

Interactions of the EU Environmental Liability Regime

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Jürgen Lefevere

Foundation for International Environmental Law and Development

1. Introduction

‘Traditional’ environmental legislation attempts to protect the environment through regulating the behaviour of actors. Violations of these rules are usually punishable through administrative or criminal sanctions. An environmental liability regime can provide an important addition to this legislation by providing the means to help recover the costs of damages that occur either in violation of existing environmental standards or as a result of (partly) unregulated behaviour. Providing recourse to recover damage from those responsible for the pollution is in line with one of the core principles of European environmental law, the ‘polluter pays principle’, listed in Article 174(2) of the EC Treaty, which requires a polluter to pay for the pollution caused by his actions. But the role of a liability regime is not only remedial. A well-designed liability regime can have an important preventive effect by giving a signal to potential polluters that they will need to provide compensation for any pollution that they may cause, and thus requiring them to better integrate the environmental impacts of their actions in their decision making. The role of liability is however limited by the fact that it can only play a role in situations where sources of pollution are identifiable and a link between the act of pollution and the damage (causal link) can be established.

Discussions on the development of an EU environmental liability regime started almost twenty years ago. In January 2002 the discussions on this regime entered a new phase, when the Commission put forward a proposal for a Directive on environmental liability with regard to the prevention and remedying of environmental damage. During the discussions on its design, the focus of the liability regime has changed considerably.

In the formation of the current proposal, interactions with other institutions, not only at the international and at the EU level, but also at the national level, have played an important role. This chapter provides a brief overview of some of the key interactions and analyses two of them in greater detail. It commences with a brief overview of the development of the EU liability regime. It continues with a discussion of the proposal for a Community Directive on environmental liability with regard to the prevention and remedying of environmental damage, as adopted by the European Commission in January 2002 (European Commission, 2002). This is followed by an overview of the major interactions with other EU legislative instruments and international instruments in which the Community liability regime has been involved. This chapter then addresses two key interactions in separate sections. The first is the interaction with the Lugano Convention. The second is the interaction with the recently revised Deliberate Release Directive. The concluding section summarizes the findings.

2. The Development of the EU Liability Regime

Discussions on the development of an EU environmental liability regime are among the most protracted and controversial in the history of EU environmental law. The reasons for the difficulties in designing an EU-wide regime can be found in the fact that views on the need for and design of a liability instrument fundamentally differ between industry and environmental NGOs. In addition to that, the approach to environmental liability is fundamentally different between individual member states, and environmental liability discussions are frequently politicised as a result of new large environmental pollution incidents.

The first efforts to elaborate an EU-wide regime on civil liability for environmental damage go back as far as 1984.¹ Initially these efforts were limited to establishing a liability regime for damage caused by waste, which resulted in the Commission issuing a proposal for a regime for Civil Liability for Damage caused by Waste in 1989 (European Commission, 1989). This proposal was abandoned in 1993 when the Commission refocused its efforts on developing a broader liability regime. The first result of this new focus was a Commission Green Paper on Remedying Environmental Damage (European Commission, 1993), which was published in May 1993. Efforts to establish a broader liability regime were supported by the European Parliament (European Parliament, 1994) and the Economic and Social Committee (Economic and Social Committee, 1994) which both requested ‘a proposal for a Directive on civil liability in respect of (future) environmental damage’. The European Parliament in its request for the first time made use of its newly acquired right to request the Commission to adopt a Proposal under Article 192(2) of the EC Treaty. The new efforts at Community level coincided with the signing in June 1993 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, (‘the Lugano Convention’). The Lugano Convention was negotiated under the auspices of the Council of Europe, which now counts 44 Parties, virtually all states on the European continent.² Although nine countries signed the Convention (Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands and Portugal), none have ratified. Increasing criticism of the wide scope of this liability regime, the vagueness of its definitions and, most importantly, the developments around the elaboration of an EU liability regime, discussed below, has made it unlikely that it will ever enter into force.

After the adoption of the Green Paper, it took the Commission almost 7 years to take a next formal step in EU debate on liability. In February 2000 the Commission issued the White Paper on Environmental Liability (European Commission, 2000).³ The adoption of the White Paper was followed by a round of stakeholder consultations. It was initially expected that a Commission Proposal would follow the White Paper soon after the closing of the deadline for the submission of comments. The criticism on the design elements contained in the White Paper and a change of responsible Commission staff however further delayed the adoption of

¹ Directive 84/631 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste (European Community, 1984) in its Article 11 requires the Council to take measures for implementing civil liability and take a decision on a system of insurance.

² Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, signed at Lugano in 1993 (Council of Europe, 1993).

³ In the interim, on 17 November 1997, the Commission issued a working paper on environmental liability (European Commission, 1997).

the proposal. On the basis of the responses to the White Paper, the Commission decided to limit the scope of the liability regime. In July 2001 the Commission issued a new Working Paper on Prevention and Restoration of Significant Environmental Damage, which specified and changed some of the options set out in the White Paper (European Commission, 2001). Stakeholders were invited to submit comments by 15 September 2001. In December 2001 a leaked draft proposal for a liability Directive emerged from the Commission, leading to a storm of protests, both from the NGO and industry side and a further delay in the adoption of the proposal.

On 23 January 2002 the Commission finally adopted its proposal for a Directive on Environmental Liability with regard to the Prevention and Restoration of Environmental Damage (European Commission, 2002). The proposal is only at the very beginning of the legislative trajectory (it follows the co-decision procedure under Article 175(1) of the EC Treaty). The final design and even the adoption of the Community liability regime are therefore still uncertain and difficult to predict. Because of the highly controversial nature of the discussions preceding the adoption of the proposal, there is a good possibility that the proposal may change substantially during its discussion in Council and Parliament, which is likely to take at least two years.

Table 1: Basic liability concepts

Liability concept	Description
<i>Strict liability:</i>	The defendant is liable even if he could have done nothing to avert the damage;
<i>Fault-based liability:</i>	The plaintiff must demonstrate that the defendant's actions were wrongful in some way, for example, that he has been negligent.
<i>Mitigated joint and several liability:</i>	each party is liable for the whole of the damage unless the party can prove that he caused only part of the damage, in which case he will only be liable for that part.

The Commission liability proposal puts forward a liability regime that is limited in scope. It requires Member States to implement a public law regime, allowing only liability claims by public authorities. Under this regime, persons affected by the damage or public interest groups do not have direct recourse against the polluter, but can request the authorities to hold the polluter liable. When this request is denied, the proposal provides for a possibility of judicial review. The proposal also contains a limited definition of environmental damage, which is restricted to:

- Biodiversity damage, which is defined as damage to natural habitats and species protected under the Habitats and Wild Birds Directives⁴ and areas and species for which areas of protection or conservation have been designated pursuant to Member States' legislation on nature conservation;
- Pollution of water covered by the new Water Framework Directive;⁵ and

⁴ Directive 79/409 on the conservation of wild birds (European Community, 1979) and Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (European Community, 1992).

⁵ Directive 2000/60 establishing a framework for Community action in the field of water policy (European Community, 2000).

- Damage that creates serious potential or actual harm to human health as a result of soil and subsoil contamination.

The proposal excludes liability for historical damage. It proposes strict liability (see Table 1 above) for damage caused by activities covered under Annex I of the proposal, which lists a range of Directives that regulate the operation of installations, transport and storage of dangerous or polluting goods, the operation of landfill sites, water abstraction and impoundment as well as the use, transport and release of genetically modified organisms. The proposal also establishes liability for biodiversity damage caused by other activities than those listed in its Annex I, but limits this to a fault-based liability (see Table 1). The proposal furthermore contains a number of important exemptions. It excludes liability for damage caused by actions that were authorized under applicable laws and regulations or by authorizations or permits. It also exempts emissions or activities which were not considered harmful according to the state of scientific and technical knowledge at the time the emission was released or the activity took place.

3. The Liability Proposal as a Source and Target of Institutional Interaction

The number of direct and visible interactions with the EU liability regime that have been observed thus far has been limited. The key reason for this is the fact that the proposal was only adopted in January 2002. Until January 2002 the shape of the liability proposal, and even its very adoption, was uncertain. As a result of this, any interactions took place while there was no specific text on the table, during the relatively non-transparent process used for the development of the Commission proposal. Discussions on the instrument took place on the basis of the Green Paper and the White Paper, as well as multiple discussion documents, studies and leaked drafts in various stages of work on the proposal. Only part of these discussions took place publicly, through rounds of public consultation. Three open rounds of public consultation were held, in response to the Green Paper and the White Paper, as well as on the basis of a working document released in the middle of 2001.⁶ A larger part of these discussions took place behind the scenes. Liability being a very controversial issue, with a large divide between certain industry sectors on the one hand and environmental groups on the other, considerable pressure was exerted on the Commission's Environment Directorate General by stakeholders, Member States and other Commission services throughout the development of the proposal.

Although the number interactions observed in this study is limited, it does offer the opportunity to study interactions on the basis of a regime in formation. Interactions can be observed and analyzed as they take place. This study has also greatly benefited from the possibility to interview participants in the regime's formation, utilizing an institutional memory that in many other institutions is often harder to access.

Because of the fact that, until recently, no specific text for the proposal was on the table, the debate on the formulation of the proposal was very much focused on broader concepts and approaches, often in a very political context. The character of this debate has had a significant impact on the types of interactions observed thus far, focusing the visible interaction with

⁶ The various papers as well as the comments submitted can be found through the Commission's website: <http://europa.eu.int/comm/environment/liability/consultation.htm>

other institutions on those same broader concepts and approaches, rather than more detailed technical issues. With the adoption of the liability proposal in January 2002, the regime has entered a new stage of formation. Now that a proposal is on the table, its further development will be through a set legislative procedure. Interactions are now likely to take place in a more defined and transparent manner, although there is still scope for changes in the broader political outlines of the proposal.

The relatively limited number of direct and visible interactions observed in this study is also due to the subject matter of the liability proposal. Although a number of international treaties contain rules on liability for environmental damage, these instruments are generally limited to specific activities, mostly in relation to nuclear activities or damage resulting from oil spills. Because of the limited scope of these regimes, no significant interactions with the liability proposal could be observed. In relation to the international instruments on oil spills, it is however interesting to note that perceived gaps in these instruments have been used as political arguments to force the adoption of the liability proposal. In particular the Erika shipwreck in December 1999 off the coast of Brittany and the resulting pollution played an important role in raising the political profile of the liability proposal and advancing its adoption, even though this type of pollution falls outside the scope of the liability proposal.

Interaction did occur with more recent international liability instruments, in particular the Council of Europe's Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (the Lugano Convention), adopted in 1993. Although this Convention never entered into force and is unlikely to do so in the future, it has played an important role in the development of the EU liability regime and has itself been greatly influenced by the EU liability discussions. Interactions with the Lugano Convention are further discussed below. Limited interactions have also occurred or are likely to occur with more recent international instruments addressing liability issues such as the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, adopted in 2000 in Montreal, Canada. A first interaction with the Basel Protocol was analyzed in the Liability Inventory Study (Lefevre, 2001). The liability regime under the Biosafety Protocol is still to be elaborated, which leaves opportunities for interaction with the EU liability regime.⁷ Interesting in this respect is the inclusion of a short description of the state of play of the development of the EU liability regime in the review of existing liability instruments recently drafted by the secretariat of the Convention on Biological Diversity (Biodiversity Secretariat, 2001).

The limited number of interactions with other international instruments can thus also partly be explained by the novelty of the development of a relatively comprehensive liability regime at the international level. The development of the liability proposal is yet another example where the EU is at the forefront of the development of international environmental legislation. Legislative initiatives on new issues in many instances arise earlier at the EU level than at the international level, and EU action often inspires action at the international level.

Initiatives at the EU level action are in turn often inspired by initiatives in one or more Member States. It is at this level that most interactions with the liability proposal have taken place. In the drafting of the EU liability proposal important inspiration was sought in the environmental liability regimes in the EU Member States, but also in a number of non-EU

⁷ See for the discussion of liability under the Biosafety Protocol Cook, K., 2002.

States. During the development of the Proposal two studies on national liability systems for environmental damage were commissioned. These two studies, the first one of which was finalized in 1995 (CMS Cameron McKenna, 1995) and the second in 2001 (Clarke, 2001), gave overviews and updates on the development of liability legislation in a range of EU and non-EU countries, trying to extract a common denominator and approaches that could be applied at the EU level. Specific studies were also commissioned on financial assurance and damage valuation, all of which focused on the specific national regimes.⁸ Whilst researching the design of the liability proposal for this study, many direct and visible interactions were in particular found with the implementation of environmental liability in the United States. As scope of this study excludes interactions with national regimes, these will not be addressed here.

Table 2: Specific Interactions between the Liability Proposal and other International Institutions or EU Legislative Instruments

Institution/Instrument	Cases of Interaction
Revised Deliberate Release Directive	<ul style="list-style-type: none"> Provisions on liability for damage caused by GMOs were excluded from the scope of the Revised Deliberate Release Directive as these were intended to be included in the liability proposal
Habitat, Wild Birds and Water Framework Directives (as a source)	<ul style="list-style-type: none"> The scope of the liability proposal ('environmental damage', Article 2(1)(18)) is defined by the coverage of these Directives.
Habitat, Wild Birds, Water Framework and Deliberate Release Directives (target)	<ul style="list-style-type: none"> The liability proposal is intended to strengthen the implementation and enforcement of these Directives.
EU legislation regulating specific activities and their impact on the environment	<ul style="list-style-type: none"> Reference to these Directives is made to define the 'dangerous activities' subsequent to which liability can be incurred (Article 3.1 and Annex I). The Directive also excludes 'compliance with a compulsory order, instruction or other legally binding or compulsory measure emanating from a public authority', which can be given under those Directives, from the scope of the liability regime (Article 9(3)(b)).
Lugano Convention	<ul style="list-style-type: none"> Initially the Lugano Convention provided an important inspiration for the EU liability regime. More recently the EU decided to develop an alternative liability regime, using the Convention as a 'bad precedent'. As a result of which this Convention is now unlikely to ever enter into force.
Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal	<ul style="list-style-type: none"> EU negotiators secured a possibility to allow a stricter EU liability regime to be established at a later date, and exclude damages covered by such a stricter regime from the scope of the Basel Protocol.

In total six cases of direct and specific institutional interaction were identified during the inventory stage of this project (Lefevere, 2001). These interactions are summarized in Table 2 above. Readers should keep in mind that the interactions with the Habitat⁹, Wild Birds and Water Framework Directives were in fact seven separate interactions (three in which the liability proposal was the target and four in which it was the source of the interaction), but because of the similarities with the interactions with these directives these interactions were

⁸ See also: <http://europa.eu.int/comm/environment/liability/followup.htm>.

⁹ See for interactions with the Habitats Directive also the contribution by Clare Coffey & Saskia Richartz.

treated as two cases. Similarly, the interactions with the Directives listed in Annex I of the liability proposal defining ‘dangerous activities’ should each be seen as a separate interaction.

All observed interactions were with environmental instruments or instruments regulating specific activities for reasons of their health or environmental impact. Less direct and visible interactions may have taken place with non-environmental instruments, but these were not significant enough to be picked up in this study. Almost all interactions that were observed related to the shaping and role of the liability proposal, which can be explained by the fact that for most of the period that the interactions were studied no specific proposal was on the table. In the interactions where the liability regime was the target, the Commission tried to borrow concepts from other Directives and international instruments in order to define the scope and design of the liability proposal. In most of the interactions where the liability proposal was the source, the Commission tried to carve out a role for the liability proposal. This was done through avoiding the limitation of the scope or prescription of the approach of the EU liability regime as a result of international instruments or by avoiding the inclusion of liability provisions in sector-specific Community legislation.

The interactions took place during the drafting of the Commission proposal. As the adoption of this proposal is the prerogative of the European Commission, the Commission was formally the only actor in the ‘institution’ of the liability proposal. In a large part because of this ‘shaping’ character of most of the interactions, all of them were intentional. The Commission pursued these interactions not only within the EU, but also at the international level, either in the source or in the target institution. The Commission’s central role in promoting these interactions meant that all of the interactions with international instruments were initially unilaterally driven. The interaction with the Basel Protocol is an exception to that. Here the Commission and the Member States proposed to the other States participating in the negotiations that a possibility would be included to allow a group of states to adopt a stricter liability regime. The inclusion of this possibility in the Basel Protocol necessitated the collective decision making of all States participating in the negotiations on the inclusion of the necessary text. The resulting interaction thus needed the consent of both the source and the target institution. The interaction with the Lugano Convention on the other hand came at a point where it had not entered into force and did not have a functional decision making structure, making the interaction by definition unilateral.

The ‘shaping’ character of most of the interactions and their intentionality on the part of the Commission meant that these interactions were intended to be synergistic rather than disruptive. Interestingly, the Commission’s assessment of the need for and the synergy of the interactions was not focussed on the liability instrument alone. Rather, it was motivated by the wish to preserve the compatibility and avoid unnecessary overlap between different Community instruments, contributing towards the construction of a coherent body of Community environmental legislation. The Commission’s strategic choices, intended to be synergistic, did however not necessarily have a synergistic result. In the case of the interaction with the Deliberate Release Directive, further discussed below, the result of the interaction can now be seen as disruptive, as the liability proposal no longer includes a civil liability regime for GMO damage. The isolated pursuit of the Commission’s interests and the focus on synergy within Community legislation caused an interaction with disruptive effects in the case of the Lugano Convention. As will be discussed below, the Lugano Convention initially served as a model for the Community regime and was for some time even considered as an alternative to developing a Community-specific instrument. Once the Commission changed

its approach, this also meant the demise of the Lugano Convention, which is now unlikely ever to enter into force.

Membership issues at the level of state participation have only played a minor role in the interactions observed in this study, more important was the role of Community institutions. Most of the interactions occurred during the time of the Commission's elaboration of the liability proposal. Member States only play an indirect role in the elaboration of Commission proposals – the drafting of a proposal is a prerogative of the Commission alone. Member States and other Community institutions usually only come into play once the Commission adopts the proposal and it enters the legislative procedure. As a result of this the Commission is the key player in all the interactions observed in this study, with only a limited role for the Member States. The overlap in membership in horizontal interactions was thus complete – with the Commission being the central player. Membership did play a role in the vertical interaction with the Basel Protocol and the Lugano Convention, where the Community and its Member States constituted an important part of the states participating in the negotiations. The Community acting as a block in relation to those instruments helped secured the exemption to allow stricter regional liability regimes and caused the demise of the Lugano Convention.

The following sections will address in more depth two interactions. The first is the interaction with the Lugano Convention. This interaction was chosen as it provides a good example of how European Community environmental law can play a crucial role in shaping environmental policy instruments at the international level, even to the extent that it is capable of causing the demise of an instrument that was already agreed in the Council of Europe. The second is the interaction with the recently revised Deliberate Release Directive. This interaction was chosen for further analysis because of the interesting dynamics of the interactions between the various institutions of the European Community and its significance for the further integration of Community environmental law into a full and complete body of legislation.

4. *Interactions with the Lugano Convention*

The Lugano Convention on Civil Liability for Damage initially served as a model for the EU liability regime and was for some time even considered as an alternative to developing a Community-specific instrument. During the development of the EU liability regime the Lugano Convention received increasing criticism, as a result of which it increasingly became a model of how not to develop a liability regime. Once the Commission decided to develop an alternative liability regime without a direct link to the Lugano Convention, this also meant the demise of the Lugano Convention, which is now unlikely ever to enter into force.

4.1 Background to the Lugano Convention

The Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment was adopted on 21 June 1993. The Commission and all EU Member States participated in the negotiations, as well as the EFTA countries and a number of central and eastern European states.

The Lugano Convention sets out the fundamental principles for a broad liability regime. It covers a wide range of 'dangerous activities', including: the production, handling, storage, use

or discharge of dangerous substances; the production, culturing, handling, storage, use, destruction, disposal, release of GMOs and micro-organisms; waste treatment, recycling, incineration, handling and disposal. The Convention's definition of damage is equally broad, covering loss of life, loss or damage to property, but also environmental damage. Environmental damage is limited to the actual costs of any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. The Convention covers the costs of preventive measures and contains a very broad definition of environment, including all natural resources (abiotic and biotic), as well as property which forms part of cultural heritage and characteristic aspects of the landscape. The application of the Convention is limited to incidents occurring after its entry into force. In the case of waste it covers damage that becomes known after entry into force, unless a site closed or the damage was caused by waste deposited before the Convention's entry into force. The Convention establishes a strict liability regime and joint and several liability in case the damage was caused by multiple operators. The Convention furthermore requires a compulsory financial security scheme. It also contains elaborate access to information provisions and gives a role to environmental organizations, allowing them to file claims requiring operators to stop a dangerous activity, take measures to prevent incident or prevent damage or take measures of reinstatement.

The adoption of the Lugano Convention coincided with the start of the discussions on a general Community environmental liability regime, initiated with the adoption of the Commission Green Paper on Environmental Liability. The evolution of the discussions on the EU liability regime, as well as the changing attitudes in relation to the Lugano Convention laid the foundation for the interaction between the two institutions.

4.2 From a Source of Inspiration to a Bad Precedent

The Commission's attitude towards the Lugano Convention changed considerably during the development of the Community liability regime. Initially the Convention was seen as a robust basis for a Community liability regime, and Community accession to the Convention was considered as one of the most attractive options. Increasing criticism on the Lugano Convention led the Commission to focus its thinking on using a combination of accession to Lugano and a Community Directive to address the Convention's ambiguities and gaps. By the end of 1996 the Commission had given up on the idea of accession to the Lugano Convention, but the Convention continued to serve as an important source of inspiration for the approach of the Community liability regime. In 2000 a change of Commission staff responsible for the development of the Commission proposal marked the Commission's final break with the Lugano Convention, leading to a fundamental reshaping of the Community's liability regime. The Commission Proposal now no longer covers civil liability aspects, but is limited to a public liability regime.

The criticism on the Lugano Convention mostly related to the open scope of its fundamental definitions. The definition of 'dangerous activities' was seen as too wide, not giving sufficient certainty on whether a particular activity was covered by the liability regime. Much criticism was also aimed at the fact that the Convention not only included property damage and loss of life, but also environmental damage. The definition of 'environment' was found too all-encompassing, and the Convention was seen to lack a concrete definition of the scope of the liability for this damage as well as a method to value the actual costs.

Shortly after the adoption of the Convention, Member State opposition to its ratification started to grow and what was initially a good example started to be viewed as a bad precedent. The Commission's White Paper, adopted in 2000, still singles out five Member States that were in the process of preparing legislation to implement the Lugano Convention or preparing its ratification.¹⁰ None of these Member States have however ratified. The White Paper also singled out Germany, the UK and Denmark as Member States that had already decided not to ratify in the beginning of 2000. Most importantly, the Commission White Paper itself criticised the Lugano Convention and dismissed it as a basis for an EU-wide environmental liability regime. This conclusion was later confirmed in the Council of Ministers on 31 March 2000.

The Lugano Convention requires three ratifications to enter into force. Although nine states, of which six are Member States of the EU, have thus far signed the Convention, it is unlikely that it will ever be ratified by a single state, let alone enter into force. The rejection of the Lugano Convention by the Community and its Member States can be seen as the main reason for its demise. The Community and its Member States constitute the core of the potential Parties to the Convention. Without their support it is unlikely that other states will ratify the Convention. The development of an alternative liability regime within the Community can be seen as one of the reasons for the rejection of the Convention. Although part of the Convention's failure could be attributed to its perceived weaknesses, the Community liability regime provided the final nail in the coffin of the Lugano Convention.

4.3 Analysis of the Interaction

Three separate but closely related interactions were observed. The first interaction was that the EU designed its own environmental liability regime using the Lugano Convention as a source of inspiration. In the second interaction the Lugano Convention, turns from a source of inspiration into a bad precedent. In the third interaction the EU liability regime finally 'kills' the Lugano Convention. The first interaction between the Community liability regime and the Lugano Convention has been very much driven by the Commission's search for a foundation and later for a source of inspiration for the Community regime. The Commission's interest in the Lugano Convention can be very easily explained by the fact that the Convention was adopted at the beginning of the Community's thinking on an internal environmental liability regime and provided an example of a very progressive and comprehensive regime. With this first interaction between the two regimes, the Lugano Convention constituted the source regime, whereas the Community liability regime constituted the target. As criticism of the Lugano Convention grew, the second interaction started to occur, and criticism of the Lugano Convention started playing an important role in the discussions on the design of the EU liability regime. This second interaction, leading to the construction of an alternative regime within the Community, caused the third interaction, with the Lugano Convention being the target. As a source, the discussions on the Community regime provided a platform for voicing the weaknesses of the Convention and constructing a coalition against its ratification that eventually got support not only from the Commission, but also all Member States through the Council. The development of the Community liability regime thus helped channel and concentrate the criticism on the Convention, and with the likelihood that a better EU-wide

¹⁰ Greece, the Netherlands, Austria, Portugal and Finland.

liability regime would be developed Member States decided to reject the Lugano Convention in 2000.

The Lugano Convention was adopted by the Council of Europe, the membership of which covers all EU Member States, as well as a broader range of Central and Eastern European States, many of which are soon to become members of the EU. The fact that EU Member States and EU accession countries constitute the core of the membership of the Council of Europe is one of the important drivers of this interaction, for two reasons. With all EU Member States being a member of the Council of Europe and having participated in the negotiations on the Lugano Convention, it was logical that this Convention would subsequently be used as the basis for the discussions on a Community liability regime. When the EU members of the Council of Europe collectively decided no longer to ratify the Lugano Convention, support from the core group of countries for this Convention disappeared. While the entry into force of the Lugano Convention was formally still possible, its rejection by key members meant that this was unlikely to ever happen. A second, but less apparent reason was that the broader membership of the Lugano Convention may have contributed to its rejection. Because of the broader participation in the negotiation of the Lugano Convention, Member States had less control over and had a lesser sense of ownership of the Convention, making it easier to reject the Convention.

As with the interaction between the liability regime and the revised Deliberate Release Directive, the Commission played a central role in this interaction. Being the initiator of proposals for Community legislation, it was the initial task of the Commission to develop the proposal for a Community liability regime. The Commission set the agenda for the discussions and took the final decision to abandon the Convention, which was then followed by the Council. Although the Commission position developed in response to opinions of stakeholders and Member States, the actual interaction was channelled through Commission actions. The interactions were intentional on the part of the Commission. Because the Lugano Convention had not entered into force, no formal reaction of this institution to the actions of the Community was possible. Tacit agreement with the Community's rejection of the Convention can however be seen in the fact that since 1997 no more states have signed, let alone ratified the Convention.

An assessment of the success of this interaction depends on one's opinion on the desirability to have a Community wide or European-wide environmental liability regime in place and what such a regime should look like. To many environmental groups the Lugano Convention provided a solid basis for an environmental liability regime. The rejection of this Convention and the fact that no Community regime is yet in place and the scope of the Commission proposal is significantly more limited than the regime envisaged by the Lugano Convention means that for these groups the interaction was a clear failure. Those groups that found the Lugano Convention too broad, and have opposed the adoption of a Community liability regime will classify this interaction as a clear success. Even without the inevitable interaction between the two regimes it would however not been very likely that the Lugano Convention would have entered into force with a significant number of states. The interaction may only have made the rejection of the Convention more explicit and have deprived it from entry into force.

Even the long delays in the elaboration and adoption of a Community liability regime are unlikely to revive the Lugano Convention. The Lugano Convention is however still seen as an important example for the development of the Community regime, although now much more

as an example of mistakes to avoid, and will continue to play a role in its development. The Convention is also still seen and used as an example of an international liability regime and a source of inspiration for other institutions currently being developed, and may thus still live on for years to come.

5. Interactions with the Revised Deliberate Release Directive

The interaction between the EU liability regime and the Revised Deliberate Release Directive is an interesting case of horizontal interaction, where arguments on legislative consistency were combined with political priorities and agenda setting. During the discussions on the adoption of the new Deliberate Release Directive the European Parliament insisted that a liability clause be included for damages caused by GMOs. The European Commission was however of the opinion that liability for GMOs should be regulated through the EU environmental liability regime, not in the Deliberate Release Directive, for reasons of legislative consistency, but also in order to avoid a further delay in the adoption of the Deliberate Release Directive. Parliament finally gave in to the Commission's wishes. The recent proposal for a liability Directive however no longer covers civil liability for environmental damage, which means that no Community-wide regime for civil liability for GMO damage will be established.

5.1 Community GMO Legislation

Community legislation on Genetically Modified Organisms (GMOs) has been in place since the early 1990s. The legislation on GMOs attempts to balance the protection of human health and the environment with the creation of a single market for biotechnology products. Community legislation covering GMOs can be divided in three main categories. Products derived from GMOs, such as paste or ketchup from a GMO tomato are covered by sectoral legislation such as the 1997 Regulation on Novel Foods and Novel Food Ingredients. The contained use of GMOs for research and industrial purposes is regulated by Directive 90/219/EEC as amended by Directive 98/81/EC. The central pillar of the Community's GMO regime is the Directive that regulates experimental releases and placing on the market of genetically modified organisms in the Community. Directive 90/220/EEC put in place a step-by-step approval process on a case by case assessment of the risks to human health, animal health and the environment before any GMO or product consisting or containing GMOs can be released into the environment or placed on the market. Directive 90/220/EEC has recently been replaced by Directive 2001/18/EC on the deliberate release of genetically modified organisms (the Deliberate Release Directive) (European Community, 2001). This Directive was adopted by the European Parliament and the Council of Ministers in February 2001 and entered into force on 17 October 2002.¹¹

The revised Deliberate Release Directive updates and strengthens the existing rules of the risk assessment and the decision-making process on the release of GMOs into the environment. It requires mandatory information to the public and general rules on mandatory labeling and traceability at all stages of the placing on the market. It also introduces mandatory monitoring requirements of long-term effects associated with the interaction with other GMOs and the

¹¹ For a more elaborate discussion of the Deliberate Release Directive and interactions with this Directive see the contribution by Ingmar von Homeyer in this volume.

environment and requires such effects to be taken into account in the risk assessment carried out prior to authorization. The revised Directive limits first approvals for the release of GMOs to a maximum of ten years. It also introduces an obligation to consult the European Parliament on decisions to authorize the release of GMOs and the possibility for Council of Ministers to adopt or reject a Commission proposal for authorization of a GMO by qualified majority.

One of the key issues that arose during the negotiations of the Deliberate Release Directive was the inclusion of a liability clause and an obligation for users of GMOs to take out liability insurance. The need for the inclusion of a liability and insurance clause was discussed in the context of the parallel development of the Community liability regime, leading to an interaction between the two pieces of legislation in formation.

5.2 Liability for GMOs – Choosing the Right Instrument

The discussion on liability for the use of GMOs can be traced back to the beginning of the development of the Community GMO regime. Growing public awareness and concern on the use of GMOs led the European Parliament, strongly supported by environmental NGOs, to play an important role in championing the inclusion of liability and insurance clauses in the recent revisions of both the Contained Use and Deliberate Release Directive.

The Commission proposed the revision of the Contained Use Directive in December 1995 (European Commission, 1995). Both the European Parliament's Committee on the Environment, Public Health and Consumer Protection (Rapporteur: Mr Antonios Trakatellis) and the Committee on Research, Technological Development and Energy (Draftsman: Mr Alain Pompidou) proposed in their reports for the Parliament's first reading to amend the Commission proposal to include full civil and criminal liability for users of GMOs, in combination with compulsory liability insurance (European Parliament, 1997). These recommendations were taken over by the European Parliament, which proposed that the following provision was to be included in the Commission Proposal:

‘Legally responsible users of genetically modified micro-organisms shall have full civil and criminal liability for any damage to human health and the environment caused by the uses in question. Before the activities begin, they shall take out sufficient liability insurance to cover such losses as might be occasioned thereby.’

The European Parliament's proposed amendments on liability and insurance were not taken over by the Commission in its amended proposal of June 1997. The Commission rejected inclusion of the Parliament's proposed amendment using the argument that liability for damage caused by GMOs as well as any liability insurance issues would be regulated in the separate regime on environmental liability. Although the European Parliament re-tabled its amendments in second reading, it was not taken up by the Commission or the Council. As the Contained Use Directive was adopted following the cooperation procedure, Parliament could not use the threat of its veto power to put pressure on the Commission and the Council to accept its amendment.

In 1996 the Commission issued a report on the review of Directive 90/220.¹² In response to this report, the European Parliament adopted a resolution on 16 July 1997, which explicitly called for liability and insurance provisions in the new proposal. When the Commission

¹² COM(96)0630.

proposed the new Deliberate Release Directive in February 1998 (European Commission, 1998), no provisions on liability for GMOs were included. Although little progress had been made on the development of the general liability regime, the Commission maintained its position that a liability for GMOs should be included in that general liability regime, not in the revised Deliberate Release Directive. The European Parliament disagreed and, in first reading of the Proposal for the new Deliberate Release Directive, put forward two amendments, virtually identical to those put forward in relation to the Contained Use Proposal:

Recital 17a (new):

Whereas there may be a wide range of causes of damage to the environment, not only GMOs; whereas EU-wide environment liability rules should therefore be introduced to provide wide-ranging regulation of possible cases of damage;

Article 22aa (new):

Those legally responsible for deliberate releases of genetically modified organisms shall have full civil and criminal liability for any damage to human health and the environment caused by the releases in question. Before the activities begin, they shall take out sufficient liability insurance to cover such losses as might be occasioned thereby.

The Commission's amended proposal, issued in March 1999, again ignored Parliament's amendments on environmental liability. When the European Parliament's Rapporteur recommended in March 2000 in his report for the second reading of the Proposal to re-table Parliament's amendment on liability, a range of stakeholders started lobbying the Parliament. Pressure on Parliament not to accept the committee's recommendation came not only from EU Environment Commissioner, Margot Wallström, but also from Consumer Affairs Commissioner David Byrne and the biotechnology industry. Commissioner Wallström, in her speech before Parliament on 11 April 2000, urged Parliament not to re-table the amendments. She referred to the progress made on the development of the liability regime through the adoption of the White Paper on Environmental Liability, adopted three months earlier, which proposed to introduce liability for GMO. She assured Parliament that GMO liability would form part of that proposal and that a proposal for an environmental liability Directive would be tabled before the end of 2001.¹³

As a result of this pressure, the European Parliament dropped its proposed amendment in second reading of the Proposal to revise the Deliberate Release Directive. Instead, Parliament put forward a proposal for a new consideration in the text of the Directive, which was to refer to the need to establish a general liability regime and which contained the deadline for bringing forward the proposal for this regime. Consideration 16 in the text of the final Directive is based on Parliament's proposal and now reads:

¹³ The text of her speech was: 'When I made my presentation to the Parliament in the autumn, I promised that I would take particular care of GMOs in the White Paper on environmental liability. The Commission has done exactly that when adopting the White Paper in February this year. The Commission is of the opinion that a horizontal approach is the most efficient way to guarantee a comprehensive responsibility regime for environmental damage. This will provide clarity for complainants and prevent loopholes. This is also the best way to complement the existing horizontal system for product liability already covering GMOs. I can assure you that I will do my utmost to be able to present a proposal for legislation on liability before the end of 2001', SPEECH/00/142, available through RAPID.

The provisions of this Directive should be without prejudice to national legislation in the field of environmental liability, while Community legislation in this field needs to be complemented by rules covering liability for different types of environmental damage in all areas of the European Union. To this end the Commission has undertaken to bring forward a legislative proposal on environmental liability before the end of 2001, which will also cover damage from GMOs.

Due to the pressure from the European Parliament to establish a liability regime for GMOs, this issue was explicitly addressed in the Commission's White Paper on Environmental Liability, adopted in February 2000. The European Parliament and the environmental NGOs were not the only groups pushing for a liability regime for GMOs. The White Paper also mentioned the requests by Belgium, Germany, Spain, the Netherlands, Austria, Finland and Sweden that the question of liability for environmental damage linked to the deliberate release and placing on the market of GMOs would be assessed in the context of the development of the Community liability regime. The White Paper furthermore mentioned that the United Kingdom had called upon the Commission as a matter of priority to consider the feasibility of and possible criteria for a liability regime or regimes to cover the release and marketing of GMOs. The growing calls from Member States for including liability for GMOs in the EU's liability regime were to a large extent linked with the discussions on ending the EU moratorium for GMO products, in which a number of Member States started using such liability as a condition for lifting the moratorium.¹⁴ In response to this wide support to address GMO liability the White Paper considered it appropriate for activities related to GMOs to be included in the Community's environmental liability regime.

The Commission's Liability Proposal from January 2002 still covers liability for activities under the Contained Use and Deliberate Release Directives. A significant limitation in GMO liability however comes through the fact that the Commission's proposal is limited to a public liability regime only. Whereas the White Paper still proposed a two tier liability, giving interest groups the right to act on a subsidiary basis, i.e. only if the State does not act at all or does not act properly, the Commission Proposal is limited to government action, with a possibility for interested Parties to request a judicial review of the government's action. Independent civil action is no longer possible.

5.3 Analysis of the Interaction

The interactions between the Community's liability regime and the Revised Deliberate Release Directive were driven by a number of factors. A first factor was the Commission's wish to maintain the consistency and coherence of Community law. The Commission was hesitant to pre-empt a general environmental liability discussion with a specific discussion on GMO liability in the Deliberate Release Directive. It felt that the GMO liability discussion should be held as part of the broader discussions on the development of the EU liability regime. A second factor is related to the objectives of the two regimes. The primary objective of the Deliberate Release Directive was to establish a Community-wide regime for allowing GMOs on the market. The issue of liability was only secondary to this, and if dropping the liability issue could speed up decision making on the Deliberate Release Directive, furthering its primary objective, this would be sooner be deemed acceptable. A third factor is more strategic. Concentration of the liability discussion in one forum removed one of the more

¹⁴ For a more elaborate discussion of the GMO moratorium see the contribution by Ingmar von Homeyer in this volume.

controversial issues, civil liability for damage caused by GMOs, from the discussions on the Revised Deliberate Release Directive. By doing so, the adoption of the revised Deliberate Release Directive could be finalized sooner, and the controversial discussion on liability for GMOs could be postponed.

In this interaction, the liability regime was not only a source. The interaction itself made the liability regime into a subsequent target. The liability regime was the source in the sense that the ongoing discussions on a general environmental liability regime have been the main reason for the exclusion of liability provisions from the Revised Deliberate Release Directive. Once the decision was taken to exclude GMO liability from the Revised Deliberate Release Directive, the Commission had undertaken the commitment to include GMO liability in the environmental liability regime. The interaction has thus reinforced the call for inclusion of liability for the use of GMOs in the Commission Proposal.

Perhaps the most interesting aspect of this interaction is the dynamics of the discussions between and the role of the two central players in this interaction. Although on a general level the membership of the two instruments is identical – all the Member States of the EU – membership issues do become much more interesting if those are studied at the level of the Community's institutions and their role in the decision making process. The two main players in this interaction were the Commission and European Parliament. Although the Member States, joined in the Council, also played an important role in the adoption of the Revised Deliberate Release Directive, their role was not decisive on the issue of liability. The reason for this is that there was no clear common agenda among the Member States either in favour of or against the inclusion of liability in the Deliberate Release Directive. Member States need unanimity in order to adopt an amendment of the European Parliament on which the Commission has given a negative opinion. Since the Commission took a clear position against including liability in the Deliberate Release Directive, the absence of a clear position among Member States automatically prevented them from introducing liability in the proposal. The Member States' role would have been different had the Commission accepted Parliament's amendments. In that situation the Council would have become the third party in this interaction. Interesting from the 'extended' membership perspective is also the role of the Community institutions under both instruments. During the largest part of the interaction, the Commission was the key player in the design of the liability regime, having the right of initiative for Community legislation. For the Revised Deliberate Release Directive the interaction took mostly place during the various stages of the co-decision procedure, where each of the Community institutions has a defined role. Interesting, too, was that the adoption of the Deliberate Release Directive was one of the earlier Directives adopted under the co-decision procedure, according a veto power to the European Parliament. This contrasts with the lack of concessions that Parliament managed to obtain in the discussions on the Contained Use Directive, which still followed the cooperation procedure, where Parliament has no such power.

The identical membership of both institutions greatly facilitated the ability of these institutions to interact with each other by allowing a joint decision on which institution to place the liability rules in. The adoption of the deliberate release Directive was most pressing, the proposal already being in the final stages of its adoption. The members of the institutions felt that due to the objective of the liability regime, liability rules were best dealt with under the upcoming environmental liability proposal. This influence was intentional on the part of both the target and the source institution.

Finally, it is interesting to analyze the objectives of both institutions in this interaction. The liability regime is mostly environmental protection oriented. Since the start of the discussions on an EU liability regime, key industry groups have opposed the adoption of an environmental liability regime at the EU level and have actively lobbied to weaken and obstruct the adoption of the liability proposal. The revised Deliberate Release Directive on the other hand has a dual objective, aiming to promote both environment and health protection on the one hand and the creating of a single market in which GMOs can be released Community-wide following specific procedures on the other. This balance in objectives allowed Parliament and environmental groups to put strong and concrete demands for liability rules on the table, demanding that no GMOs should be released unless a liability regime is in place. The Commission however made a strategic choice in favour of consistency of Community legislation, separating the liability discussion and concentrating it in one instrument. From an environmental perspective de-linking the liability from the access issue resulted in an important loss of leverage to push for the adoption of liability rules for the use of GMOs. This loss of leverage is already apparent in the Commission's liability proposal, which no longer covers civil liability for GMO damage. Having lost the leverage in the Deliberate Release Directive, and with only a limited role for the liability regime, it is unlikely that a Community-wide regime for civil liability for damage caused by GMOs will be adopted in the short term.

6. Conclusions and Recommendations

The Community liability regime is only at the start of its formation, and it is thus expected that further interactions will become more apparent during the discussion of the Commission proposal and in particular after its adoption. A clearer interaction is likely to become more apparent with the Community's biodiversity related institutions, in particular the habitats and wild birds Directives (see also the chapter on the Habitats Directive by Clare Coffey and Karen Shaw) and the Water Framework. Interactions are also likely to become clearer in relation to the Community legislation set out in the Proposal's Annex I, regulating dangerous activities which may give rise to strict liability for damages caused by these activities. At the moment, interaction with these institutions is mostly limited to the EU liability regime being the target rather than the source institution. In addition to these clear interactions there may also be a link with the revision of the EU chemicals policy and the elaboration of the EU's Integrated Product Policy (IPP), both of which are still in their early stages of their development.

It is also to be expected that the Commission liability proposal, and, once adopted, the Directive, will have a more visible impact on ongoing international negotiations on various liability regimes, including in particular the development of the liability regime under the Biosafety Protocol, as already indicated above. The EU liability regime may thus in the short to medium term become an important source of new interactions.

This chapter mapped out five interactions, the results of which have been summarized in section 3. Two interactions have been studied in more detail: the interaction with the Lugano Convention and the interaction with the Revised Deliberate Release Directive.

A number of lessons can be learned from this case study. A first lesson is the important role of the Community's institutional features in the analysis of interactions involving the

Community. Community institutions, in particular the European Parliament and the Commission, play a crucial role as players in the interactions. Their role, in particular that of the Commission, is not limited to horizontal interactions – the Commission can also drive vertical interactions through its role in representing the Community in international negotiations and by setting the agenda for and its monopoly on issuing new proposals for Community legislation. The Council, although not an important player in the interactions analyzed in this study, can not be seen as an aggregate of all Member States, but should also be seen as a separate entity with a separate role in the interactions. The role of the various institutions in the interactions is best explained through the Community's division of competence and its decision making procedures. The importance of these competencies and procedures was shown in both case studies. The Lugano Convention case study showed the power of the Commission in determining the focus of new Community legislation. The Revised Deliberate Release Directive case study showed how Parliament's role was significantly increased by the change in decision making procedure from cooperation to co-decision.

The interactions observed in this case-study also show a maturing of the Community's environmental policy. Community legislation is no longer seen in terms of individual instruments. Instead increasing attention is given to the interaction between these instruments and how they fit into the system of Community environmental legislation as a whole. Thinking about individual instruments is overtaken by a move towards more integration and a drive to make Community legislation consistent, building a complete framework of environmental legislation. This can also be seen within individual instruments, where there is a move to consolidate legislation from issue-specific instruments into broader, horizontal instruments and framework legislation. Through this integration thinking interactions are increasingly given explicit consideration in the development of new instruments.

The Community's integration thinking and awareness of interactions also has an impact on its actions at the international level. Not only does the Community increasingly attempt to export its legislation and concepts to the international level,¹⁵ it also explicitly wishes to keep the possibility to go beyond the rules set at international level and maintain the possibility to implement its own regime. Community-minded thinking does not always have a positive impact at the international level. An example of this is the Lugano Convention's demise, where the Community decided to redo the liability discussion internally, even though agreement at European level had already been achieved in the form of a convention.

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¹⁵ Although not explicitly discussed in this case-study, many examples of this can be given. Within the context of this case study one can refer to the fact that explicit references to Community legislation were used to define the scope of the Lugano Convention.

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Interviews

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