AVOSETTA QUESTIONNAIRE

ENVIRONMENTAL LIABILITY DIRECTIVE

Danish report – by Peter Pagh - Ghent, 1-2 June 2007.

I. Can you give some concise information about your national environmental liability system?

Danish Law on environmental liability is a mixture of three concepts or regimes:
(a) case law, the polluter is liable for environmental damage caused by negligence (culpa);
(b) civil liability legislation adopted by Parliament, the operators of IPPC-installations is strictly liable for environmental damage (the Act on Liability for Environmental Damage from 1994); and
(c) public law adopted by Parliament, a strict administrative liability regime is established regarding polluted land in the Contaminated Soils Act from 1999 (the strict administrative liability regime means that the environmental authorities are granted the discretion to order the polluter to clean up even if the pollution is caused incidental – but no retroactive effect). In the same way owners of Sea Vessels are strictly liable for the costs held by the public authorities the remedying pollution of the Sea (the Marine Environmental Protection Act from 1980).

1.1 Are there special provisions on civil liability for environmental damage?

Yes, in the Act on Liability for Environmental Damage establishing a strict civil liability regime for environmental damage - restricted to listed dangerous industrial activities.

1.2 Are there other (administrative type of) special provisions and procedures concerning the prevention and remedying of environmental damage?

Yes: (1) the the Contaminated Soils Act from 1999 establish a strict administrative liability regime - means that the environmental authorities are granted the discretion to order the polluter to clean up even if the pollution is caused incidental. (2) the Act on the Protection of the Marine Environment from 1980 establish a strict administrative liability regime regarding marine pollution from sea-vessels and ofshore installations.

1.3 Do they have a general nature or are they only applicable in one or another environmental field (e.g. soil pollution) ?

The administrative liability under the Contaminated Soils Act from 1999 is restricted to soil pollution and the liability under the Marine Environmental Protection Act is restricted to certain cause of marine pollution.

2 Is your country party to the international conventions listed in the annexes IV and V of Directive 2004/35/EC?

Yes.

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

2.1 Has Directive 2004/35/EC already been fully implemented?

No – a proposal from the Minister of Environment was presented in parliament in March 2007. For very good reasons, members of the Parliament from all political parties raise questions on the proposal – and a hearing was held in which experts (including my self) presented strongly critic of the proposal – which neither comply with the directive nor is fit to do ensure liability of remedying environmental damage.

2.2 If not, is it under way?

Unclear what will happen

2.3 Have deficiencies of the Directive been identified during national discussions?

No

2.2. General approach of implementation:

Has your country reduced the level of environmental protection as a consequence of the Directive ?

- *Did your country opted for a comprehensive piece of legislation to transpose the Directive? A Separate Act or a new Chapter of a General Act?*

- *Did your country opted for amending several pieces of legislation?*

- *Did your country opted for a combination of these 2 approaches?*

- *Did your country opted for a mere transposition of the minimum requirements of the Directive or introduced stricter provisions?*

Not yet known

2.3. Options taken during the transposition process (please focus on innovations in your country legislation with respect to the text of the Directive)

2.3.1. Definitions

- How is the definition of environmental damage implemented?
- Did your country included in the notion 'protected species and natural habitats' habitats or species, not listed in the Annexes of the Birds and Habitat Directives? (art. 2.3 (c))
- Is land damage protected just in case of significant risk of adverse effect on human health?
- When is the conservation status of a natural habitat taken as favourable?
- What about the definition of "operator"? Are persons 'to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of the permit or authorization for such an activity or the person registering or notifying such an activity" included? (art. 2.6)

2.3.2. Scope

- Did your country opted for a double system of liability (strict and fault based) or for a more stringent regime as allowed by art 3.2?

2.3.3. Exceptions

- Which are the exceptions to the scope of the liability regime in your country? (art 4)
- What about the permit defence and the state of the art defence (art. 8.4)?

2.3.4. Preventive and remedial actions

- When are preventive (art 5) and remedial (art 6) actions taken by the operator?
- Which is the role of the competent authority?
- Is there any way for environmental organisations to participate in the negotiations between the polluter and the administration on the restoration ? Are these discussions public ?
- Are there provisions to develop in further details the common framework concerning the remedying of environmental damage (Annex II)?

2.3.5. Preventive and remedial costs

- Is there a system of security over property or other appropriate guarantees (art. 8.2)? Is it a preventive system or shall such measures only be taken after environmental damage has occurred? How the system works?
- Is there a special provision to give effect to art. 8.3, *in fine* (appropriate measures to enable the operator to recover the costs incurred in cases the operator shall not be required to bear the cost of preventive or remedial

actions)? Must the operator in such cases nevertheless take the remedial measures? Or are they taken by the authorities ?

2.3.5. Cost allocation

- Are there national provisions within the meaning of article 9?

2.3.6. Competent authority

- Which authority or authorities were designated for the purposes of article 11?
- Which remedies are available when preventive or remedial measures are imposed? (art. 11.4)

2.3.7. Request for action

- Which of the alternatives listed in art. 12.1. were chosen ?
- Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damager ? (art. 12.5)
- What type of review procedure is available under national law ? (art. 13)

2.3.8. Financial security

- How was article 14 implemented?

2.3.9. National law

- Were additional activities included in the scope of the regime? Were additional responsible parties identified?(art. 16.1)

- Are there special provisions to prevent a double recovery of costs in cases of concurrent action ? (art. 16.2)

2.3.10. Temporal application

- How was article 17 implemented?

2.3.11. Transboundary environmental damage

- How the system works in case of environmental damage in a transboundary context ?

- The directive cannot be used in case of transboundary environmental damage.

Other comments

Based on the Danish experiences, the new Directive on Environmental Liability might very well create more problems than helping the restoration of environmental damage. The administrative liability scheme established by the Directive seems neither adequate to remedying environmental damage, nor to make the polluter pay. Moreover, it is disputable how to justify to provide the public authority with stronger protection than individual victim in case of environmental damage. – Seen from my desk, the impression is that the liability model of the Directive is rather close to the Danish administrative liability system – so it seems reasonable to expect it will run into the same problems.

Despite the inspirations from the Danish scheme, the Directive on Environmental Liability will require substantial changes in Danish Environmental Liability Law. The concept of ecological damage is not known in Danish Law and the access of third parties to challenge these decisions will also require substantial changes.

Moreover, some of the innovations in the Directive and their implications are in my opinion underestimated. In this respect I will emphasise three questions.

1. Stricter measure. The Directive is adopted under article 175 of the Treaty which according to article 176 should give Member States the right to maintain or enact stricter measures. The concept 'stricter' should however be interpreted in the light of the objectives and contend of the Directive. Because the Directive intends to allocate liability for environmental damage to the operator as this is defined in article 2(6) it will in my opinion conflict with the objective of the Directive if Member States maintain or enact rules which make the landowner liable. Moreover, taking the defences listed in the Directive it seems also doubtful whether Member States can choose not to implement these defences.

2. Protection of private property and ecological damage: The concept of ecological damage might effect the interpretation of the constitutional protection of private property to ensure compliance with the polluter pays principle. It is generally acknowledged that the polluter pays principle prevent authorities from paying preventive costs unless this is approved by the Commission under article 88(3) of the EC Treaty. In this respect, the polluter cannot expect any support from the constitutional protection of private property. It seems also generally accepted that the polluter should pay for the damage the pollution causes if the pollution is caused by negligence of the polluter. The fundamental reasoning is that property right does not give the owner any right to damage protected interests of others. When these protected interests are expanded to include damage to endangered species, the operator cannot expect any compensation from the State for the preventive costs of not causing such damages. In this respect, the Directive effect a matter which is strongly discussed in most Member States after the European Court of Justice in Commission v. Ireland, C 117/01 concluded that article 6(2) of the Habitat Directive (92/43) also effects existing land use. Because of the ECJ ruling, Denmark did in 1994 adopt a new regime giving the farmers the right to be compensated if the farmers were prevented from land use because of Nature 2000 sites protection. But seen in the light of the Directive on Environmental Liability, such compensation seems to jeopardize the allocation of responsibilities and liability established by the Directive and in conflict with the polluter-pays principle and therefore state aid.

3. Subsidiary State Liability: In the proposal of the Commission was included a provision making the public authority subsidiary liable for environmental damage. Member States

strongly opposed this proposal and in the final version this provision wasn't included. The implications of this is however not that clear. First, based on the Francovich doctrine Member States are still liable for damage caused by wrongful implementation provided the mistake is sufficiently serious. This doctrine does also apply for the Directive on Environmental Liability. Taking into account that third parties have the right to challenge decisions on remedying environmental damage it seems likely that the Member States could be held liable for remedying environmental damage in accordance with the Directive, if the polluter cannot be held liable because of procedural failures or other mistakes made by the public authority. Although one might considered such a subsidiary liability a hidden State-aid this seems solved by article 6(3) of the Directive which as a last resort opens a door for making the public authority pay the remedying costs. Moreover, the same conclusion is supported by the defences for the polluter under article 8(4) of the Directive. Second, the same conclusion is supported by the scope of the Liability Directive which is restricted to matters which are already covered by EC-legislation. In this perspective, the Environmental Liability Directive supplements the preventive EC environmental legislation by requiring remedying of damage in case the preventive part fails. Same conclusion is further supported by the title which underlines the close relation between prevention and remedying the damage.