from an economic point of view, the formula is rather easy: the bigger the risk and the higher the potential costs for the operator are, the more he is going to invest in risk minimisation. A strict liability regime should therefore motivate the operator to move towards more efficient levels of prevention and precaution.⁶

The characteristic feature of the precautionary principle is environmental action in the face of scientific uncertainty. Therefore, to implement the precautionary principle, the Directive would have to trigger further measures minimising risks (precautionary measures) and not only measures dealing with hazards (preventive measures). To see whether that is the case, we have to clarify the conditions under which a party will be held liable under the Directive and how far the responsibility of the operator really goes. This evaluation is identical with the financial risk analysis an operator is supposed to carry out when he decides whether to invest in further measures to reduce the economic risks of strict liability.

3. The strict liability regime of the future EC-Directive on Environmental Liability

The Directive introduces a strict liability regime for the occupational activities listed in Annex III of the Directive, as well as an additional fault based liability for damage to protected species and natural habitats caused by other than the listed activities, Article 3 (1b)⁷. The operator of a listed activity has to bear the costs for the necessary preventive and remedial actions, irrespective of whether he was at fault or not, Article 8 (1). The Directive's scope is strictly limited to environmental damage and the imminent threat of such damage. Environmental damage includes damage to protected species and natural habitats, water and land. It does not cover the classic

⁶ See proposal for a Directive on environmental liability with regard to the prevention and remedying of environmental damage, COM(2002) 17 final, page 6.

⁷ Articles without indication belong to the Common Position of the Council.

damages to property and health, as these are covered in all Member States by the respective national tort laws.

The Directive's objectives are to prevent and remedy damage by establishing a framework of environmental liability. It should guarantee that damage is remedied by the polluter and that, in case of an imminent threat of damage, preventive measures are taken. These measures have to be reimbursed by the responsible party if they have been taken by the competent authority itself or by a third party on its behalf. Thus, as lined out in Article 1, the Directive is implementing the "polluter pays" principle according to Article 174 EC Treaty.

3.1. Obstacles to the implementation of the precautionary principle

In principle, strict liability is liability for legitimate behaviour. Regardless, the legal requirements due to the economic threat of potential liability should drive the operator to invest in further safety measures. Hence, in terms of precaution, a strict liability regime is most effective if the operator is liable under any circumstances. But there may be situations where it seems unfair to hold somebody responsible, for example, in cases of *force majeure*. The Directive includes several such exemptions and restrictions that interfere with its suitability to trigger precautionary measures.

Another obstacle for liability may be the burden of proof for the causal relationship between the release of a substance and the damage. This causal relationship is, especially in cases of scientific uncertainty, extremely difficult to establish.

3.1.1. "Permit defence" and "state-of-the-art defence"

The restrictions to the scope of the Directive can be classified in horizontal and vertical restrictions. For example, the Directive only applies to activities listed in Annex III. It does not cover mining activities, nuclear activities, or the so-called diffuse sources. These restrictions to the range of application can be defined as horizontal.

Vertical restrictions are those that do not limit the range of application and exclude liability from the first, but open the operator to the possibility of raising clearly-defined objections to defend himself. He could do this, for example, by demonstrating that the damage was caused by an act of armed conflict, by a natural phenomenon of exceptional, inevitable and irresistible character, Article 4 (1 a, b) or by a third party, Article 8 (3 a). The most important defences are the so called "permit defence" and the "state-of-the-art defence", Article 8 (4 a, b). The operator being charged may demonstrate that he was neither at fault nor negligent, and that the environmental damage was caused either:

- by an emission or event that has been expressly authorised by an authorisation and that is fully in accordance with the conditions of this authorisation, Article 8 (4 a), or

- by an emission or activity or any manner of using a product which the operator demonstrates was not dangerous according to the state of scientific and technical knowledge at the given time, Article 8 (4 b).

The Commission's proposal already contained a similar, even broader exemption that had been included at the insistence of the DG Enterprise. The original permit defence proposed by the Commission included every emission or event allowed in applicable laws, regulations, or in the permit. Now, the provision is more restricted. The operator can only exonerate himself if the emission or the event causing harm was *expressly* authorised in the permit and is fully in accordance with the conditions of this authorisation. Thus, it does not matter what is set out in the applicable law or regulation on which the authorisation is based. The operator can only defend himself in cases where the damaging event has been expressly authorised in the permit. The operator depends now entirely on the content of his permit. But what is laid down in the permit may differ a lot depending on the national or regional permitting system. The more conditions that are laid down in directly applicable abstract rules, the fewer parameters are included in the authorisation and therefore cannot be used as an argument to turn down responsibility. For example, authorisations usually do not include emissions limit values for every substance. Instead, they supplement or replace limit values by equivalent parameters or technical measures.⁸ The practical application of the permit defence will therefore be more complicated than it seems, and will differ according to the national or regional permitting system.

The "state-of-the-art" defence, or more precisely the "state of scientific and technical knowledge" defence, excludes responsibility for emissions that are in line with the authorisation and whose harmful character was unknown in terms of the state of scientific and technical knowledge. This provision assigns the development risk – the retrospective knowledge that a certain substance is harmful to the environment – not to the one who introduced the harmful substance into the environment, but to the general public. This defence even goes beyond the exemptions foreseen under the US Superfund⁹, the role model for the Directive. However, the European Commission is of the opinion that this clause should strike a better balance between environmental, economic and social goals, as it preserves incentives for innovation since it does not penalise innovative activities retrospectively.¹⁰

The question remains of whether this is due to legal obligations or whether the EC missed the chance to effectively implement the precautionary principle. One

⁸ See Article 9 (3) Directive 96/61/EC on integrated pollution prevention and control (IPPC-Directive), OJ 1996, L 257/26-40.

⁹ Under the US American Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §§ 9601-9675) no liability is imposed if the party sought to be charged demonstrates that „the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources...“, § 107 (f) CERCLA; see Hager, Günter, *Juristenzeitung* 2002, page 901 (905).

¹⁰ See proposal (footnote 5), page 13.

argument raised is that the authorisation would give the operator the right to pollute the environment. Strict liability would punish the operator for a state-controlled, legitimate activity.

It is true that at first glance this situation seems to look odd. But does the state, by allowing a potentially dangerous activity, want to take over all responsibility for possible harm? No. The state is controlling these activities to eliminate intolerable risks in order to protect the population and the environment. When it authorises an activity, the state considers the related risk tolerable but does not assume financial responsibility for the possible realisation of the remaining risks. Therefore, a permit usually does not protect the operator against third-party law suits. For example § 14 Bundes-Immissionsschutzgesetz¹¹ only protects the operator against third parties claiming the closure of the plant, not against third parties claiming damage.¹² The same is true for strict liability according to the German Umwelthaftungsgesetz¹³ (§ 5 Umwelthaftungsgesetz).

In fact, a permit does not govern the division of risks, as long as it does not exclude third-party law suits.¹⁴ The risk of being held liable always remains with the operator, despite the legalisation of his activity. Strict liability is therefore not a sanction or a punishment, but just the implementation of the regular division of risks between the operator and the general public represented by the state.

3.1.2. Causal relationship and the burden of proof

Another major obstacle for the implementation of the precautionary principle may arise from the division of the burden of proof between the operator and the authority as claimant.

The Directive leaves the question of causal relationship open. If Member States follow this example, general tort law rules will apply: The burden of proof will lie with the authority as claimant. It will have to prove the causal link between the release and the damage. In complex cases, especially in the field of scientific uncertainty, it will often be unable to prove this causal relationship to a sufficient degree. This can lead to a situation called *non liquet*, meaning that the claimant cannot prove the causal link, but the contrary is not proven either. As the claimant bears the burden of proof in these cases, the lawsuit will be dismissed. The environmental damage will then have

¹¹ Federal Emissions Control Act, Bundesgesetzblatt 2002, I, page 3830, amended 2002, Bundesgesetzblatt 2002, I, page 3322. – the equivalent to the French loi relative aux installations classées.

¹² The situation in France, for example, is the same, see Article 8 de la loi no 76-663 du 19.7.1976 relative aux installations classées pour la protection de l'environnement; Prieur, Michel, Droit de l'environnement, Paris 2001, Number 1111.

¹³ Federal Environmental Liability Act, Bundesgesetzblatt I, 1990, page 2634, amended 2002, Bundesgesetzblatt I, 2002, page 2674.

¹⁴ That is sometimes the case, for example under §§ 11, 22 (3) German Wasserhaushaltsgesetz (Federal Water Resources Act), that excludes claims for indemnity of third parties.

to be remedied at the cost of the general society. The burden of proof for the causal link therefore decides who bears the risk of scientific uncertainty. If the burden of proof remains with the authority as claimant, the liability regime will be weakened. There is no incentive for the operators to invest in further precautionary measures. On the other hand, to require the operator to demonstrate the absence of a causal link between the emission and the damage means that operators will be held liable in situations where there is in reality no causal link, but where they are simply not able to prove it. This would set a false incentive. The question of the division of the burden of proof therefore requires a tailor-made solution by each Member State. Different examples exist for a division of the burden of proof under similar circumstances, for example in the field of product liability, liability for medical malpractice or existing laws governing environmental liability. Usually, the burden of proof is not completely reversed, but in comparison to general tort law rules, the requirements for the proof are less demanding. For example the *prima facie* evidence might be accepted, or it may be sufficient to demonstrate a high degree of probability. The operator then has the possibility to exonerate himself.

3.2. What does this mean for the implementation of the precautionary principle?

Under a strict liability regime, the operator of a potentially dangerous activity is responsible for the possible risks and the damage which may arise from the activity, independent of the question whether he is at fault or not. The one who is making the profit is also bearing the risks.

The permit and the “state-of-the-art” defence reverse this regular division of risks. If the operator complies with the permit, no liability is imposed, except in cases of fault. The risk of damage to the environment is borne by the general public. The preliminary outcome of the law-making procedure represents a more limited exemption, reducing the defence to the expressly authorised emissions and actions. However, from the perspective of the precautionary principle, liability is restricted in a way that impedes strong incentives to implement precautionary measures going beyond the legal obligations laid down in the permit. The only incentive may be to limit any emissions that are not expressly authorised in the permit, independent of whether they may be illegal or legal.

This incentive will be further reduced if Member States apply traditional tort law rules in the question of the burden of proof. If the claimant, as under traditional tort law, has to prove damage and causation, the operator will take this fact into account. There will be no incentive to invest in precautionary measures if it is unlikely that anybody will be able to prove the causal link between release and damage. However, there are small chances that Member States will go beyond the requirements of the Directive. Germany, for example, usually follows the strategy of one-to-one implementation. This is also due to difficulties the legislator otherwise has to face: industry will argue that European law is harmonising environmental standards in

Europe, and if Germany goes beyond these standards, German industry will be at a competitive disadvantage. This is always a strong political argument to stick to the European requirements these days.

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Strict liability can be a strong incentive for risk-minimising measures and one way of implementing the precautionary principle. The future EC Directive on Environmental Liability, however, does not set a strong incentive for the potential liable operators to invest in risk-minimising measures going beyond the legal requirements. Due to the restricted scope of the Directive, the permit, the “state-of-the-art” defence and the division of the burden of proof for causal relationships between event and damage, operators are not running a great risk of being held liable in cases of scientific uncertainty. They have therefore no economic reason to invest in further risk-minimising measures.