

Environmental Liability in Europe: The European Union's Projects and the Convention of the Council of Europe

The European Commission purposely triggered a wide debate in the spring of 1993 when it issued its Green Paper on Repairing Damage to the Environment.¹ The intensity of the discussions was heightened by the fact that the Green Paper's release occurred just a few days after a competing institution, the Council of Europe, adopted its Convention on Civil Liability Resulting from Activities Dangerous to the Environment.² As a result of the adoption of the Convention, the European Union (EU) must make a decision: It must either adopt the Convention's principles or develop its own legislation.

In any event, the EU must act soon or risk being labelled incapable of implementing its own policy, the "Fifth Environmental Action Program." Approved in 1992, this program expressly envisioned the extension of civil liability to all types of pollution as the ultimate instrument of Europe's environmental policy.³

Note: The American Bar Association grants permission to reproduce this article, or a part thereof, in any not-for-profit publication or handout provided such material acknowledges original publication in this issue of *The International Lawyer* and includes the title of the article and the name of the author.

*Mr. Thieffry is a member of the law firm of Thieffry & Associés, based in Paris, France, and a member of the Paris, New York, and Georgia Bars. He is also co-chair of the International Tort Liability Committee of the American Bar Association's Section of International Law and Practice.

1. Communication from the Commission to the Council, Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage, COM(93)47 final [hereinafter Green Paper].

2. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, June 21, 1993, Europ. T.S. 150, *reprinted in* 32 I.L.M. 1230 (1993) [hereinafter Convention].

3. A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, 1993 O.J. (C 138) 1, 5. In drafting its Fifth Environmental Action Programme, the Commission was concerned by the economic boom, which was believed to result from the establishment of the Single Market; the progressive association of European Free Trade Association (EFTA) countries, which are highly concerned with environmental matters; and the inevitably increased relations with notoriously polluted countries of Central and Eastern Europe.

While the main purpose of the Convention is to ensure adequate reparation of damages resulting from environmentally dangerous activities, it also seeks to encourage potential polluters to take preventive and restorative measures. It also introduces a right to freedom of information, a right that is not limited to information held by public authorities, but also extends to information held by any person exercising control over a dangerous activity. However, this right is subject to major restrictions by the contracting states, especially with respect to information deemed confidential by government institutions or information considered a business or industrial secret. The Convention also contains provisions concerning jurisdiction and the recognition and enforcement of judgments, dispositions that are parallel to those contained in the Brussels⁴ and the Lugano Conventions⁵ on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.⁶

Although environmental protection has progressively become an essential instrument in the creation of a European internal market, the EU's work is far less advanced than that of the Council of Europe with respect to environmental liability questions. The "polluter pays" principle has not been applied in Europe to imply strict liability for environmental damages⁷ as has been the case in the United States pursuant to Superfund legislation.⁸ The first real step toward the application of strict liability was the European Commission's proposal of a Community Directive concerning Civil Liability for Damage Caused by Waste of September 1, 1989.⁹ The proposal has met with difficulties at the legislative level, which

Focusing on the degradation of the environment, the Commission expressed the need to enlarge the scope of available instruments. It thus reviewed tax and economic instruments that aim at internalizing the external ecological costs involved in the life of products from the source to their final elimination.

4. European Communities' Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, 1969 O.J. SPEC. ED. (C 97) 2, *reprinted in* 8 I.L.M. 229 (1969) [hereinafter Brussels Convention]. The recognition and enforcement of judgments among the Member States of the European Union, which are all parties to the Brussels Convention, differs drastically with the treatment of foreign judgments in the United States. *See generally* PATRICK THIEFFRY & CHRISTINE LECUYER-THIEFFRY, *LE RÈGLEMENT DES LITIGES CIVILS ET COMMERCIAUX AVEC LES ÉTATS-UNIS* (1986).

5. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention]. The purpose of the Lugano Convention is to extend the rules of the Brussels Convention, which are only applicable to civil and commercial matters involving parties having certain contacts with the twelve Member States of the European Community, to parties in countries that are members of the EFTA.

6. In fact, the relevant provisions of the Brussels and Lugano Conventions shall apply in cases in which Member States of the EU or the European Economic Area are involved. Convention, *supra* note 2, arts. 19-24.

7. Declaration of the Council of the European Communities and of the Representatives of the Government of the Member States Meeting in the Council of 22 Nov. 1973 on the Programme of Action of the European Communities on the Environment, 1973 O.J. (C 112) 1.

8. Comprehensive Environmental Response, Compensation, and Liability Act [hereinafter CERCLA], 42 U.S.C. §§ 9601-9675 (1994).

9. Proposed Directive on Civil Liability for Damage Caused by Waste, COM(89)282 final [hereinafter proposed Directive], *modified by* Amended Proposal for a Council Directive COM(91)219 final [hereinafter modified proposed Directive]. *See* Patrick E. Thieffry & Peter E. Nahmias, *The European Community's Regulation and Control of Waste and the Adoption of Civil Liability*, 14 HASTINGS INT'L & COMP. L. REV. 949 (1991).

have slowed its adoption to the point where it may never become law, and its ultimate fate hinges on the results of the consultation initiated by the publication of the Green Paper.

This article compares the options found in the proposed Directive with the solutions embodied in the Convention. By so doing it puts into perspective the questions raised in the Green Paper regarding the future liability of polluters, its scope of application, conditions, and the resulting remedies.

I. The Adoption of Strict Liability for Environmental Damage

Both the Convention and the proposed Directive opt for strict liability and limit the defenses available to operators of dangerous activities or permanent waste disposal sites and producers of waste. While the European Commission's officials claim to have postponed any final determination on the issue of strict liability, its Green Paper appears to show a strong preference for a strict liability regime, thus focusing the current political debate on available defenses.

A. STRICT LIABILITY

The terminology used by both the Convention and Directive is similar: While under the Convention the operator is responsible for damages caused,¹⁰ the proposed Directive would render the producer of waste civilly liable for environmental damage and degradation caused by waste. Both systems would operate regardless of fault.¹¹ The negotiators of the Convention seem to have held the position that strict liability would encourage operators to adopt all preventive measures necessary to avoid the occurrence of damages.¹²

While this position is not uncommon, it is questionable whether strict civil liability is an effective deterrent against behavior harmful to the environment. Indeed, one could argue that large businesses already have significant economic incentives to comply with the abundant EU and Member States' environmental laws, and that they are already subject to strict monitoring by various governmental authorities. Conversely, small and medium-sized companies have thus far shown a lack of sensitivity to environmental concerns. Comparisons to the U.S. experience may lend credence to the belief that polluter liability is indeed an effective deterrent.

The Green Paper also clearly demonstrates the merits of strict as opposed to fault-based liability. The Paper takes the position that fault-based liability is, by its very nature, flawed in that it requires the victim to prove fault. Conversely, strict liability can significantly promote compliance with environmental laws.¹³

10. Convention, *supra* note 2, art. 6, § 1, art. 7, § 1.

11. Proposed Directive, *supra* note 9, art. 3.1.

12. Explanatory Report of the Convention § 51.

13. Green Paper, *supra* note 1, § 2.1.

Given that the Commission deems fault-based liability an inadequate solution in many cases as it is difficult, and sometimes impossible, to establish liability,¹⁴ it sees strict liability as a particularly well-adapted solution to the reparation of environmental damages. It simplifies the determination of liability¹⁵ and thereby encourages the mitigation of damages.

Notwithstanding these advantages, however, the European Commission recognizes that an excessively broad strict-liability regime can lead to economic problems such as those seen in the United States. For that reason it has opened the debate on the implementation and scope of application of strict liability.

B. DEFENSES

A narrow interpretation of strict liability provisions in order to limit the availability of defenses is necessary to guarantee the effectiveness of such a law as a deterrent and to ensure the adequate reparation of damages.¹⁶ This goal perhaps explains why defenses available in both the Convention and the proposed Directive appear particularly limited. For example, neither the Convention nor the proposed Directive sets a financial limitation on liability, and Member State legislatures may not mandate such a financial limitation. Citing an OECD communiqué on compensation for victims of accidental pollution, the Green Paper states that "any limit on liability would have to be set at a high level so as not to undermine the prevention function of strict liability."¹⁷ Such a reference suggests that, if limits are set, potential polluters may also be required to contribute to a compensation fund to cover those costs that exceed the amount paid by parties already judged liable.

Neither compliance with regulations nor an express authorization from public authorities would relieve a party of liability under the terms of the proposed Directive.¹⁸ This provision accords with generally applied principles in European countries. In this respect, the Convention may appear somewhat less stringent, as it provides that operators shall not be liable for damage resulting from compliance with a specific order or other compulsory measure of a public authority.¹⁹

The most significant defenses would be limited to force majeure, third-party fault, and statutes of limitation.

1. *Force Majeure*

According to the terms of the proposed Directive, defendants would be allowed to invoke force majeure as a defense to liability.²⁰ However, it must be noted

14. *Id.* § 4.1.1.

15. *Id.* § 4.1.2.

16. Explanatory Report of the Convention § 7.

17. C(91)53, August 1991 (OECD).

18. Proposed Directive, *supra* note 9, art. 6.2.

19. Convention, *supra* note 2, art. 8(c).

20. Modified proposed Directive, *supra* note 9, art. 6.1.b.

that the draft refers to a specific notion of force majeure, although in respect to liability, such notion is unknown in the EU's legal system. The Commission should investigate this issue.

With respect to the Convention, it provides certain exemptions in article 8(a). The operator shall not be held liable in the case of: an act of war; hostilities; civil war; insurrection; or a natural phenomenon of an exceptional, inevitable, and irresistible character.²¹

Civil law countries generally criticize such narrowly drawn definitions as too restrictive. It is indeed regrettable that a more generic definition was not employed, especially since a broader definition would have found support in well-established case law in many Member States.

2. *Contributory Negligence and Third-Party Fault*

Not surprisingly, both the proposed Directive and the Convention provide that, if the victim contributed to the damage by its own fault, compensation may either be reduced or denied altogether. However, the Convention provides an exemption from liability for damages resulting from lawful, dangerous activity, where the injured party reasonably exposed himself to risk.²² Such a defense is surprising, and possibly unsound. At the very least, there should be a bright-line standard for determining when the defense is triggered.

Under the Commission's first proposal a defendant was liable where a third party's acts contributed to the damages. Following the lead of the European Parliament on the matter, however, a newer version of the Directive exonerates the polluter of all liability if it is able to prove that, in the absence of fault on its part, the damage to the environment is the result of an act or omission of a third party that intentionally caused the damage. Here again, the Commission borrowed from the Convention. The latter provides that the operator shall not be liable for damage if it is able to prove that the damage was caused by a third party acting with the intent to cause damage, despite safety measures appropriate to the type of dangerous activity in question.²³ Thus, the Convention imposes the additional condition that the defendant must have taken appropriate safety measures in light of the dangerous activity in question.

3. *Statutes of Limitations*

According to the proposed Directive, actions for damages must be brought within three years from the date on which the claimant knew or should have known of the damage to or deterioration of the environment. The Convention provides for a similar three-year time limit, but with as a starting date "the date on which the claimant knew or had reason to have known of the damage and of

21. Convention, *supra* note 2, art. 8(a).

22. *Id.*

23. *Id.* art. 8(b).

the identity of the operator.''²⁴ In addition, both the proposed Directive and the Convention include a thirty-year statute of limitations.

II. Scope of Application of Contemplated Strict Liability

Strict liability is generally imposed as a charge to businesses that engage in specific types of inherently dangerous activities. The desire to protect against such harms is reflected in the strict liability legislation enacted by major countries of both civil-law and common-law systems. The importance of determining the reach of the proposed legislation cannot be overemphasized in the current political debate.

In determining the extent of the polluter's liability, both the nature of the activities proscribed and the potentially liable actors must be examined. This enquiry also involves the issue of reparation when it is no longer possible to obtain relief from the party that actually caused the damage.

A. ACTIVITIES TRIGGERING LIABILITY

The proposed Directive would apply only to damages caused by waste created in the course of a commercial or industrial activity. It provides certain exceptions in light of the existence of various international treaties on certain types of waste, most notably nuclear waste. Indeed, as well-established, industry-specific treaties already govern many such activities, it would be quite disruptive to introduce new legislation.

The Convention, on the other hand, has a much broader scope. Much like CERCLA, it applies to all dangerous activities presenting a significant risk to humans, property, the environment, or genetically modified organisms, while setting forth only limited exceptions.

In its Green Paper, the European Commission recognizes that the adoption of strict liability on a wide scale may not be desirable, as it could prove to be excessively costly for certain industries.²⁵ Clearly, this concern can be viewed as an expression of the Commission's fear of duplicating the American precedent. Irrespective of the Commission's motives, however, such caution is laudable and should be encouraged. Strict liability must remain a special charge imposed on specified, hazardous activities. As it hampers the competitiveness of businesses affected, it is precisely the older industrial sectors whose activities create no special hazards and whose competitiveness is increasingly threatened that should be exempted from the scope of strict liability.

24. *Id.* art. 17, § 1.

25. Green Paper, *supra* note 1, § 2.1.2.

B. POTENTIALLY RESPONSIBLE PARTIES AND COMPENSATION FUNDS

The proposed Directive broadly defines a potentially responsible party as any person who produces waste in the course of a commercial or industrial activity, as well as any person who carries out pretreatment operations, including mixing, that leads to a change in the nature or composition of the waste.²⁶

The Convention places liability on the operator of the dangerous activity²⁷ or site,²⁸ that is any person who exercises control over a dangerous activity.²⁹ Here again, a parallel can be drawn to U.S. CERCLA legislation.

According to the Green Paper, the channelling of liability must constitute both an efficient and equitable solution to the remedying of damages to the environment and should also be likely to discourage further pollution, an essential element of strict liability.³⁰ To achieve this goal, it is necessary to impose liability on the party who possesses technical knowledge, sufficient resources to influence, and operational control over the activity in question.³¹

As explained in the Green Paper, cases involving (1) multiple-source pollution, (2) pollution emitted over a period of time where it is not possible to determine the precise identity of the polluter, or (3) pollution caused by a polluter who has disappeared or is no longer solvent, should not be handled with liability instruments. The Commission similarly takes the position that certain injuries to the environment cannot be remedied through regular liability rules. In this respect, it draws from the U.S. experience that imposing liability against innocent purchasers of polluted sites for past or gradual pollution, or where the polluter has disappeared, results in excessive hardship that may endanger the entire system. Nevertheless the Commission has looked to compensation funds as a solution to this problem, proving that it is not consistently mindful of the U.S. Superfund experience.

III. Relief and Access to Justice

The third major stake in the current political debate relates to the types of relief available and to the ability of various interest groups to obtain access relief.

Both the Convention and the proposed Directive define the types of damages and the categories of claimants entitled to seek reparation of their injuries. The subject constitutes a delicate matter for the Commission to consider in its next legislative project.

26. Modified proposed Directive, *supra* note 9, art. 2.1(a).

27. Convention, *supra* note 2, art. 6.

28. *Id.* art. 7.

29. *Id.* art. 2, § 5.

30. Green Paper, *supra* note 1, § 2.1.3.

31. *Id.* § 4.1.2(C).

A. DAMAGES, ALTERATIONS TO, AND DETERIORATION OF THE ENVIRONMENT

Defining the types of injuries that will result in polluter liability is dependent upon the type and the scope of the corrective measures necessary, and hence the costs that can be recompensed through the imposition of liability. While the European Commission recognizes the need for this approach, it is at odds with the business community with respect to the extent of restorative measures that should be allowed.

1. *Damages*

In both the Convention and the proposed Directive, damages include both personal injury³² and property damage. The Convention is more restrictive in this respect, since it excludes the site itself, as well as all property located on the site and under the control of the operator.³³ Inequities between the Member States are highlighted by the proposed Directive, which provides that the Directive will not interfere with national laws that govern the issue of intangible damages. Obviously, this provision would distort competition among affected companies operating under differing legal regimes in the various Member States, and should as a consequence be objected to.

2. *Alteration of the Environment*

Article 4 of the proposed Directive allows plaintiffs to obtain an order either (1) enjoining the polluter from continuing its activity or (2) compelling the polluter to correct the omission that caused or is likely to cause harm. Reimbursement for preventive measures undertaken by the plaintiff in self-defense is also contemplated.

Following the advice of the European Parliament, the modified version of the proposed Directive does not state which parties may bring actions under its provisions. Rather, it leaves this choice to the individual Member States, and then enumerates the available means of recourse. Further, it is not clear whether Member States can set aside specific causes of action for certain categories of claimants.

The Convention is very clear on these points. Only certain groups can obtain injunctive relief. These groups can obtain an order enjoining dangerous activities that constitute a serious threat of environmental damage as well as injunctions ordering operators to take preventive measures or measures of reinstatement. Such injunctions can include "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."³⁴

32. *Id.* art. 2, § 7(a); proposed Directive, *supra* note 9, art. 2.1(c).

33. Convention, *supra* note 2, art. 2, § 7(c); proposed Directive, *supra* note 9, art. 2.1(c).

34. Convention, *supra* note 2, art. 2, § 8.

As with the Directive, these provisions can in certain cases be limited by Member States' national laws. The Convention also allows damages for "impairment of the environment" and reimbursement of preventive measures.³⁵

B. PLAINTIFFS: VICTIMS AND PUBLIC INTEREST GROUPS

These innovative remedies and the measure of their efficacy appear, therefore, to depend upon which parties may invoke them.

1. *Towards a "Private Attorney General"*

The most remarkable feature of the proposed Directive may be its introduction of certain elements of the American concept of the "private attorney general." Not previously implemented in Europe, the private attorney-general concept and its threat of increased civil litigation by private parties should be a strong incentive for polluters to strictly conform their behavior to environmental standards rather than gambling that illicit behavior will go undetected.

The original draft of the proposed Directive did not forbid victims of pollution from seeking damages for deterioration to the environment distinct from the damages they personally suffered. To the contrary, legal recourse is foreseen independent of any personal damages suffered in the form of preventive measures, or via the suspension or reparation of the act likely to cause harm to the environment. The European Parliament, clearly mindful of the potential effects of such a system, convinced the Commission to modify its initial proposal to provide Member State legislators the choice of determining which persons may bring such an action. The question thus remains open.

2. *Associations and Special Interest Groups*

Pursuant to article 4, section 3 of the proposed Directive, associations or special interest groups whose goal is the preservation of nature and the quality of the environment would have the right either to initiate legal proceedings based on the rights provided for in the Directive, or to intervene in litigation already under way.

Under the Convention, only associations or foundations whose main goal is environmental protection and that satisfy "any further conditions of internal law" of the state where the claim is made may (1) bring injunctive relief against dangerous activities that pose a serious threat to the environment, and (2) force the tortfeasor to take preventive measures or restore past conditions.³⁶ Further, national laws may specify whether the action should be administrative or judicial in nature, and can require that the group have its headquarters or center of activities in the territory of the contracting state concerned.

35. *Id.* art. 2, § 7.

36. *Id.* art. 18.

IV. Conclusion

The European Union has made environmental protection one of its fundamental policies and, above all, requires that its demands be taken into account in the implementation of other Union policies. An initiative in the area of remedying environmental damage would therefore clearly have a sound basis in the law.

As for the degree to which environmental legislation will ultimately take hold in the European Union, however, discussions have arisen whether differences between the Member States' current liability systems are such as to create distortions of competitive conditions, which would demand harmonization of the disparate laws of the Member States.³⁷ The real motives underlying the actions contemplated by the European Commission and Parliament appear quite different. As stated in the Green Paper, civil liability would be "a legal and financial tool used to make those responsible for causing damage pay compensation for the costs of remedying that damage."³⁸ It would also serve "the important secondary function of enforcing standards of behavior and preventing people from causing damage in the future."³⁹ In other words, the purpose of the contemplated legislation is not to suppress distortions affecting the competitiveness of the respective Member States' industries, but rather to provide for the internalization of environmental costs and to create an incentive to businesses to undertake precautionary measures leading to better protection.

Left unresolved are two questions that do not directly arise from the problem of civil liability, but that have raised much discussion because of their immediate economic impact: those of mandatory insurance and compensation funds.

The original draft of the proposed Directive did not impose mandatory insurance, although the Commission finally agreed with Parliament that producers must be covered by insurance or another type of financial guarantee. The latter possibility would allow self-insurance, which is increasingly common in large industrial groups, and should become even more popular due to the difficulties of obtaining coverage for these types of risks.

The Convention adopts a similar solution. Although contracting states will reserve the right to forgo adoption of this provision, these states will in principle require operators of dangerous activities to participate in a "financial security" regime, or to obtain some other suitable financial guarantee. Difficulties caused by a lack of available insurance for this type of risk must be a major concern for the European legislator. Not only would it render attempts to impose mandatory

37. See *e.g.* position papers issued by the International Chamber of Commerce's French National Committee and the UNICE for the public hearings conducted on November 3-4, 1993, by the European Commission and the European Parliament, demanding that adequate comparative law studies be conducted.

38. Green Paper, *supra* note 1, at 4.

39. *Id.*

insurance unlikely to succeed, it would also impair businesses' legitimate right to procure insurance and thereby spread risks stemming from their activities.

A second problem that is particularly deserving of attention is the previously mentioned situation of environmental damages caused by a polluter from whom damages can no longer be sought, that is, multiple-source pollution and pollution emitted over a period of time in such a way that the polluters can no longer be identified, are no longer in business, or are no longer solvent. There appears to be a consensus in Europe that liability is not an appropriate response to this problem and that every effort should be made to avoid a duplication of the Superfund experience. Indeed, the European Commission and Parliament appear to be planning to create compensation funds to deal with such contingencies.

This approach, however, raises the obvious question of who would contribute to such funds and at what cost to European industry. European competitiveness vis-à-vis U.S. manufacturers is not at issue, as the latter have long been forced to accept the costs of environmental liability. On the other hand, many European industries are quite concerned that companies operating in countries known for lax or nonexistent environmental laws will attract business activity at their expense, a phenomenon that has already received the dramatic name of "ecological dumping."

