Environmental Liability
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Introduction

On Wednesday 13 November 2002, the Prestige, a Bahamas-registered, 26-year-old single hull tanker owned by a Liberian company and carrying 77 000 tonnes of heavy fuel oil, sprang a leak off the coast of Galicia. It eventually broke apart on 19 November and sank 270 km off the Spanish coast. Thousands of tonnes of heavy fuel oil spilled into the sea, polluting the Galician coastline. The pollution then spread to the shores of Asturias, Cantabria and the Spanish Basque country. In cases like this, there is clearly a need to ensure that the damaged environmental assets are restored; a better solution would be, of course, that the damage does not even occur, so that prevention is also a valuable objective in this context. When a significant environmental damage nevertheless occurs, the question inevitably arises of "who shall foot the bill". The principle according to which the polluter should pay is at the root of Community environmental policy (Article 174 (2) EC Treaty); it shows that in many cases the operator who causes a damage should be held liable, i.e. be financially responsible.


Background

The European Commission adopted a White Paper on Environmental Liability on 9 February 2000 (COM(2000) 66 final). The objective of the White Paper was to explore how the polluter pays principle, one of the key environmental principles in the EC Treaty, can best be applied to serve the aims of Community environmental policy. The White Paper explored how a Community regime on environmental liability might best be shaped. Having explored different options for Community action, the Commission concludes that the most appropriate option was a Community framework directive on environmental liability.


• Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage
• Frequently asked questions on the Commission’s proposal on environmental liability

• 17/12/2003 – following the co-decision procedure the European Parliament adopted in second reading amendments to the Council’s common position. There seems to be a conflict over Parliamentarians’ determination to delete a paragraph in article four. This would enable operators to limit their liability in line with a 1976 international convention on limitation of liability for maritime claims. Another parliamentary amendment seeks to bring forward from eight to five years after the directive’s entry-into-force a deadline for the Commission to report on implementation. Should insurance markets or other forms of financial security not have developed, a harmonized compulsory financial guarantee would have to be proposed.
• 15/01/2004 – The EU Council of ministers has rejected in its Internal note parliamentary December 2003 demands for minor changes to the draft environmental liability Directive. The move means there will be further delay before the law can be finalized. The two institutions will now hold conciliation talks to overcome their differences.
• 2/09/2003 - The EU council of ministers released the final text of an inter-governmental deal to create a financial liability regime for damage caused by firms to the environment and biodiversity. An agreement on almost all points was reached in June and a partial text
emerged later that month. The full common position confirms subsequent agreements on the wording in the directive’s definitions, annexes and recitals. It now travels to the European parliament for a second reading. See council of ministers’ common position on EU liability directive.

Overview of Environmental Liability Directive

The Environmental Liability Directive, first proposed in 2002, entered into force in April 2004. It is a major new EU law aimed at preventing environmental damage by forcing industrial polluters to pay prevention and remediation costs. The Directive is considered to be one of the most controversial and potentially far-reaching pieces of environmental legislation negotiated by the EU up to date. Member states have to transpose its provisions into national law until 30 April 2007.

A review in 2014 will consider amending the law. A separate review in 2010 will decide whether the regime should be modified to introduce mandatory liability insurance for firms covered by the law. Final negotiations on the issue ended in February with an agreement between MEPs and governments to leave insurance optional for now.

Under the new regime, economic operators carrying out “hazardous” activities will be held strictly liable for preventing or remediating any damage caused by those activities to land, water and protected habitats and species. In addition, operators carrying out other, less harmful, activities will be held liable when found to be at fault for damage to protected habitats and species. Defining this latter term proved a tough political balancing act. Policy makers eventually decided it should encompass all habitats and species listed in the EU's habitats and birds Directives, plus any others added by member states at national level.

Member states will have discretion to exempt firms from clean-up costs if the damage is caused by pollution released within the terms of emission permits or if the damage occurred despite the use of best practice. If this happens, governments will not be obliged to cover the costs themselves. Moreover, operators will automatically be exempt from having to compensate for damage if it is caused by war or an act of God, or if it was caused by a third party and despite taking all safety measures. Damage from nuclear and maritime accidents falls outside the regime's scope and remains subject to existing treaties.

Overview of the commission proposal

The legal basis of the proposal is Article 175 (1) of the EC Treaty. The proposal aims to establish a framework whereby significant environmental damage would be prevented or restored. “Significant environmental damage” is to be defined in the context of the proposal by reference to biodiversity protected at Community and national levels, waters covered by the Water Framework Directive and human health, including when the source of the threat to human health is land contamination. Specific criteria are given to assess more precisely when a damage is significant. That goal is to be achieved through the enactment of general duties on Member States according to which they will have to ensure that the necessary preventive or restorative measures are actually taken. The proposal leaves it open to Member States to decide when the measures should be taken by the relevant operator, or by the competent authorities or by a third party on their behalf. Institutional and procedural detailed arrangements as to how the prescribed results will be achieved are left to a very large extend to Member States in line with subsidiarity and proportionality principles. The proposal determines, however, certain rules on the restoration objectives to be achieved and how to identify and choose the appropriate restorative measures so that a minimum common basis is shared by Member States in that respect and enable them to ensure in an effective manner the implementation of the proposed regime.

In accordance with the “polluter pays” principle, the operator, who has caused the significant environmental damage or who is faced with an imminent threat of such damage occurring, must ultimately bear the cost associated with those measures. In case when restorative measures were taken by the competent authorities or by a third party on their behalf, operator in question must then recover the costs. An Annex to the Proposal contains a list of activities for which operators shall be strictly liable. For other types of damages (like biodiversity damage) operator can only be held liable when at fault or negligent. Finally, when no operator can be held liable, the Proposal requires that Member States to ensure the needed preventive or restorative measures are actually taking place. Alongside the subsidiarity principle, such measures can be financed from any source.
Environmental NGOs are given a locus standi in the proposal in a sense that it allows qualified entities, alongside those having sufficient interest, to request the competent authority to take appropriate action and possibly challenge their subsequent action or inaction. The proposal envisages several economic instruments like financial assurance of environmental liabilities in general and damage assessment methodologies that are likely to ensure adequate restoration at reasonable economic costs.

Studies and Publications

- **Developments in Liability and Compensation post-Prestige** (ppt file)
- **An Analysis of the Preventive Effect of Environmental Liability. Environmental Liability, Location and Emissions Substitution: Evidence From the Toxic Release Inventory**
  
  The study shows that adoption of strict liability in preference to a negligence-based system does not appear to have induced widespread, unforeseen changes in the way firms handle their toxic pollutant emissions.