AVOSETTA QUESTIONNAIRE

ENVIRONMENTAL LIABILITY DIRECTIVE

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German Report

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

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

The *Umwelthaftungsgesetz* (Law on Environmental Liability) provides for strict civil liability in case of (individual) damage suffered from a polluting facility. In addition, the general civil law provisions on damage §§ 823 et seq. Bürgerliches Gesetzbuch – BGB (Civil Code) are applicable.

- Are there other (administrative type of) special provisions and procedures concerning the prevention and remedying of environmental damage? Do they have a general nature or are they only applicable in one or another environmental field (e.g. soil pollution)?

- §§ 4 and 7 *Bundesbodenschutzgesetz* (Federal Law for Soil Protection) provides for such prevention and remedying with regard to soil pollution. § 1a of the *Wasserhaushaltsgesetz* (Federal Law on Water Balance) demands the pollution of water to be avoided. The States have laws providing for the prevention and remedying of water pollution (e.g. Art. 68a *Bayerisches Wassergesetz*). § 19 *Bundesnaturschutzgesetz* (Federal Law for the Protection of Nature) contains a provision on interference with nature, which are to be prevented. If they occur the polluter is obliged to implement measures for compensation of that interference. § 5 of the *Bundesimmisionsschutzgesetz* (Federal Law on Immissions) contains duties for a facility´s operator to minimise environmental damage.

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

Germany is party to all these treaties except for those listed in Annex IV c and d (International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage and

International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea). However, Germany intends to ratify those treaties, too.

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

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

  At the federal level the directive has been implemented by the *Umweltschadensgesetz* (BGBl. I, 2007, p. 666). But this Act contains not all necessary provisions.

- If not, is it under way?

  The *Directive* will have to be implemented at the *Land* level, too. The federal states do not yet have drafts for the implementation.

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

  The Directive has been criticised for quite some shortcomings and inconsistencies. (*M. Ruffert*, Zur Konzeption der Umwelthaftung im Europäischen Gemeinschaftsrecht, in: R. Hendler (ed.), Umwelthaftung nach neuem EG-Recht, UTR vol. 81, 2004, p. 43-72; *G. Wagner*, Die gemeinschaftsrechtliche Umwelthaftung aus der Sicht des Zivilrechts, in: R. Hendler (ed.), Umwelthaftung nach neuem EG-Recht, UTR vol. 81, 2004, p. 73-146; *Knopp*, UPR 2005, 361 (361); *Becker*, NVwZ 2005, 371(371)).

  First, it has been heavily criticised that the Directive provides for an over-complex and inconsistent legal structure, which makes the Directive and the respective national legislation unduly complicated. (Führ/Lewin/Roller, NuR 2006, p. 67 (68); C. Schrader/T. Hellenbroich, Verbandsklage nach dem Umweltschadensgesetz (USchG), ZUR 2007, p. 289-294). The poor legal quality of the directive is considered to question the quality of EU-law-making.

  Second, the title of the directive has been criticised as misleading, because the directive is not dealing with the liability vis a vis third (private) parties but is establishing a public-law regime of prevention and remediation of (ecologic) damages.

  Third, the limited scope of the directive is considered by some to be problematic. Only the prevention of hazards to the soil, water, protected species and natural habitats is dealt with whereas damage to other natural assets such as the air or the climate were not attended to (Führ/Lewin/Roller, NuR 2006, 67 (68)). Furthermore the Directive has been criticised for the definition of land damage: Land damage is existent only, if any land contamination creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction in, on or under land, of substances, preparations, organisms or micro-organisms (Art. 2 Nr. 1c of the Directive). The restriction on health risk is considered by some authors to be a break with the system of the Directive.

Forth, for many it is still unclear, which regional scope the Directive has with regard to the species and habitats referred to in the Directive, especially whether the Directive´s scope ends where the "Natura 2000" network ends.

Fifth, some critics regard the possibility to allow the operator not to bear the costs of remedial actions as problematic. (Art. 8 (4) of the Directive; Becker, NVwZ 2005, 371 (375 f.); Führ/Lewin/Roller, NuR 2006, 67 (74 f.); Knopp, UPR 2005, 361 (363)).

Art. 8 (4) lit. a of the Directive provides that the operator may be exempt from bearing the costs where that operator was not at fault or negligent and where the emission or event has been expressly authorised and where the operator has acted fully in accordance with the conditions of that authorisation. Critics of that provision contend that an authorisation does not imply that the operator´s responsibility has been passed on to the authority. (Führ/Lewin/Roller, NuR 2006, 67 (74).

Art. 8 (4) lit. b provides for another exemption in cases where the operator was not at fault or negligent and where the emission resulted from an activity which was not considered likely to cause environmental damage according to the state of scientific and technical knowledge. Critics argued that the ignorance of the risks involved will be rewarded. (Führ/Lewin/Roller, NuR 2006, 67 (75).

Sixth, it is argued that the Directive includes many provisions for remedial measures but it includes also the exception that the competent authority is entitled to decide that no further remedial measures should be taken if the cost of the remedial measure would be disproportionate to the environmental benefits to be obtained (Annex II, 1.3.3.b). This exception might be used in very different ways.

2.2. General approach of implementation:

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

  No. The new Umweltschadensgesetz, which transposes the Directive, contains a subsidiary clause (in § 1) providing for primacy of the most rigorous provision.

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

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- Did your country opt for amending several pieces of legislation?

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

  Yes. Introduction of a new act called *Umweltschadensgesetz*. But other federal legislation has also been amended in order to adapt that legislation to the Directive.

- Did your country opt for a mere transposition of the minimum requirements of the Directive or introduce stricter provisions?

  On the federal level the Umweltschadensgesetz only transposed the minimum requirements. With regard to existing provisions, the subsidiary clause (in § 1 USchadG) provides for primacy of the most rigorous provision in German law.

However, some *Länder* might choose to introduce stricter provisions. Actually, this latest option is not likely to be taken.

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?

Germany almost entirely transposed the definition contained in the Directive into the *Umweltschadensgesetz.* However, only the definition for land damage can actually be found in the *Umweltschadensgesetz* whereas the definitions for water damage and damage to protected species were transposed into the *Wasserhaushaltsgesetz* and the *Bundesnaturschutzgesetz* respectively.

(Art. 2 UHRL:

"Im Sinne dieser Richtlinie bezeichnet der Begriff

1. ‚Umweltschaden'

a. eine Schädigung geschützter Arten und natürlicher Lebensräume, d.h. jeden Schaden, der erhebliche nachteilige Auswirkungen in Bezug auf die Erreichung oder Beibehaltung des günstigen Erhaltungszustands dieser Lebensräume oder Arten hat. […];

Schädigungen geschützter Arten und natürlicher Lebensräume umfassen nicht die zuvor ermittelten nachteiligen Auswirkungen, die aufgrund von Tätigkeiten eines Betreibers entstehen, die von den zuständigen Behörden gemäß den Vorschriften zur Umsetzung von Artikel 6 Absätze 3 und 4 oder Artikel 16 der Richtlinie 92/43/EWG oder Artikel 9 der Richtlinie 79/409/EWG oder im Falle von nicht unter das Gemeinschaftsrecht fallenden Lebensräumen und Arten gemäß gleichwertigen nationalen Naturschutzvorschriften ausdrücklich genehmigt wurden;

b. eine Schädigung der Gewässer, d.h. jeden Schaden, der erhebliche nachteilige Auswirkungen auf den ökologischen, chemischen und/ oder mengenmäßigen Zustand und/ oder das ökologische Potential der betreffenden Gewässer im Sinne der Definition der Richtlinie 2000/60/EG hat, mit Ausnahme der nachteiligen Auswirkungen, für die Artikel 4 Absatz 7 jener Richtlinie gilt;

c. eine Schädigung des Bodens, d.h. jede Bodenverunreinigung, die ein erhebliches Risiko einer Beeinträchtigung der menschlichen Gesundheit aufgrund der direkten oder indirekten Einbringung von Stoffen, Zubereitungen, Organismen oder Mikroorganismen in, auf oder unter den Grund verursacht;

[…]"

§ 2 USchadG:

„Im Sinne dieses Gesetzes sind

1. Umweltschaden:

a. eine Schädigung von Arten und natürlichen Lebensräumen nach Maßgabe des § 21a des Bundesnaturschutzgesetzes,

b. eine Schädigung der Gewässer nach Maßgabe des § 22a des Wasserhaushaltsgesetzes,

c. eine Schädigung des Bodens durch eine Beeinträchtigung der Bodenfunktion im Sinne des § 2 Abs. 2 des Bundes-Bodenschutzgesetzes, die durch eine direkte oder indirekte Einbringung von Stoffen, Zubereitungen, Organismen oder Mikroorganismen auf, in oder unter dem Boden hervorgerufen wurde und Gefahren für die menschliche Gesundheit verursacht;

[…]"

§ 21a I BNatSchG:

„Eine Schädigung von Arten und natürlichen Lebensräumen im Sinn des Umweltschadensgesetzes ist jeder Schaden, der erhebliche nachteilige Auswirkungen auf die Erreichung oder Beibehaltung des günstigen Erhaltungszustandes dieser Lebensräume oder Arten hat. Abweichend von Satz 1 liegt eine Schädigung nicht vor bei zuvor ermittelten nachteiligen Auswirkungen von Tätigkeiten eines Verantwortlichen, die von der zuständigen Behörde nach den §§ 34, 34a, 35 oder entsprechendem Landesrecht, nach § 43 Abs. 8 oder § 62 Abs. 1 oder, wenn ein solche Prüfung nicht erforderlich ist, nach

1. § 19 oder entsprechendem Landesrecht oder
2. auf Grund der Aufstellung eines Bebauungsplans nach den §§ 30 oder 33 des Baugesetzbuchs

genehmigt wurden oder zulässig sind."

§ 22a I WHG:

„Eine Schädigung der Gewässer im Sinne des Umweltschadensgesetzes ist jeder Schaden, der erhebliche nachteilige Auswirkungen auf

1. den ökologischen oder chemischen Zustand eines oberirdischen Gewässers oder Küstengewässers,
2. das ökologische Potential oder den chemischen Zustand eines künstlichen oder erheblich veränderten oberirdischen Gewässers oder Küstengewässers oder
3. den chemischen oder mengenmäßigen Zustand des Grundwassers

hat, mit Ausnahme der nachteiligen Auswirkungen, für die § 25d Abs. 3, § 32c in Verbindung mit § 25d Abs. 3 und § 33a Abs. 4 Satz 2 gelten.")

- Did your country include 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))

  The new § 21 a BNatSchG only refers to those species listed in the Birds and Habitats Directive. § 21 a seems to be comprehensive. Therefore, the Länder do not have the competence to include additional species (Art. 72 III GG expressly provides that in questions relating to the protection of species the Länder have no right to derogate from federal legislation.)

- Is land damage protected just in case of significant risk of adverse effect on human health?

  No. A significant risk is not required. A mere danger for human health is sufficient (§ 2 Nr. 1 c Umweltschadensgesetz).

- When is the conservation status of a natural habitat taken as favourable?

  The act does not contain a definition of "favourable conservation status" although § 10 of the Bundesnaturschutzgesetz, which is applicable in conjunction with § 21 a Bundesnaturschutzgesetz (which transposes parts of the Directive) mentions the term "favourable conservations status".

- 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)

  Yes and no. § 2 Nr. 3 USchadG includes "der Inhaber einer Zulassung oder Genehmigung für eine solche Tätigkeit oder der Person, die eine solche Tätigkeit anmeldet oder notifiziert" (the holder of the permit or authorization for such an activity or the person registering or notifying such an activity). The provision is however not transforming the first part of the sentence (persons 'to whom decisive economic power over the technical functioning of such an activity has been delegated).

2.3.2. Scope

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

  First, I do understand the question as referring to art. 3.1 lit. a.+b. of the Directive. Its provisions have been implemented in § 3 I 1.+2. USchadG providing for the Directive's differentiation between strict and fault based liability.

  However under other provisions of German law concerning the responsibilities for dangers (Polizeirechtliche Normen) and environmental liability (Umwelthaftung) strict responsibility/liability is – at least under certain conditions – the rule.

2.3.3. Exceptions

- Which are the exceptions to the scope of the liability regime in your country? (art 4)

  All exceptions outlined in Art. 4 of the Directive except for that contained in Art. 4.3. (Art. 4.3 contains the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC) or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI).)

- What about the permit defence and the state of the art defence (art. 8.4)?

  It lies in the competence of each *Land* to decide whether it will allow for such defences.

2.3.4. Preventive and remedial actions

- When are preventive (art 5) and remedial (art 6) actions taken by the operator?

  Preventive actions are to be taken in case of an imminent threat of environmental damage. Remedial actions must be taken where environmental damage has occurred.

- Which is the role of the competent authority?

  The competent authority supervises that preventive or remedial actions are taken. The competent authority may order the operator to submit all necessary information or to take the necessary preventive actions or to take the necessary remedial actions.

- 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?

  § 8 IV USchG obliges the competent authority to inform those persons and NGOs that are allowed to request an action under Art. 12 Directive of all planned remediation-measures. Their statements on the planned remediation shall be taken into account. Apart from that, there is no express right of organisations to participate in negotiations over the necessary remediation.

- Are there provisions to develop in further detail the common framework concerning the remedying of environmental damage (Annex II)?

  No. But § 8 II of the *Umweltschadensgesetz* requires that the competent authority decides upon remedial measures according to provisions found in other more specific acts. (partly acts by the *Länder*).

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?

  The question of costs lies in the competence of the *Länder*. It remains to be seen how each *Land* will transpose Art. 8.2.

- 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?

  The question of costs lies in the competence of the *Länder*. It remains to be seen how each *Land* will transpose Art. 8.3

2.3.5. Cost allocation

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

  Yes, in § 9 of the *Umweltschadensgesetz.* According to § 9 I of the *Umweltschadensgesetz,* the operator must bear the costs of preventive and remedial actions. In a case of multiple operators § 9 II provides for a right to compensation vis a vis those responsible operators that did not have to bear costs.

2.3.6. Competent authority

- Which authority or authorities were designated for the purposes of article 11?

  That question lies in the competence of the *Länder*. It remains to be seen which authority each *Land* will designate.

- Which remedies are available when preventive or remedial measures are imposed? (art. 11.4)

  Each natural or legal person who the competent authority requests to take measures according to the *Umweltschadensgesetz* has the right to instigate the usual legal proceedings: that person may file an objection with a higher authority. If that objection was not successful the person can sue before an administrative court.

2.3.7. Request for action

- Which of the alternatives listed in art. 12.1. were chosen ?

  Art. 12.1 a and c (transposed into § 10 and § 11 II *Umweltschadensgesetz*).

  But art. 12.1. c is not completely implemented with regard to the NGO`s and their possibility to sue. The Umweltschadensgesetz refers to the respective regulation in the newly adopted *Umweltrechtsbehelfsgesetz* (URbG). The URbG only allows for an action for the NGO`s, if an individual has the possibility to sue, too. With this construction, the German lawmaker tries to preserve the traditional restrictive approach on standing under German administrative procedural law (§§ 42 II, 113 I VwGO)

  According to a widespread critic, the lawmaker has thereby not considered the last paragraph of art. 12.1: "To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law be deemed sufficient for the purpose of subparagraph (b). **Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c)."** The wording of the directive does not allow for a restriction of the NGO`s right to an action. If such a restriction had been intended, the legislator at EU-level would have found another wording (e.g. "Non-governmental organisations shall be deemed to have these kind of rights, which are awarded to the individual by national law.")

- Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damage? (art. 12.5)

  Only in cases of remediation of environmental damage.

- What type of review procedure is available under national law ? (art. 13)

  Administrative review and judicial review.

2.3.8. Financial security

- How was article 14 implemented?

  The draft of the *Umweltschadensgesetz* included a provision which contained the basis for a financial security system. Later the provision was cancelled on the grounds that the Commission will propose a common system of financial security before 30 April 2010 (article 14.2 of the directive). Those `s proposals should first be taken into account.

2.3.9. National law

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

  No additional activities included. However, § 1 of the *Umweltschadensgesetz* provides that existing or future rules that are stricter take precedence over the act. Additional responsible parties were not explicitly identified. However, the *Umweltschadensgesetz* contains a wide definition of the responsible party, which goes beyond the definition of "operator" contained in Art. 2 of the Directive.

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

  Costs are in the competence of the *Länder*. It remains to be seen which what each *Land* will decide.

2.3.10. Temporal application

- How was article 17 implemented?

  Art. 17 has been fully implemented. However Art. 17 § 2 has been modified so that the *Umweltschadensgesetz* will not apply to damage if more than 30 years have passed since it was caused and if the authority has not taken measures against the responsible person during that time-period.

2.3.11. Transboundary environmental damage

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

Art. 15 of the Directive has been almost literally transposed into § 12 of the *Umweltschadensgesetz.*