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The Environmental Liability Directive of 2004

**Traditional Administrative Mechanisms with a
New Name**

- LL.M. Master Degree Thesis -



HÁSKÓLI ÍSLANDS

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To my friends Giulia and Jane

Preface

The idea to write about the Environmental Liability Directive of 2004 developed after my attendance to the course European environmental law at the University of Iceland in the winter 2008. The course sparked my interest in this field of law particularly because of its great impact on the national legal orders of the Community's Member States. Convinced that a liability scheme for environmental damage must be of great benefit to the Community's and Member States' environmental policies I endeavoured to make the Liability Directive the object of my research and thesis. The thesis marks the last step of one year of LL.M studies at the University of Iceland which I am most grateful to have had the chance to attend. For this last and probably most challenging step of the year, I would like to record my debt to European Commission's members and staff from environmental ministries in the different European countries as well as of the federal German states that have been of very helpful assistance with information that would otherwise not have been available for this thesis. However, I dedicate my greatest and warmest thanks to my supervisor, Adalheidur Jóhannsdóttir, who attended and supported my working process with academic inspiration, insightful advice and critical thoughts.

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List of Abbreviations

<i>A</i>	General Assembly
<i>BGB</i>	Bürgerliches Gesetzbuch
<i>BGBI</i>	Bundesgesetzblatt
<i>C</i>	Cases
<i>CEA</i>	Comité Européen des Assurances
<i>COM</i>	Communication
<i>CONF</i>	Conference
<i>DG</i>	Directorate General
<i>Doc.</i>	Document
<i>e.g.</i>	Exempli Gratia
<i>EC</i>	European Community
<i>ECE</i>	Economic Commission for Europe
<i>ECR</i>	European Court Reports
<i>ed.</i>	Editor
<i>EEELR</i>	European Energy and Environmental Law Review
<i>EL</i>	Environmental Liability
<i>ELM</i>	Environmental Law and Management
<i>ELR</i>	Environmental Law Review
<i>Env</i>	Environment
<i>ETS</i>	European Treaty Series
<i>EUF</i>	European Focus
<i>f.</i>	Following
<i>ff.</i>	Forth following
<i>Fn.</i>	Footnote
<i>GV.</i>	Gesetze und Verordnungen
<i>GVBl.</i>	Gesetz- und Verordnungsblatt
<i>ICCLR</i>	International Company and Commercial Law Review
<i>IFLR</i>	International Financial Law Review
<i>ILM</i>	International Legal Materials
<i>iss.</i>	Issue
<i>JEL</i>	Journal of Environmental Law
<i>JPL</i>	Journal of Planning & Environment Law
<i>L</i>	Legislation
<i>LEG</i>	Legal
<i>MEMO</i>	Memorandum
<i>Nds.</i>	Niedersachsen / niedersächsisches
<i>NJW</i>	Neue Juristische Wochenschrift
<i>No.</i>	Number
<i>NR</i>	Natur und Recht
<i>Nr.</i>	Nummer
<i>NRF</i>	Natural Resources Forum
<i>NRW</i>	Nordrhein-Westfalen
<i>NVwZ</i>	Neue Zeitschrift für Verwaltungsrech
<i>OECD</i>	Organisation for Economic Co-operation and Development
<i>OJ</i>	Official Journal
<i>OklaLR</i>	Oklahoma Law Review
<i>p.</i>	Page
<i>PJES</i>	Polish Journal of Environmental Studies
<i>pp.</i>	Pages
<i>RECIEL</i>	Review of European Community & International Environmental Law
<i>S.I.</i>	Statutory Instruments
<i>Suppl.</i>	Supplement

<i>SYN</i>	Synoptic
<i>U.S.C</i>	United States Code
<i>UN</i>	United Nations
<i>UNTS</i>	United Nations Treaties Series
<i>UPR</i>	Umwelt und Planungsrecht
<i>vol.</i>	Volume
<i>WiRO</i>	Wirtschaft und Recht in Osteuropa
<i>YBAAA</i>	Yearbook of the Association of Attenders and Alumni
<i>YBEEL</i>	The Yearbook of European Environmental Law
<i>YM</i>	Ympäristöjuridiikka
<i>ZUR</i>	Zeitschrift für Umweltrecht

Introduction

It is assumed that environmental liability results in the prevention of environmental damage by providing a financial incentive.¹ This is due to the fact that the obligation to pay for an environmental damage in its aftermath reflects on the conduct of actors indirectly to not cause damage in the first place. It is, thus, a mechanism for the protection of the environment which works through financial pressure.² It is further seen as a mechanism to internalise the costs of an environmental damage.³ This means that the costs of an environmental damage must be paid by the parties responsible for the damage and not financed by society in general.⁴ “The role of liability depends however on the detailed design of the scheme”.⁵

The first environmental liability scheme of the European Community was concerned with sectoral environmental liability for damage caused by waste and dates back to the 1970s.⁶ The first comprehensive environmental liability scheme was established by Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (Liability Directive or the Directive).⁷ Due to the fact that it is not confined to one sector it is called a “horizontal regime”.⁸ It integrates in the environmental

¹ COM(2000) 66 final, pp. 11-12; *Environmental Liability Directive enters into force*, Editorial Comment, *EUF*, vol. 209, 2007, pp. 2-4 at p. 2; P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, *ZUR*, vol. 5, 2004, pp. 257-320 at p. 257; A. Epiney: *Umweltrecht in der Europäischen Union*, 2nd edition, Cologne *inter alia* 2005, p. 250; M. Hinteregger: “International and Supranational Systems of Environmental Liability in Europe”, in: *Environmental Liability and Ecological Damage in European Law*, ed. M. Hinteregger, New York 2008, pp. 3-32 at p. 8.

² Calling it a *marked-based mechanism* in this sense F. Coroner: “Environmental Liability Directive: how well are Member States handling transposition?”, *EL*, vol. 6, 2006, pp. 226-229 at p. 226; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, Portland 2005, p. 208.

³ COM(2000) 66 final, pp. 11-12; F. Coroner: “Environmental Liability Directive: how well are Member States handling transposition?”, p. 226; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 206.

⁴ COM(2000) 66 final, pp. 11-12; M.R. Grossman: “Agriculture and the Polluter Pays Principle: An Introduction”, *OklaLR*, vol. 59, 2006, pp.1-51 at p. 29.

⁵ M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 207.

⁶ For a description see G. Betlem: “Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws”, *YBEEL*, vol. 4, 2005, pp. 117-148 at p. 118; C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, *RECIEL*, vol. 12(3), 2003, pp. 254-268 at p. 255; I. Doolittle: “A Guide to EC Regulation: Environmental Liability”, *IFLR*, Suppl. June 1992, pp. 20-25 at pp. 20-22; L. Krämer: *EC Environmental Law*, 6th edition, London 2007, pp. 187 ff.; G. Roller: “Liability”, in: *Reflection on 30 Years of EU Environmental Law – A High Level of Protection*, ed. R. Macrory, Groningen 2006, pp. 127-139 at pp. 132-133; M.S. Wenk: *The European Union's Eco-Management and Audit Scheme (EMAS)*, Dordrecht 2005, pp. 119 ff.; see in particular Commission Proposal on Environmental Liability in the Waste Sector on 22 May 1991 COM(1991) 102 final – SYN 335.

⁷ OJ 2004, L 143/56 ff. as amended by Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the Management of Waste From Extractive Industries and Amending Directive 2004/35/EC, OJ 2006, L 102/15 ff. and by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 On the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 OJ 2009, L 140/114 ff.

⁸ See e.g. G. Betlem: “Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws”, p. 119; G. Betlem and E.H.P. Brans: “The Future Role

law of the European Community after the Fifth Environmental Action Programme.⁹ It is further seen to complement existing Community law on nature conservation.¹⁰

Wherever analysed, discussed or merely mentioned, it is always pointed out that the Liability Directive is the outcome of a very long and controversial process and that it constitutes a compromise solution.¹¹ Yet also the final version of the Liability Directive is not uncontroversial. Why else would the process of implementation in the Member States be so cumbersome¹² even though the deadline for implementation was 30 April 2007.¹³ The history of the Directive and its final text were and are surrounded by the notions of civil and public liability, as well as of public and private law in an environmental context. There does, however, not exist any clarity of the precise meaning of those terms nor if the Liability Directive really deserves to contain the term *liability* in its title. Therefore, this thesis shall inquire if the Liability Directive really establishes a liability regime and of what kind the regime actually is that the Directive covers. It will show that the Liability Directive establishes a liability regime that complements already existing environmental liability schemes and is at the same time of greater environmental benefit than any of the other schemes. It will also show that the Directive has implications for principles of international environmental law. It will, thus, focus on both the detailed design of the liability scheme and on its general role as a mechanism to protect the environment. In order to do so, in the first chapter the notions of traditional liability as well as the term environment as found in the European law context will be clarified. The second chapter will give an overview over the

of Civil liability for Environmental Damage in the EU”, *YEEL*, vol. 2, 2002, pp. 183-221 at p. 184; J. Thornton and S. Beckwith: *Environmental Law*, 2nd edition, London 2004, p. 89.

⁹ “Towards Sustainability” the European Community Programme of policy and action in relation to the environment and sustainable development, OJ 1993, C 138/I ff.

¹⁰ E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, *ELR*, vol. 7(2), 2005, pp. 90-109 at p. 2; calls it a “gap-filling” instrument P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 257; N. de Sadeleer: “The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat”, *YBEEL*, vol. 7, 2007, pp. 36-75 at p. 67.

¹¹ Representative for others G. Betlem: “Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws”, p. 118; P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 257; C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 268; E.K. Czech: “Liability for Environmental Damage according to Directive 2004/35/EC”, *PJES*, vol. 16(2), 2007, pp. 321-324 at p. 321; K. De Smedt: “Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive”, *EEELR*, February 2009, pp. 2-18 at p. 2; A. Epiney: *Umweltrecht in der Europäischen Union*, p. 249; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, 3rd edition, Groningen 2008, p. 340; G. Roller: “Liability”, p. 133; C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, paper to be presented at the time of the conference organized in Brussels on October 22, 2004 by Eagle International on the theme of environmental liability, http://www.eagle-law.com/papers/brussels2004_en-06.pdf, p. 1.

¹² See article of K. De Smedt: “Is Harmonisation always Effective? The Implementation of the Environmental liability Directive”, pp. 2 ff.

¹³ Compare Article 19 of the Liability Directive.

historical development of the Directive and of the liability regimes it comprises. The third chapter will set out the regime of the Directive and pay special attention again to whether or not and what type of liability it sets up. Lastly, in the fourth chapter, the problems of the implementation process of the Directive into the Member States' laws will be examined and assessed if the implementation improves the national liability systems for environmental damage.

Chapter 1: Liability and environment – an introduction

1.1 Introduction

The underlying notions of the Liability Directive of 2004, often referred to as the Environmental Liability Directive,¹⁴ seem, thus, to be *liability* and *environment*. In order to lay the ground for the analysis of chapter 3 and the question if and in what way they both really constitute the underlying notions, the definitions of both of the terms shall be set out first. The definitions given shall be the definitions found at the European level which comprises Community law, European conventions and declarations and other European documents. Thus, this chapter will set out the definitions irrespective of how they are perhaps contained in the Liability Directive. The following does, however, not aim at setting out a comprehensive explanation of the terms. Instead, it aims at outlining their basic features and will serve as a background for the present thesis. First, the term *liability* in its traditional meaning shall be defined. Secondly, the term *environment* will be explained. Lastly, the relationship between both, which can be titled *environmental liability*, shall be introduced.

1.2 Liability

The ordinary definition of liability is legal responsibility.¹⁵ There are different types of liability which are described with the terms of civil liability, public liability or administrative liability. It is difficult to establish a legal definition of these terms at the European level, for the terms are mainly found at the Member States' national level in which contexts their meanings can differ from each other.¹⁶ However, it seems that mainly civil liability is mainly

¹⁴ See for instance Commission Memorandum MEMO/07/157 of 27 April 2007, p. 1; G. Betlem and E.H.P. Brans: "Environmental Liability in the EU: An Introduction", in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. G. Betlem and E.H.P. Brans, London 2006, pp. 17-27 at p. 17; E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 1; K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 2; V. Fogleman: "Environmental Liability Directive", *EL*, iss. 3, 2004, pp. 101-115 at p. 101; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 340; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 204; G. Roller: "Liability", p. 129; N. de Sadeleer: "The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat", p. 67.

¹⁵ Ed. Allen, Robert: *The New Penguin English Dictionary*, Harmondsworth 2000, p. 803; synonyms used for it in an ordinary non-legal context are responsibility, answerability, accountability, fault, blame and culpability eds. R. Fergusson, M. Manser and D. Pickering: *The New Penguin Thesaurus*, Harmondsworth 2000, p. 350.

¹⁶ G. Betlem: "Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws", p. 120; at least for civil liability M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, Cambridge *inter alia* 1999, p. 247; pointing in particular to the different understandings of civil law systems and common law systems G. Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", *JEL*, vol. 20, 2008, pp. 163-186 at p. 2.

associated with the term liability.¹⁷ Of the different forms of civil liability, mainly tort law is relevant in the context of the environmental liability regime envisaged at the European level.¹⁸ Therefore, at this point, only the term civil liability and liability under tort law shall be subject to scrutiny. Some of the other terms will be discussed at a later point in more detail. Despite the difficulty of defining the meaning of the term in a European context, it shall be identified on the basis of European conventions, Community legislation, other European documents and literature in this field. The following will, first, set out the general forms and conditions of civil liability in general and then describe its other features in more detail.

1.2.1 General forms and conditions of civil liability

Broadly defined, liability arising under civil law is civil liability.¹⁹ There exist different forms of civil liability. For instance, it comprises liability under contractual law and under tort law.²⁰ Under contractual law, as implied by its name liability arises out of a contract between persons. Under tort law liability arises due to a law, irrespective of a prior legal relationship between the persons involved,²¹ thus, without a contract. Moreover, civil liability exists for unlawful acts of officials. This liability can be found at the European level²² as well as in the national laws of the Member States.²³

¹⁷ K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 2.

¹⁸ C'M'S' Cameron McKenna, *Study of Civil Liability Systems for Remedying Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf, pp. 62, 70, 71, 72; ed. M. Hinteregger: *Environmental Liability and Ecological Damage in European Law*, New York 2008, p. 435; in general see the tort law approach in ed. P. Wetterstein: *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, Oxford 1997, pp. 9 ff.; see also only on tort law in an environmental context under the heading of civil liability M. Wilde: *Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy Europe and the United States*, The Hague / New York 2002, p. 1 ff.

¹⁹ COM(1993) 47 final, p. 6.

²⁰ G. Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", p. 3.

²¹ C. von Bar: *The Common European Law of Torts – The Core Areas of Tort Law, its Approximation in Europe, and its Accommodation in the Legal System*, vol. 1, New York 1998, pp. 1-2; M. Wilde: *Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy Europe and the United States*, p. 9.

²² Non-contractual liability of the European Community enshrined in Article 288(2) EC Treaty, on this also Opinion of Advocate General Geelhoed delivered on 3 July 2003 in the case C-234/02 P *European Ombudsman supported by European Parliament v. Frank Lamberts*, ECR [I-2803] at para. 115 ff.; case T-4/01 *Renco SpA v. Council of the European Union*, ECR [II-171]; joined cases 63-69/72 *Wilhelm Werhahn Hansamühle and others v Council of the European Communities*, Judgement of 13 November 1973, ECR [1229]; E. Berry and S. Hargreaves: *European Union Law*, 2nd edition, Oxford / New York 2007, p. 121; T.C. Hartley: *The Foundations of European Community Law*, 5th edition, New York 2003, pp. 450 ff.; J. Schwarze: *European Administrative Law*, 1st revised edition, London 2006, pp. 504 ff.

²³ E.g. Article 34 of the German Constitution (Grundgesetz für die Bundesrepublik Deutschland) of 23 May 1949, BGBl. 1949, pp. 1 ff., as amended by law of 19 May 2009, BGBl. 2009, pp. 606 ff.; § 1 of the Austrian Law on the Liability of Officials (Bundesgesetz, womit die Haftung des Bundes, der Länder, der Bezirke, der Gemeinden und der sonstigen Körperschaften und Anstalten des öffentlichen Rechts für den in Vollziehung der Gesetze zugefügten Schaden geregelt wird (Amtshaftungsgesetz)) of 18 Dezember 1948, BGBl. Nr. 20/1949.

In general, all types of civil liability always require an action or omission by a person,²⁴ a compensable damage²⁵ and a causal link²⁶ between the action and the damage.²⁷ Sometimes a further condition is the fault of the actor. There exist two standards of liability. Fault based liability is one of them and the other one is strict liability.²⁸ Strict liability means liability without any fault on the side of the actor.²⁹ Fault based liability, on the other hand and as implied by its name, requires fault of the liable person.³⁰ Broadly speaking fault can take the forms of intent or negligence.³¹ As a consequence, liability usually triggers the

²⁴ Ed. M. Hinteregger: *Environmental Liability and Ecological Damage in European Law*, p. 67; see the requirement of the “polluter” M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, pp. 90 ff.

²⁵ Examples for civil liability at the international level, at the European level, at the national level example Sweden and Denmark in M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, pp. 201, 226, 302, 329.

²⁶ See e.g. Article 6 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) of 21 June 1993, ETS 150; for the non-contractual liability of the European Communities see case T-4/01 *Renco SpA v. Council of the European Union*, Judgement of 25 February 2003, ECR 2003, pp. II-171 ff. at para. 60; in general on liability and causal link L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, The Hague 2001, p. 280; P. Wetterstein: “A Proprietary or Possessory Interest: A Condition Sine Qua Non for Claiming Damages for Environmental Impairment”, in: *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, ed. P. Wetterstein, Oxford 1997, pp. 29-54.

²⁷ For all three elements C’M’S’ Cameron McKenna, *Study of Civil Liability Systems for Remediating Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf, p. 9; E.M. Basse: *Environmental Law in Denmark*, The Hague 2000, pp. 203 ff.; B. Jones: “Deterring, Compensating, and Remediating Environmental Damage: The Contribution of Tort Liability”, in: *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, ed. P. Wetterstein, Oxford 1997, pp. 11-27 at p. 17; ed. M. Hinteregger: *Environmental Liability and Ecological Damage in European Law*, p. 67; for non-contractual liability of the Community institutions see T.C. Hartley: *The Foundations of European Community Law*, p. 451.

²⁸ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, New York 2002, pp. 49 ff.; ed. M. Hinteregger: *Environmental Liability and Ecological Damage in European Law*, pp. 67 ff.; M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 292; A. Waite: “The Quest for Environmental Law Equilibrium”, in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. G. Betlem and E.H.P. Brans, London 2006, pp. 49-87 at p. 55.

²⁹ L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, p. 213; described as non-fault liability C’M’S’ Cameron McKenna, *Study of Civil Liability Systems for Remediating Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf, p. 65; N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 50; A. Waite: “The Quest for Environmental Law Equilibrium”, p. 56; strict liability is sometimes used interchangeably with absolute liability but it is not the same thing see L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, pp. 122 ff.

³⁰ L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, p. 213; A. Waite: “The Quest for Environmental Law Equilibrium”, p. 57.

³¹ For negligence as a form of fault based liability C’M’S’ Cameron McKenna, *Study of Civil Liability Systems for Remediating Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf, p. 9.

obligation to compensate or restore.³² This can take different forms, depending on the scheme of liability.

Hence, in general, civil liability can take different forms. Tort law liability is a form of civil liability outside of contracts. All require an action by a person who causes damage, depending on the standard of liability sometimes in addition fault and will generally lead to an obligation to pay compensation or to restore.

1.2.2 Other features of civil liability

Further features of civil liability which also apply to tort liability in particular can be described in respect of the parties involved, their relationship, the legal interests at stake and the conditions for compensation or remediation. The parties involved are private parties.³³ Hence, they are equal to one another meaning that there is no hierarchy between them. A private party can be a natural or legal person and even a public person if it is acting in a private capacity.³⁴ When it comes to a claim the parties' relationship is typically a triangular one: plaintiff – defendant – judge.³⁵ The injured party can bring a claim directly against the party that acted unlawfully.³⁶ Under tort law the unlawful act is the infringement of private interests.³⁷ Private interests under tort law are traditionally property, life and health of a person.³⁸ They are often referred to as *traditional damage*.³⁹ Moreover, pure assets may also

³² Ed. M. Hinteregger: *Environmental Liability and Ecological Damage in European Law*, p. 437; for compensation see Article 17 ff. Lugano Convention.

³³ The parties under private law L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, p. 211; M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", *EPL*, vol. 7(3), 2001, pp. 375-397 at p. 377.

³⁴ See e.g. definition of person in Article 2(6) of the Lugano Convention; L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, pp. 155 ff.

³⁵ C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 4.

³⁶ E.g. Article 17 ff. of the Lugano Convention; Article 2(1)(c) of Council Regulation (EC) No 2027/97 of 9 October 1997 on Air Carrier Liability in the Event of Accidents, OJ 1997, L 285/1 ff.; Article 12 of Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, OJ 1985, L 210/29 ff.

³⁷ E.K. Czech: "Liability for Environmental Damage according to Directive 2004/35/EC", p. 322; V. Fogleman: "Environmental Liability Directive", p. 102; "third party interest" M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 153; M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", p. 390; M.L. Wilde: "The EC Commission's White Paper on Environmental Liability: Issues and Implications", *JEL*, vol. 13(1), 2001, pp. 21-37 at p. 27 and in *Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy Europe and the United States*, p. 11.

³⁸ C'M'S' Cameron McKenna, *Study of Civil Liability Systems for Remedying Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf, pp. 10-11; Article 3 of Annex I to Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents, OJ 2009, L 131/24 ff.; Article 9 of Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, OJ 1985, L 210/29 ff.; Article 1(2) Council Directive 72/166/EEC of 24 April 1972 on the Approximation of the Laws of Member States Relating to

be counted to the private compensable interests.⁴⁰ Lastly, any form of civil liability usually requires an economic loss as a condition to pay compensation or to restore.⁴¹

Hence, civil liability in general is a liability arising between private parties. The injured private party can bring a claim against the private party whose actions or omissions caused the injury. Tort law liability in particular arises for the infringement of a private interest such as property, person or assets.

1.2.3 Conclusion

In conclusion, there exist different types of liability. However, it is civil liability which is mainly associated with the term liability. Civil liability in general requires an action by a person that causes damage, depending on the standard of liability maybe in addition fault and will generally lead to an obligation to pay compensation or to restore. The parties involved are private parties. The injured private party can bring an action directly against the private party that caused the infringement. Tort law liability is the most relevant form of civil liability in the field of environmental damage. It is a liability outside of contract for the infringement of private interests such as property, health, life and assets.

1.3 The environment

The second underlying notion of the Liability Directive is *environment*. In an ordinary context environment simply means surroundings.⁴² The reference to ordinary definitions is a good

Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, and to the Enforcement of the Obligation to Insure Against Such Liability, OJ 1972, L 103/1 ff.; only listing damage to person Article 1 of Council Regulation (EC) No 2027/97 of 9 October 1997 on Air Carrier Liability in the Event of Accidents, OJ 1997, L 285/1 ff.; V. Fogleman: "Environmental Liability Directive", p. 102; at least for property see M.-L. Larsson, *The Law of Environmental Damage – Liability and Reparation*, pp. 403-404; B. Mullerat: "European Environmental Liability: One Step Forward", *ICCLR*, vol. 16(6), 2005, pp. 263-268 at p. 264; Roller: "Liability", p. 136.

³⁹ M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 13; M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", p. 388; B. Mullerat: "European Environmental Liability: One Step Forward", p. 264; referred to as "classical" damage by Roller: "Liability", p. 136; P. Wetterstein: "A Proprietary or Possessory Interest: A Condition Sine Qua Non for Claiming Damages for Environmental Impairment", pp. 33 ff.

⁴⁰ E.g. V. Fogleman: "Environmental Liability Directive", p. 114; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 13; L. Krämer: "Directive 2004/35/EC on Environmental Liability", in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. G. Betlem and E.H.P. Brans, London 2006, pp. 29-47 at p. 34; H. Lopatta: "Perspectives from the European Commission – Overview and State of Play of the ELD", 3rd CEA Environmental Liability Workshop of 27 April 2009, available at http://www.cea.eu/uploads/DocumentsLibrary/documents/1240821878_eld-overview-and-state-of-play-hans-lopatta.pdf, slide 2; P. Wetterstein: "A Proprietary or Possessory Interest: A Condition Sine Qua Non for Claiming Damages for Environmental Impairment", p. 30.

⁴¹ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 257; B. Jones: "Deterring, Compensating, and Remediating Environmental Damage: The Contribution of Tort Liability", p. 13.

starting point in order to establish a legal definition.⁴³ Currently, no conclusive definition of the environment exists in Community law. The environment is defined differently depending on the context and instrument in which it is used.⁴⁴ The diverging definitions can be categorised into wide and narrow definitions. The following shall give an overview over what the environment comprises at the European level. First, however, the term natural resources shall be addressed particularly since they constitute part of both sets of definitions as will be demonstrated.

1.3.1 Natural resources

One can categorise the definitions of natural resources on the international level into two sets. First, these sets shall be set out and then the examples of natural resources on the European level shall be named.

It has been suggested that natural resources are naturally occurring materials that are useful to man.⁴⁵ Another proposal is that natural resources are tangibles or intangibles which may be used in an economic manner or to create economic value and which are not manufactured or produced.⁴⁶ These definitions imply that the appearance in nature must have an economic value. This economically-valuing definition represents the first set of definitions. The second category covers definitions of natural resources which do not include an economic element.⁴⁷ It was suggested that natural resources are all physical natural goods, as opposed to those made by man.⁴⁸ Hence, there are basically two sets of definitions, one requiring an economic value, the other one not. Nevertheless, both definitions agree on the fact that a natural resource is something nature given so to speak and not man-made. Moreover, they do not seem to include human beings.

Also in the European context, natural occurrences are listed as natural resources which are not human or man-made. According to several directives and regulations natural resources

⁴² Eds. R. Fergusson, M. Manser and D. Pickering: *The New Penguin Thesaurus*, p. 203; compare also S. Bell and D. McGillvray: *Environmental Law – The Law and Policy Relating to the Protection of the Environment*, 5th edition, New York 2000, pp. 3-4.

⁴³ See also reference to an ordinary dictionary by A. Kiss and D. Shelton: *Manual of European Environmental Law*, Oxford 1993, p. 3.

⁴⁴ A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 4; J. Thornton and S. Beckwith: *Environmental Law*, p. 5.

⁴⁵ J.B. Skinner: *Earth Resources*, 3rd edition, Englewood Cliffs (New Jersey) 1986, p. 1.

⁴⁶ S. Rosenne: "Exploitation and Protection of the Exclusive Economic Zone and the Continental Shelf", *YBAAA*, 1986, pp. 63-74, p. 64.

⁴⁷ This approach is favoured by N. Schrijver: *Sovereignty Over Natural Resources – Balancing Rights and Duties in an Independent World*, Groningen 1995, pp. 15-16.

⁴⁸ G.J. Cano: *A Legal and Institutional Framework for Natural Resources Management*, FAO Legislative Studies No. 9, Rome 1975, p. 1.

comprise fauna and flora, natural habitats, groundwater⁴⁹ and surface waters,⁵⁰ soil,⁵¹ oil, natural gas and solid fuels.⁵² Sometimes their economic value is stressed,⁵³ but also elements without an economic value fall with the definition. Moreover, the European Community is a party to the Convention on Biological Diversity⁵⁴ since 1993⁵⁵ and Article 2 of the Convention lists as natural resources air, water, land, flora and fauna and natural ecosystems.⁵⁶

Hence, at the European level natural resources are also nature given occurrences which are not man-made and do not include human beings. Furthermore, they have numerous appearances that include air, water, land, flora and fauna, natural ecosystems, oil, gas and fossil fuels.

1.3.2 Wide definitions

Some definitions of the environment found at the European level are wide. A wide definition is one which comprises not only natural resources but in addition also humans or man-made

⁴⁹ E.g. Step 1(j) of Annex I to the Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ 2009, L 140/114 ff.

⁵⁰ E.g. Groundwater and surface waters Preamble 28 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, OJ 2000, L 327/1 ff.; fresh water Article 2(2)(g) of Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 Laying Down General Provisions Establishing a European Neighbourhood and Partnership Instrument, OJ 2006, L 310/1 ff.; water in general Preamble 12 of Commission Regulation (EC) No 889/2008 of 5 September 2008 Laying Down Detailed Rules for the Implementation of Council Regulation (EC) No 834/2007 on Organic production and Labelling of Organic Products with regard to Organic Production, Labelling and Control, OJ 2008, L 250/1 ff.; Article 13(1) of Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 Establishing a Financing Instrument for Development Cooperation, OJ 2006, L 378/41 ff.

⁵¹ E.g. Preamble 12 of Commission Regulation (EC) No 889/2008 of 5 September 2008 Laying Down Detailed Rules for the Implementation of Council Regulation (EC) No 834/2007 on Organic production and Labelling of Organic Products with Regard to Organic Production, Labelling and Control, OJ 2008, L 250/1 ff.

⁵² E.g. all three Preamble 2 of Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the Promotion of the use of Biofuels or other Renewable Fuels for Transport, OJ 2003, L 123/42 ff.; Preamble 2 of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 On the Energy Performance of Buildings, OJ 2003, L 1/65 ff.; only oil Preamble 1 of Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of Clean and Energy-Efficient Road Transport Vehicles, OJ 2009, L 120/5 ff.

⁵³ E.g. Preamble 5 of Council Directive 1999/13/EC of 11 March 1999 on the Limitation of Emissions of Volatile Organic Compounds Due to the Use of Organic Solvents in Certain Activities and Installations, OJ 1999, L 85/1 ff.

⁵⁴ Convention on Biological Diversity of 5 June 1992 1760 UNTS, pp. 79 ff.

⁵⁵ See <http://www.cbd.int/countries/?country=eur>.

⁵⁶ See further on these examples not mentioning the term natural resource explicitly but describing the natural environmental elements, not human and not man-made Article 2(1)(c) Council Directive 67/548/EEC of 27 June 1967 on the Approximation of Laws, Regulations and Administrative Provisions Relating to the Classification, Packaging and Labelling of Dangerous Substances, OJ 1967, L 196/1 ff.; Article 2(12) of Council Directive 91/414/EEC of 15 July 1991 Concerning the Placing of Plant Protection Products on the Market, OJ 1991, L 230/1 ff.

things or even both.⁵⁷ No explicit legal definition of the environment is found in the Treaty of the European Communities. However, Article 174(1) and Article 175(2) of the EC Treaty⁵⁸ imply that the European environment comprises natural resources such as the natural element water, man-made elements such as waste and human beings themselves.⁵⁹ Thus, the EC Treaty seems to give a broad definition of the environment. Another example of a European document implying a broad definition is the Helsinki Final Act of 1975.⁶⁰ There the co-operation in the environmental field comprises air, water, land and soil, genetic resources, rare animal and plant species, natural ecological systems, human health and waste.⁶¹ Still a broad definition although slightly narrower is the definition contained in the Lugano Convention of 1993.⁶² Its Article 2(10) defines the environment to comprise

natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, property which forms part of the cultural heritage; and the characteristic aspects of the landscape

This definition does not include humans in the definition, but natural resources and man-made elements.⁶³ Moreover, it also comprises the relationships between the elements. Other definitions that comprise also the relationship between the environmental elements are enshrined in Directives, though excluding man-made things.⁶⁴ In particular, Article 2(1)(a) of Directive 2003/4/EC⁶⁵ which implements the Aarhus Convention comprises as environmental elements air, atmosphere, water, soil, land, landscape, natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements. Several Directives do not provide for a definition of the environment, but list for

⁵⁷ A definition of an ordinary dictionary for instance defines the environment as the circumstances, objects or conditions by which somebody or something is surrounded, ed. Allen, Robert: *The New Penguin English Dictionary*, p. 465.

⁵⁸ OJ 2006, C-321 E/39 ff.

⁵⁹ J. Thornton and S. Beckwith: *Environmental Law*, p. 4.

⁶⁰ Conference on Security and Co-Operation in Europe Final Act of 1 August 1975, 14 ILM 1992, pp. 1292 ff.

⁶¹ Conference on Security and Co-Operation in Europe Final Act of 1 August 1975, pp. 28-29.

⁶² Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) of 21 June 1993, ETS 150.

⁶³ J. Thornton and S. Beckwith: *Environmental Law*, p. 5.

⁶⁴ Listing “water, air and land and their inter-relationships as well as between them and any living organism” Article 2(1)(c) Council Directive 67/548/EEC of 27 June 1967 on the Approximation of Laws, Regulations and Administrative Provisions Relating to the Classification, Packaging and Labelling of Dangerous Substances, OJ 1967, L 196/1 ff.; Article 2(12) of Council Directive 91/414/EEC of 15 July 1991 Concerning the Placing of Plant Protection Products on the Market, OJ 1991, L 230/1 ff.; another example for a wider definition not including man-made things is to define the environment to be the natural surroundings of or the complex of external factors that acts upon an organism, an ecological community, or plant and animal life in general, Allen, Robert (ed.): *The New Penguin English Dictionary*, p. 465.

⁶⁵ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, OJ 2003, L 41/26 ff.

example humans and the environment next to one another and thereby imply at least that the environment does not comprise humans but might include man-made things.⁶⁶

Hence, several documents at the European level provide a wide definition of the environment and it seems to include natural resources and sometimes human beings, man-made things or both.

1.3.3 Narrow definitions

Some of the definitions of the environment found at the European level are narrow, however. A narrow definition will only include natural resources but exclude man-made things and human beings.

Examples of definitions representing a narrow approach are less frequent. Still, a legal example of a definition is Article 7(d) of the Convention on Long-range Transboundary Air Pollution of 1979.⁶⁷ According to this provision the environment includes agriculture, forestry, materials, aquatic and other natural ecosystems and visibility.⁶⁸ Other examples for a narrow definition are found in the Habitats Directive of 1992 which only comprises habitats and wild fauna and flora⁶⁹ and the Wild Birds Directive of 1979 which only comprises wild birds.⁷⁰ A narrow definition is also found in several other directives. They, again, do not expressly define the environment but from listing the environment next to man-made things, humans or other elements it can at least be concluded what the environment does not

⁶⁶ Preamble 6 of Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 Concerning the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Classification, Packaging and Labelling of Dangerous Preparations, OJ 1999, L 200/1 ff.; Article 1 of Council Directive 1999/32/EC of 26 April 1999 Relating to a Reduction in the Sulphur Content of Certain Liquid Fuels and Amending Directive 93/12/EEC, OJ 1999, L 121/13 ff.; Article 1 of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, OJ 2001, L 106/1 ff.; Article 6(5) of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the Incineration of Waste, OJ 2000, L 332/91 ff.; Article 1(7) of Commission Directive 2001/59/EC of 6 August 2001 Adapting to Technical Progress for the 28th time Council Directive 67/548/EEC on the Approximation of the Laws, Regulations and Administrative Provisions Relating to the Classification, Packaging and Labelling of Dangerous Substances, OJ 2001, L 225/1 ff.; Article 4(2) of Council Directive 2002/55/EC of 13 June 2002 on the Marketing of Vegetable Seed, OJ 2002, L 193/33 ff.; Article 1(a) of Directive 2009/41/EC of the European Parliament and of The Council of 6 May 2009 on the Contained Use of Genetically Modified Micro-Organisms, OJ 2009, L 125/75 ff.; Article 1(1) of Directive 2008/50/EC of the European Parliament and of The Council of 21 May 2008 On Ambient Air Quality and Cleaner Air for Europe, OJ 2008, L 152/1 ff.

⁶⁷ Convention on Long-range Transboundary Air Pollution of 13 November 1979, 18 ILM 1979, pp. 1442 ff.

⁶⁸ This definition is a good example for the initially made statement that the definitions given will serve the context they are made in J. Thornton and S. Beckwith: *Environmental Law*, p. 5.

⁶⁹ Preamble 1 of Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora Official Journal 1992, L 206/7 ff.

⁷⁰ Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds Official Journal 1979, L 103/1 ff.

comprise. For instance, some directives list humans and animals and the environment.⁷¹ They, hence, seem to exclude humans and animals from the ambit of the environment. Even though the definitions only including natural resources are narrower than the ones above their scope is not to be underestimated especially due to the above-shown wide range of occurrences falling under the term natural resources.

Thus, also the narrow definitions that only comprise natural resources have a wide scope of application.

1.3.4 Conclusion

In conclusion, the definitions of the notion environment found in a European context can be divided into a wide and a narrow definition. A wide definition comprises natural resources and human beings or man-made things or both, while the narrow one only comprises natural resources. It seems to be more common though in the European context to choose a wide definition of the term environment.

1.4 Environment and liability – introductory remarks on the relationship

It remains to make a few introductory remarks on the relationship between liability and the environment. This relationship can be described with the already abovementioned term *environmental liability*. Without taking a stand on the type of liability,⁷² this means of course the application of a liability mechanism for damage to the environment. This relationship is highly problematic.

In general, every type of liability will have the problem that the proof of causation between an action and an environmental damage is difficult.⁷³ Furthermore, it is also never easy to determine the threshold of an environmental damage.⁷⁴

⁷¹ Article 2(1)(b) of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 Concerning the Placing of Biocidal Products on the market, OJ 1998, L 123/ 1 ff.; Preamble 6 Directive 2000/16/EC of the European Parliament and the Council of 10 April 2000 amending Council Directive 79/373/EEC on the Marketing of Compound Feedingstuffs and Council Directive 96/25/EC on the Circulation of Feed Materials, OJ 2000, L 105/36 ff.; Article 6 of Directive 2002/32/EC of the European Parliament and of the Council of 7 May 2002 on Undesirable Substances in Animal Feed, OJ 2002, L 140/10 ff.

⁷² Pointing to the fact that the term is not used in a uniform way, C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 3.

⁷³ L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, p. 216; P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 261; N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 53; A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 37; M. Wilde: *Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy Europe and the United States*, pp. 56 ff.

⁷⁴ See description of M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, pp. 123-124; J. Thornton and S. Beckwith: *Environmental Law*, p. 90.

In addition to these problems, a civil liability in the form of tort law liability for environmental damage adds more problems. It has the major shortcoming that it is confined to damage to those environmental elements that are the property of someone or to those damages which also pose a threat to human health or life.⁷⁵ Thus, the initially stated environmental benefits attributed to an environmental liability scheme to be a mechanism of environmental protection are merely *incidental*⁷⁶ and depend on the infringement of a private interest. Moreover, it is difficult to attribute an economic value to the environment.⁷⁷ As seen above, natural resources do not necessarily have one. However, as also seen above, civil liability usually requires an economic value of the damaged interest for there to be a compensable damage.

Consequently, the relationship of civil liability and environment in form of an environmental liability system is not unproblematic and therefore one might argue that a civil liability system, in particular the tort law liability system, does not seem to be suitable to cover liability for environmental damage in an adequate way.

1.5 Final conclusion

In conclusion, of the different types of liability, civil liability is the one which is mainly associated with the term liability. Tort law is the most relevant form of civil liability in the field of environmental damage. It is a liability outside of contract for the infringement of private interests such as property, health, life and assets. The injured private party can bring an action directly against the private party that caused the infringement. At the European level the environment comprises, according to wide definitions, natural resources, human beings or even man-made things, while the narrow definitions only comprise natural resources. The relationship of the two notions liability and environment in form of a liability for environmental damage is not free from problems. Problems exist in general with the

⁷⁵ L. de La Fayette: "The Concept of Environmental Damage in International Liability Regimes", in: *Environmental Damage in International and Comparative Law – Problems of Definition and Valuation*, eds. M. Bowman and A. Boyle, New York 2002, pp. 149-189 at p. 186; N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, 52; M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", p. 388; B. Mullerat: "European Environmental Liability: One Step Forward", p. 264; pointing to the problem to cover un-owned natural resources R. Ludwig and M. Petersen: "Aktuelle Fragen und Entwicklungen des europäischen Bodenschutzrechts", *NR*, 2007, pp. 446-423 at p. 448; unproblematic if natural resources are owned by someone P. Wetterstein: "A Proprietary or Possessory Interest: A Condition Sine Qua Non for Claiming Damages for Environmental Impairment", p. 47; M. Wilde: *Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy Europe and the United States*, p. 56.

⁷⁶ M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", p. 389 and in "The Changing Aims of Environmental Liability", *ELM*, vol. 14, 2002, pp. 189-196 at p. 196.

⁷⁷ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 7.

application of civil liability to environmental damage, but in particular the features of a tort law liability system are not suitable to cover environmental damage as such. Therefore it seems doubtful that tort law liability can serve as a mechanism for environmental protection. This chapter merely aimed at setting out the general definitions of the notions. It is meant to provide a background to be kept in mind for the analysis that will follow in the next chapters.

Chapter 2: The history of the Liability Directive – from civil liability to public law

2.1 Introduction

“Seveso, Amoco Cadiz, Sandoz, Curunna and the Braer are names that conjure up memories of major environmental accidents within in the European Community” states the opening sentence of the introduction of the Green Paper of the Commission of 1993.⁷⁸ The Green Paper marks the first step in the development process of the Liability Directive. The process initiated by the Green Paper was marked by a development from a broad to a narrow liability regime⁷⁹ and by the already mentioned controversies surrounding it. Issues of controversy were, for instance, the duty of insurance by the operator and questions of liability even though the operator had acted lawfully.⁸⁰ In particular in those cases where the activity had been undertaken according to a permit.⁸¹ Already in the developmental process of the Directive it was difficult for the Commission to decide which character the envisaged liability system should have. The developmental process of the Liability Directive is often described as a development from civil to public law.⁸² What this means exactly shall be shown by scrutinising the developmental process. Mainly three documents⁸³ mark the way of this process: the Green Paper on the Restoration of Environmental Damage of 1993, the White Paper on Environmental Liability of 2000⁸⁴ and the Proposal of the Commission for a Directive on Environmental Liability of 2002.⁸⁵ The following will set out the main aspects of the three documents in order to analyse their respective liability system or public law system and to picture the development from a broad to a narrow liability system.

2.2 The 1993 Green Paper on the Restoration of Environmental Damage

⁷⁸ COM(1993) 47 final, p. 4.

⁷⁹ For the narrowing development between the White Paper of 2000 and the Proposal of 2002 see in particular M. Lee: “The Changing Aims of Environmental Liability”, pp. 189 ff.

⁸⁰ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 257.

⁸¹ C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 261; P. Wennerås: “Permit Defences in Environmental Liability Regimes – Subsidizing Environmental Damage in the EC?”, *YBEEL*, vol. 4, 2005, pp. 149-180 at p. 149.

⁸² V. Fogleman: “Environmental Liability Directive”, p. 102; M. Lee: “From Private to Public: The Multiple Faces of Environmental Liability”, pp. 375 ff.; C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, pp. 7-8; J. Thornton and S. Beckwith: *Environmental Law*, p. 90; G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 1.

⁸³ Listed also by K. De Smedt: “Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive”, p. 5.

⁸⁴ COM(2000) 66 final.

⁸⁵ COM(2002) 17 final.

More than ten years before the adoption of the Liability Directive, the Green Paper on the Restoration of Environmental Damage of May 14, 1993 was initiated by the Commission. As stated above, it can be seen as the first step on the way to the Liability Directive. It aimed at raising a discussion on remedying environmental damage in order for the Commission to find out which future way it should take in this regard.⁸⁶ Thus, the Green Paper does not yet give concrete solutions⁸⁷ but rather makes suggestions and points out problems surrounding the topic. For the work on the Green Paper, the Commission made, *inter alia*,⁸⁸ reference to the trends of the national laws of the then 12 Member States of the European Community concerning civil liability,⁸⁹ concluding that all of them foresaw a strict liability for environmental damage – specifically or embedded in the general civil liability rules of the Member States. The following will describe the general type of liability suggested by the Commission for an environmental liability regime and present the problems of such a regime identified by the Commission. Many of these problems will affirm the findings of chapter 1.

2.2.1 A civil liability approach

Probably under the impression of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention)⁹⁰ of the European Council, the Paper suggested a civil liability system.⁹¹ The Green Paper defines civil liability as a liability arising under private law as opposed to one arising under public law.⁹² The liability system suggested consisted of a twofold liability mechanisms, an individual and collective compensation mechanism.⁹³ However, the Commission did not yet set out what features such a system should have. Thus, the fact that the Green Paper suggested a civil liability system did not derive from any substantive findings on such a system of the Commission but from the express statement that the envisaged liability system should be a civil one.

⁸⁶ COM(1993) 47 final, p. 4.

⁸⁷ G. Betlem and E.H.P. Brans: “The Future Role of Civil liability for Environmental Damage in the EU”, p. 185; C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 256.

⁸⁸ The Commission also made reference to individual and collective liability schemes at the international level, at the Community level and also to the situation in non-Member States such as Japan and the United States, COM(1993) 47 final, pp. 15 ff, Annex II.

⁸⁹ COM(1993) 47 final, pp. 14-15; see also on this C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 257.

⁹⁰ ETS 150; on the Convention see M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, pp. 219 ff.; evaluation of C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 257.

⁹¹ M.R. Grossman: “Agriculture and the Polluter Pays Principle: An Introduction”, p. 22; G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 1; G. Roller: “Liability”, p. 134.

⁹² COM(1993) 47 final, p. 6.

⁹³ Described already by I. Doolittle: “A Guide to EC Regulation: Environmental Liability”, p. 24.

Concerning the individual liability system, the Commission assigned two functions to civil liability for environmental damage: one being a legal and financial tool to make those responsible which caused the damage by paying the cost of the restoration of the damage, and the other one being to enforce standards of behaviour and preventing people from causing damage in the future.⁹⁴ It is seen to have, thus, a repressive and a preventive function. A collective compensation scheme was investigated in order to remedy environmental damage which is not covered by the individual civil liability.⁹⁵ Moreover, a division was further made between fault based liability and strict liability.⁹⁶ As seen in chapter 1, the first one requires the breach of an obligation whereas the second one merely requires the existence of a damage which is attributable to someone.⁹⁷

The Commission stressed that it would not be difficult to fit an intended or negligent act causing environmental damage under the liability system but that it was difficult if an act that is in itself lawful could come under the scope of the directive.⁹⁸ Examples of such lawful acts leading to environmental damage are for instance the emissions of hazardous substances in accordance with governmental authorisation and an accumulation of polluting acts which are each for themselves not damaging but only together (referred to a *chronic pollution* by the Green Paper).

2.2.2 The problems identified

The Commission mainly identified six problematic issues concerning a possible environmental liability regime in its Green Paper of 1993.

2.2.2.1 Environmental damage

First, it was seen as problematic to identify what constitutes an environmental damage. The Commission came to no final suggestion⁹⁹ but merely pointed out that this issue was far from being solved.¹⁰⁰ Neither was there yet an agreed definition of the term environment nor a uniform view what degree of impact on the environment was required to constitute damage. The Commission's observations revealed what has been observed in chapter 1: there does not

⁹⁴ COM(1993) 47 final, p. 4.

⁹⁵ COM(1993) 47 final, pp. 5, 20 ff.; described also by M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 242.

⁹⁶ Described also by M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 243.

⁹⁷ COM(1993) 47 final, pp. 6-7, 25-26.

⁹⁸ COM(1993) 47 final, p. 8.

⁹⁹ M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 243.

¹⁰⁰ COM(1993) 47 final, p. 10; pointing to the problems of a definition in the drafting process of the Green Paper I. Doolittle: "A Guide to EC Regulation: Environmental Liability", p. 23.

exit a uniform definition of the environment in the European context. The environment sometimes only comprises plant and animal life and other naturally occurring objects, as well as their interrelationships and sometimes also important objects of human origin, for instance a cultural heritage. The abovementioned proposal by the Commission on Environmental Liability in the Waste Sector of 1991 in its amended version defines impairment of the environment as meaning "any significant physical, chemical or biological deterioration of the environment".¹⁰¹ However, it still leaves open to what degree such an impairment constitutes an environmental damage. Hence, the question of what constitutes an environmental damage was identified to be very problematic.

2.2.2.2 Causation

Secondly, the requirement of causation was identified as a source of problems. A person is only liable if the act or incident for which he or she is responsible has caused the damage and the injured party can prove this causation.¹⁰² The Green Paper points out that it is difficult to prove causation if the damage is the result of activities of many different parties or if it only appears after a certain laps of time. Moreover, the scientific certainty of a causal link may provide problems. Thus, a causal link between an action or an attributable event to an environmental damage, will be difficult to prove by the injured party.¹⁰³

2.2.2.3 The parties involved

Thirdly, the Commission pointed to the difficulties surrounding the parties involved. According to the Paper there are at least two parties involved. One party is the polluter, which is not particularly defined,¹⁰⁴ but the Commission underlined that the determination of who exactly should be liable for the environmental damage (*channelling liability*)¹⁰⁵ is essential for the effectiveness of the liability system. The other party is the victim of the environmental damage. In line with the requirement of a victim, the Commission acknowledges that under a civil liability system an environmental damage can never be claimed if there is no individual interest injured at the same time.¹⁰⁶ This underscores the consequence described in chapter 1,

¹⁰¹ COM(91) 219 final, p. 6.

¹⁰² COM(1993) 47 final, pp. 10-11.

¹⁰³ Points to the fact that the Green Paper does not discuss any standard of proof M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 243.

¹⁰⁴ M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 243.

¹⁰⁵ COM(1993) 47 final, p. 7.

¹⁰⁶ COM(1993) 47 final, pp. 11, 24; on the sensitivity of the question who can bring a claim already I. Doolittle: "A Guide to EC Regulation: Environmental Liability", p. 23.

that the choice of a civil liability system will lead to the situation that an environmental damage without damage to property or persons will escape the liability scheme.

2.2.2.4 Adequate remedy

This leads to the fourth problematic issue identified by the Commission, the question of an adequate remedy. Civil law systems need an economic value of the damaged property or the cost of repairing the damage.¹⁰⁷ The environment as such does not have an economic value.¹⁰⁸ Here the Commission proposes a solution. It proposes that the costs of the restoration of the environment in order to achieve its undamaged state shall be seen as the adequate remedy that the polluter has to pay.

2.2.2.5 Limitation of liability

Furthermore, the Paper addressed a possible limitation of the liability.¹⁰⁹ According to the Commission, there was a debate if strict liability should not be limited in those cases in which the operator had taken all reasonable measures of prevention and had insured the costs of foreseeable accidental damage and the damage had been unforeseeable and unpreventable. However, it noted that any limitation carries the risk of undermining the preventive function of the liability system and also the polluter pays principle. Hence, if a limitation was envisaged, the Commission suggests that it should be set at a high level and that if these limits are set, a possible polluter has to contribute to a compensation fund to cover the portion of costs it does not have to pay due to the limitation.¹¹⁰

2.2.2.6 Insurance of environmental damage

Lastly, the problems connected to an insurance of the environmental damage were addressed by the Green Paper.¹¹¹ The main problem of ensuring an environmental damage is said to be the uncertainty of the types and probability of environmental damages. Connected to this are the problems that are faced when insurance is made compulsory. Even though an evaluation of the position of insurers towards the environmental liability schemes concerning pollution

¹⁰⁷ COM(1993) 47 final, p. 11.

¹⁰⁸ Pointing to this problem A. Kiss and D. Shelton, *Manual of European Environmental Law*, p. 65.

¹⁰⁹ COM(1993) 47 final, pp. 9-10.

¹¹⁰ Already suggested as such by the OECD Draft Recommendation on Compensation for Victims of Accidental Pollution, C(91) 53, August 1991 (OECD).

¹¹¹ COM(1993) 47 final, pp. 11 ff.; also described by described also by M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 244.

of 1993¹¹² described them as being willing to support such schemes the Commission brought forward, the concern remained that such insurances might not be available because no insurer sees itself capable to insure such damage. Moreover, insurers would be given a crucial role by withholding or granting an insurance or imposing high premium demands on the operator of an installation. The Commission suggests that in the case of a compulsory insurance, the state might have to intervene in order to ensure the possibility of insurance.

2.2.3 Conclusion

In conclusion, the Green Paper puts forward the idea of a civil liability system for individuals and a complementing joint liability system for remedying environmental damage. Besides this general structure, the Commission did not make concrete proposals but rather identified several fields of problems concerning strict and fault liability, the environmental damage, the causal link, the parties involved, the remedy available, a limitation of liability and the insurance of the environmental damage. Thus, the first step of the developmental process was very open for it merely made suggestions. However, one thing which the Green Paper inevitable put forward, is that an environmental damage without damage to property or persons will not be covered by the civil liability scheme envisaged.¹¹³ Moreover, the Commission did not address the differences in the civil liability systems of the Member States which might make it difficult to implement such a European civil liability system.¹¹⁴

2.3 The 2000 White Paper on Environmental Liability

In contrast to the Green Paper of 1993 which mainly identified key problems of a potential environmental liability system, the White Paper of February 9, 2000,¹¹⁵ *inter alia*¹¹⁶ formulated concrete views of the Commission on how to solve these problems by setting out potential key elements of a future environment liability regime¹¹⁷ of the European

¹¹² J.H. Wansink: "Environmental liability Insurance: Tour d'Horizon in Europe" in: *Transnational Environmental Liability Insurance*, ed. R.P. Kröner, London 1993, pp. 1 ff. at p. 1.

¹¹³ M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 244.

¹¹⁴ Addressing this difficulty L. Krämer: "Directive 2004/35/EC on Environmental Liability", pp. 34-5.

¹¹⁵ COM(2000) 66 final, p. 3.

¹¹⁶ Other aspects are the historical background COM(2000) 66 final, pp. 9 ff., the general explanations on an environmental liability system COM(2000) 66 final, pp. 11 ff., the different options for the form the Community action can take COM(2000) 66 final, pp. 24 ff., the principles of subsidiarity and proportionality COM(2000) 66 final, pp. 27-28 and the overall economic impact of environmental liability at the EC level COM(2000) 66 final, pp. 28 ff.

¹¹⁷ G. Betlem: "Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws", p. 119; E.H.P. Brans: "The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources", in:

Community. Thus, it went a step further than the Green Paper.¹¹⁸ Moreover, it was in particular in the White Paper that the Commission suggested for the first time that a framework directive would be the most appropriate means to establish the liability regime.¹¹⁹ The White Paper was the response to the position of the European Parliament in 1994¹²⁰ asking the Commission to submit a legislative proposal, the opinion of the Economic and Social Committee¹²¹ and the Commission's decision for a white paper after an orientation debate on January 29, 1997 not yet to submit a legislative proposal but to file a white paper first.¹²² The views and opinions had been expressed by the different interest groups in a Joint Hearing of the European Parliament and the Commission in 1993, and in the views and submissions to the Commission in the period up to 2000. Moreover, the Commission had initiated four studies concerning different fields of interest for the environmental liability regime.¹²³ The following shall, first, set out the key elements suggested by the Commission and, secondly, show the changes concerning the type of liability envisaged.

2.3.1 The key elements introduced

The Commission presented eight key elements of a European liability scheme in its White Paper. The elements were the principle of non-retroactivity,¹²⁴ the scope of the regime including the types of environmental damage and damaging activities to be covered,¹²⁵ the type of liability including the defences to be allowed and the burden of proof,¹²⁶ the precise identification of the operator,¹²⁷ aspects of access to justice,¹²⁸ issues of financial security,¹²⁹

Environmental Damage in International Comparative Law, ed. M. Bowman and A. Boyle, New York 2002, pp. 323-337 at p. 324.

¹¹⁸ M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 22 describing it as a "discussion of liability beyond the Green Paper".

¹¹⁹ COM(2000) 66 final, p. 30.

¹²⁰ Reflected in the Parliament Resolution of 20 April 1994, *OJ* 1994 C 128/165.

¹²¹ ESC Opinion of 23 February 1994, *OJ* 1994 C 133/8.

¹²² COM(2000) 66 final, p. 10.

¹²³ C'M'S' Cameron McKenna: *Study of Civil Liability Systems for Remediating Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf; ERM Economics, *Economic Aspects of Liability and Joint Compensation Systems for Remediating Environmental Damage*, available on request at the Environmental Directorate at the EC; E.H.P. Brans and M. Uilhoorn: *Liability for Damage to Natural Resources*, Background Paper for EU White Paper on Environmental Liability of 17 September 1997, available at <http://ec.europa.eu/environment/legal/liability/pdf/ecodamage.pdf>; S. Deloddere and D. Ryckbost: *Liability for Contaminated Sites*, Background Document to the EU White Paper on Environmental Liability of 26. September 1997, available at <http://ec.europa.eu/environment/legal/liability/pdf/soilcont.pdf>.

¹²⁴ COM(2000) 66 final, p. 14.

¹²⁵ COM(2000) 66 final, pp. 14 ff.

¹²⁶ COM(2000) 66 final, pp. 16-17.

¹²⁷ COM(2000) 66 final, p. 18.

¹²⁸ COM(2000) 66 final, pp. 21 ff.

¹²⁹ COM(2000) 66 final, pp. 23-24.

ways of ensuring the effectiveness of the regime¹³⁰ and the relationship with international conventions, which was left open though.¹³¹ Only the scope of the regime, the type of liability, the defences, the burden of proof, the access to justice and financial security shall now be described in the following.

2.3.1.1 Scope of the liability regime

The Commission introduced a much more precise suggestion on the scope of the future environmental liability regime. According to the White Paper the scope should be determined in two ways, by the damage to be covered and by the activities resulting in the damage.¹³²

The damages to be covered were damage to biodiversity, damage to contaminated sites and traditional damage.¹³³ It was proposed that these damages would be dealt with differently under the potential liability regime. Damage to biodiversity would only include the damage to habitats, wildlife or species and plants as defined in the Annexes to the Habitats Directive of 1992¹³⁴ and the Wild Birds Directive of 1979¹³⁵ and only significant damage should be covered.¹³⁶ Concerning the contaminated sites, the Commission suggests that they contain soil, surface waters and groundwater.¹³⁷ With regard to traditional damage, which comprises damage to personal and property and possibly economic loss, the liability regime should also apply to this damage but leave questions of definition of these damages to the Member States.¹³⁸ The inclusion of traditional damage in the system expressed the idea of harmonising to a certain extent national laws on damage to person and property, thus, aspects of national tort law.¹³⁹ This would meet much criticism in the aftermath of the White Paper.¹⁴⁰

¹³⁰ COM(2000) 66 final, p. 21.

¹³¹ COM(2000) 66 final, p. 23.

¹³² COM(2000) 66 final, p. 14 ff., 18 ff.; see also Chart on the scope of the regime COM(2000) 66 final, p. 5; L. Bergkamp: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, pp. 37 ff.; M.L. Wilde: “The EC Commission’s White Paper on Environmental Liability: Issues and Implications”, pp. 24 ff.

¹³³ Described also by G. Betlem: “Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws”, p. 119; critical if it really comprised damage to biodiversity E.H.P. Brans: “The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources”, p. 325; C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 258.

¹³⁴ Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ 1992, L 206/7 ff.

¹³⁵ Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds, OJ 1979, L 103/1 ff.

¹³⁶ COM(2000) 66 final, p. 19.

¹³⁷ COM(2000) 66 final, p. 20.

¹³⁸ COM(2000) 66 final, p. 21; calling the inclusion of traditional damage one controversial issue of the White Paper M. Lee: “The Changing Aims of Environmental Liability”, p. 189.

¹³⁹ M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 204.

¹⁴⁰ G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 2.

The second way put forward to determine the scope of an environmental liability system were the activities to be covered. The activities were those which bore an inherent risk of causing damage to the environment¹⁴¹ and could be determined with regard to other Community legislation. They were, for instance, the ones concerning emissions of hazardous substances into water and air. However, again a distinction should be made between the different damages just described above. With regard to damage to biodiversity, the Commission suggested that the scope of the liability regime should not be limited by a list of dangerous activities because of the vulnerability of biodiversity.¹⁴² Hence, one suggested key feature of the liability regime was that it should be limited, on the one hand, to damages to certain environmental categories and, on the other hand, except for damage to biodiversity, to dangerous activities listed.

2.3.1.2 The standard of liability, the defences and the burden of proof

The Commission made suggestions in the White Paper on how to deal with the issue of when to apply strict and when fault-based liability, possible defences that could exclude liability and the difficulty to prove the causal link between an activity or an omission and an environmental damage.

The Commission expressed the view that strict liability should apply to the categories where the environmental damage has been caused by a listed dangerous activity. Fault liability should apply to a damage to biodiversity, since there, as pointed out above, also non-listed dangerous activities come within the scope of the regime.¹⁴³ Concerning the possible defences the Commission listed the traditional defences of *force majeure*, contribution to the damage or consent by the plaintiff and the intervention of a third party.¹⁴⁴ However, due to suggestions of, in particular, economic operators, also damage caused by activities authorised under Community law was mentioned as a possible defence to exclude liability. With regard to the problem of proving the causation between an activity and an omission by the plaintiff, the Commission suggested that the traditional burden of proof could be alleviated in the potential liability regime.¹⁴⁵ However, this was left open to be dealt with further at a later stage.

¹⁴¹ COM(2000) 66 final, p. 15.

¹⁴² COM(2000) 66 final, p. 16.

¹⁴³ COM(2000) 66 final, pp. 16-17; on this also E.H.P. Brans, "The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources", p. 324 and M.L. Wilde: "The EC Commission's White Paper on Environmental Liability: Issues and Implications", pp. 27-28.

¹⁴⁴ COM(2000) 66 final, p. 17.

¹⁴⁵ COM(2000) 66 final, p. 17; on this also M. Lee: "The Changing Aims of Environmental Liability", p. 190.

Hence, the Commission answered this time when to apply strict and when fault-based liability – suggesting a strict liability regime with an exception of fault based liability concerning damage to biodiversity. It listed explicitly possible defences for the polluter to escape the liability regime and suggested an ease of the burden of proof for environmental damage.

2.3.1.3 Access to justice

Furthermore, the Commission introduced its views on questions of access to justice. According to the White Paper, this meant the right to take actions of restoration of the environment and administrative and judicial review procedures.¹⁴⁶ It formulated the famous *two tire approach*.¹⁴⁷ This approach foresaw that it was in the first place for the Member State to ensure the restoration of the above defined environmental damage by using the compensation or damage paid by the polluter. In the second place, public interest groups in the field of environmental protection should be able to initiate administrative and judicial review procedures against the state or bring a claim against the operator if the state fails to act as required in the first place.¹⁴⁸ However, as an exception to the subsidiary role of public interest groups, in cases of urgency, they should have the right to act immediately. Thus, this clarified that it is in the first place the state that should react to an environmental damage, but that if it fails to do so, public interest groups should be able to step in in various ways.

2.3.1.4 Insurance of environmental damage

Another aspect, identified by the Green Paper as problematic, was addressed by the White Paper: the question of insurability of environmental damage. This was referred to by the White Paper as financial security.¹⁴⁹ Like the Green Paper, it did not really provide for any suggestions on the problem of the insurability of environmental damage. However, it took the standpoint that the envisaged liability regime should not foresee a compulsory insurance system. This is a clear decision of the Commission, which it had not yet dared to take in 1993

¹⁴⁶ COM(2000) 66 final, p. 22; on this also E.H.P. Brans: “The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources”, p. 324 and M.L. Wilde: “The EC Commission’s White Paper on Environmental Liability: Issues and Implications”, p. 23-24.

¹⁴⁷ Mentioned for example in C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 259; Roller: “Liability”, p. 134; E.H.P. Brans: “The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources”, p. 324.

¹⁴⁸ COM(2000) 66 final, p. 22; described also by C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 259; Roller: “Liability”, p. 134; E.H.P. Brans: “The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources”, p. 324.

¹⁴⁹ COM(2000) 66 final, p. 23; on this see also M.L. Wilde: “The EC Commission’s White Paper on Environmental Liability: Issues and Implications”, pp. 34-35.

in the Green Paper. Hence, the Commission decided that the regime should not envisage an obligatory financial insurance.

2.3.2 Civil liability and elements of public law

The White Paper of 2000 itself did not mention anymore which liability system it established. Some are of the opinion that the proposed regime can be classified as a public law regime.¹⁵⁰ What is meant by public law regime will be explained in more detail in chapter 3. Suffice it here to say what elements were identified to be elements of a public law regime. Such elements were, for instance, the role the White Paper attributed to public authorities of the states as having the primary competence to address the restoration and compensation of environmental damage. Moreover, the fact that public interest groups should be given the opportunity to initiate administrative and judicial review procedures concerning the actions of states with regard to the restoration and compensation of environmental damage also were identified as elements of public law. In addition, the White Paper acknowledged that the protection of the environment is a public interest.¹⁵¹ These elements probably found their way into the Commission Proposal due to the fact that most environmental laws in the Member States operated through administrative law.¹⁵²

Nevertheless, these are only few elements of many aspects presented by the Commission.¹⁵³ In particular the aim to include a liability system for traditional damage to property and person touched upon the Member States tort law.¹⁵⁴ Furthermore, due to its reference to the Green Paper¹⁵⁵ which explicitly suggested to choose a civil liability regime and the fact that no further statements are made concerning the role of public authorities or public law in general it seems to be more appropriate to still see the liability system envisaged under the heading of a civil liability system.¹⁵⁶ However, even though it mainly reflected a

¹⁵⁰ E.g. G. Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", pp. 2-3.

¹⁵¹ COM(2000) 66 final, p. 21.

¹⁵² C'M'S' Cameron McKenna: *Study of Civil Liability Systems for Remedying Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf, p. 10.

¹⁵³ Sees the role of public authorities hardly mentioned E.H.P. Brans: "The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources", p. 330

¹⁵⁴ G. Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", p. 2.

¹⁵⁵ COM(2000) 66 final, p. 9.

¹⁵⁶ E.g. G. Betlem: "Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws", p. 120; E.H.P. Brans: "The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources", p. 330; C. Clarke: "The Proposed EC Liability Directive: Half-Way Through Co-Decision", p. 258; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 204; M.L. Wilde: "The EC Commission's White Paper on Environmental Liability: Issues and Implications", p. 21.

civil liability system, it can certainly be seen to have *paved the way*¹⁵⁷ to a public law regime consisting of administrative mechanisms.

2.3.3 Conclusion

In conclusion, the White Paper of 2000 went much further than the Green Paper of 1993 by setting out concrete views of the Commission. In particular the proposed scope of the environmental civil liability regime, its non-retroactivity, the decisions concerning the type of liability, the suggestion to introduce an ease of the burden of proof, the *two tire approach*, the identification of the operator as the liable person and the denial of an obligatory financial insurance are the noteworthy points made by the Commission. These findings of the White Paper - except for the inclusion of traditional damage – already showed that the envisaged environmental liability regime would be of a limited scope¹⁵⁸ and they are furthermore probably the reason why the final text of the Liability Directive is seen to mainly follow the White Paper.¹⁵⁹ The White Paper also introduced administrative mechanisms involving the state as having the primary competence to address the restoration and compensation of environmental damage. However, these elements do not change yet the overall picture of a civil liability scheme envisaged by the Green Paper.

2.4 The 2002 Commission Proposal for a Directive on Environmental Liability

The last comprehensive document on the way to the Environmental Liability Directive was the Commission 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 of January 23, 2002. It finally formulated in a concrete text the environmental liability regime discussed throughout the past years. It brought about a major change in the development of the envisaged environmental liability regime,¹⁶⁰ namely a shift from a civil liability system to a public law system. According to the background of the Green Paper of 1993 and the White Paper of 2000 the Commission could take into account many comments

¹⁵⁷ Like this G. Roller: “Liability”, p. 134.

¹⁵⁸ Pointing to the limitation aspect E.H.P. Brans: “The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources”, p. 327; fearing that from the White Paper an “extremely restrictive liability scheme” will arise M. Lee: “From Private to Public: The Multiple Faces of Environmental Liability”, p. 396.

¹⁵⁹ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 257.

¹⁶⁰ See also description by G. Betlem: “Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws”, p. 120; C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, p. 260.

by the different interest groups that had followed the publication of the White Paper,¹⁶¹ as well as those¹⁶² which were expressed as an answer to the Commission's consultation on a Working Document released in 2001.¹⁶³ The interested groups were in the first place the Member States of the European Community, European industrial and professional federations and associations and environmental non-governmental organisations.¹⁶⁴ The following will, again, set out the main features of the Proposal and lastly describe its character as a public law system.

2.4.1 The main features of the Proposal

Many suggestions of the White Paper of 2000 found their way into the Proposal of 2002. However, some suggestions of the White Paper were not developed any further while others were. In particular, the principle of prevention was given a greater role for the first time.

2.4.1.1 Aspects taken over from the 2000 White Paper

In some respects the Proposal did not depart from the White Paper. The proposed decision from the White Paper to apply in general a strict liability system for damage caused by the activities listed, and therefore being of particularly dangerous character, and to apply fault-based liability for damage to biodiversity survived in the Proposal.¹⁶⁵ Moreover, in conformity with the White Paper, Article 2(9) of the Proposal defined the operator as the natural or legal person which conducts the activity leading to the damage, Article 9 of the Proposal names the exceptions that were already put forward in the White Paper¹⁶⁶ and Article 19 of the Proposal reiterates the principle of non-retroactivity. Article 16 of the Proposal, however, does not establish a duty of operators to insure the damage covered by the directive for financial security but merely obliges Member States to encourage all forms of financial security.

¹⁶¹ Comments of the interested parties, such as the Member States, non-governmental organisations and other public bodies, on the White Paper of 2000, available at http://ec.europa.eu/environment/legal/liability/pdf/wel_export.pdf.

¹⁶² A summary of the positions can be found in Explanatory Memorandum COM(2002) 17 final, pp. 16 ff. and Annex to the Explanatory Memorandum COM(2002) 17 final, pp. 24 ff.; the full texts of many of the commentaries are available at http://ec.europa.eu/environment/legal/liability/pdf/wrkdcc_comments.pdf.

¹⁶³ Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability), available at http://ec.europa.eu/environment/legal/liability/pdf/consultation_en.pdf.

¹⁶⁴ An alphabetical list of the commentators is available at http://ec.europa.eu/environment/legal/liability/pdf/wrkdcc_commentators.pdf.

¹⁶⁵ Compare Article 8 of the Proposal.

¹⁶⁶ In particular for a description of permit defence see P. Wennerås: "Permit Defences in Environmental Liability Regimes – Subsidizing Environmental Damage in the EC?", pp. 169 ff.

2.4.1.2 Steps back from the 2000 White Paper

In some respects, one might say that the Proposal made a step back. The scope of the regime in the Proposal changed significantly from the one suggested in the White Paper. The Commission upheld the main structure of the scope of application as set out in the White Paper. According to Article 3 of the Proposal, it would still be determined by activities, listed in Annex I to the Proposal, except in the case of biodiversity damage and the environmental damage covered by the Directive. The latter definition brought about the *radical change*¹⁶⁷ since it did not anymore include traditional damage but only damage to biodiversity and water and land damage.¹⁶⁸ The Commission explained its change of mind by the lack of necessity to include it in the regime, that such damage could only be regulated under a civil liability system which it did not anymore aim for and the fact that traditional damage was subject matter of the Member States legal systems *by excellence*.¹⁶⁹ This choice had been strongly suggested by representatives of the industry during the drafting process.¹⁷⁰ Anyhow, even though the general determination of the scope remained the same, traditional damage to personal or property was excluded.

Another great change compared to the White Paper was made concerning the possibilities of access to justice. Even though in the White Paper public interest groups were only granted a subsidiary role in the so-called *two tire approach* described above, they still could bring a direct action against the operator under certain circumstances. This possibility of direct action did not find its way into the Proposal.¹⁷¹ According to the Proposal's Article 14 and 15, persons adversely affected or likely to be adversely affected by an environmental damage and qualified entities¹⁷² only had the possibility to make requests for action to the competent national authority or initiate an administrative or judicial review procedure of the

¹⁶⁷ C. Clarke: "The Proposed EC Liability Directive: Half-Way Through Co-Decision", p. 260.

¹⁶⁸ Compare definition of environmental damage in Article 2(18) of the Proposal; see also on this M. Lee: "The Changing Aims of Environmental Liability", p. 190.

¹⁶⁹ Explanatory Memorandum COM(2002) 17 final, pp. 16-17.

¹⁷⁰ E.g. Union des Confédérations de l'Industrie et des Employeurs d'Europe, Comments on the White Paper, pp. 25, 27; EU Committee of the American Chamber of Commerce in Belgium, Comments on the White Paper, pp. 73-74; Union Européenne des Indépendant Lubrifiants, Comments on the White Paper, p. 84; Movement des Entreprises de France, Comments on the White Paper, p. 101; Irish Business and Employers Confederation, Comments on the White Paper, p. 125; Federation of Swedish Industries, Comments on the White Paper, p. 149, all available at http://ec.europa.eu/environment/legal/liability/pdf/wel_export.pdf.

¹⁷¹ Again economic operators had favoured such a change, Annex to the to the Explanatory Memorandum COM(2002) 17 final, p. 27, while non-governmental environmental organisations were opposed to it, Annex to the to the Explanatory Memorandum COM(2002) 17 final, p. 28; see also on this M. Lee: "The Changing Aims of Environmental Liability", pp. 190-191.

¹⁷² See definition in Article 2(14) of the Proposal.

actions or omissions of the competent authority.¹⁷³ Thus, this aspect was taking a step back compared to the suggestions in the White Paper.

Furthermore, the Proposal also did not take over the suggestions of the White Paper on the question of burden of proof. While the White Paper suggested the possibility to ease the burden of proof for the claimant, the Proposal did not address this issue at all. Thus, in this regard it did not develop the White Paper further as well.

2.4.1.3 Moving further than the White Paper of 2000

Nevertheless, the Proposal also moved a step further in some respects. The relationship of the liability regime with international liability Conventions that had been left open in the White Paper in 2000 was now decided by Article 3(3) of the Proposal in a way that the European liability regime would only apply when any of the listed international conventions did not.¹⁷⁴

Moreover the Proposal introduced a new obligation for operators and the competent authority into the liability regime. While in the previous documents the restoration of an environmental damage was at stake, the Proposal in its Article 4 introduced the duty of the competent authority and of the operator also to prevent environmental damage. The preventive objective of the regime had been mentioned at earlier stages but it had never been formulated in the form of such an obligation.

Hence, the Proposal of 2002 took over, abandoned and developed suggestions from the White Paper in 2002 and introduced the obligation for the competent authority and the operator to also act preventively.

¹⁷³ Criticised it for being contrary to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of 25 June 1998, 38 ILM 1999, pp. 517 ff.; G. Betlem: "Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws", p. 120.

¹⁷⁴ The listed conventions are the International Convention on Civil Liability for Oil Pollution Damage of 27 November 1992, 973 UNTS, pp. 3 ff.; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 27 November 1992, 1110 UNTS, pp. 57 ff.; the International Convention on Civil Liability for Bunker Oil Pollution Damage of 23 March 2001, LEG/CONF 12/19 of 27 March 2001; the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 3 May 1996, 35 ILM 1996, pp. 1415 ff.; the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels 10 October 1989, UN Doc. ECE/TRANS/79; the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, 956 UNTS, pp. 251 ff.; the Brussels Supplementary Convention of 31 January 1963, 2 ILM 1963, pp. 685 ff.; the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, 1063 UNTS, pp. 266 ff.; the Vienna Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, 36 ILM 1997, pp. 1473 ff.; the Joint Protocol of Relating to the Application of the Vienna Convention and the Paris Convention 21 September 1988, 1672 UNTS, pp. 293 ff.; the Brussels Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971, 974 UNTS, pp. 255 ff.

2.4.2 Public law in the form of administrative mechanisms

The major shift though that had taken place was the one from a civil liability system to a public law system in the form of administrative mechanisms.¹⁷⁵ Unlike the debatable character of the legal nature of the regime proposed in the White Paper, here the public law character was uncontested.¹⁷⁶ The public law character stems mainly from the exclusion of the traditional damage. Again, while the concrete meaning of a public law character will be explained in chapter 3, the features can be listed that are seen to reflect a public law regime. They are, on the one hand, the competences of the competent authority of the state and, on the other hand, administrative and judicial review procedures of individuals and qualified entities. The competent authority may make binding requests of prevention and restoration of environmental damage towards the operator. Individuals and qualified entities can make requests for action to the competent national authority or initiate an administrative or judicial review procedure of the actions or omissions of the competent authority. Considering only these aspects and the exclusion of traditional damage, one can even call the system established by the proposal a purely public law system. Thus, eventually in the Proposal of 2002 the regime developed throughout the past decade had undergone a shift from civil liability to public law. This type of regime will be analysed further in the next chapter.

2.4.3 Conclusion

In conclusion to the above said concerning the Proposal of 2002, the latter constitutes a major change in the development of the environmental liability system. As an outcome of the discussion taking place after the publication of the White Paper in 2000, the Proposal dropped some of the suggestions made, developed some suggestions further, introduced the new duty of preventive action and over all abandoned completely elements of a civil liability system by excluding traditional damage from the scope of the system.

2.5 Final conclusion

The Liability Directive went through a developmental process which can be followed on the basis of the Commission's Green Paper of 1993, its White Paper of 2000 and the Proposal for

¹⁷⁵ See also description by G. Betlem: "Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws", p. 120; C. Clarke: "The Proposed EC Liability Directive: Half-Way Through Co-Decision", p. 260; M. Lee: "The Changing Aims of Environmental Liability", p. 190; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 204, addresses the Directive, but this aspect did not change between the Proposal and the Directive; C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 2.

¹⁷⁶ E.g. statement of the Commission in the Explanatory Memorandum COM(2002) 17 final, pp. 16-17.

a Directive on Environmental Liability of 2002. Each of the documents had its important role to play. The Green Paper initiated the discussion at the Community level for the future developments of an environmental liability regime by outlining the potential problems of such a regime. The White Paper then addressed these problems by making suggestions concerning key aspects of a potential liability regime. Finally, the Proposal for a Directive pinned down in concrete paragraphs aspects of the liability regime in a framework. The major aspect of the developmental process is the shift away from a civil liability system to a public law system in form of administrative mechanisms.

Moreover, the development of the Directive as seen above further pictured a shift from a very wide environmental liability scheme to a narrow one. While the Green Paper initiated the discussion in an open manner, already the White Paper foreshadowed that the envisaged regime would be a narrow one.¹⁷⁷ The Proposal for a directive confirmed this foreshadow by excluding traditional damage from the regime and the possibility of individuals and public entities to take action against the operator directly. Thus, the development was also one narrowing the scope of the envisaged liability system step by step.

¹⁷⁷ Of *closed character* G. Betlem: "Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws", p. 119; G. Betlem and E.H.P. Brans: "The Future Role of Civil liability for Environmental Damage in the EU", p. 186; *a closed category of hazardous activities* P. Wennerås: "Permit Defences in Environmental Liability Regimes – Subsidizing Environmental Damage in the EC?", p. 149.

Chapter 3: The regime under the Liability Directive – really a *liability* directive?

3.1 Introduction

The final text of the Liability Directive was adopted by the European Parliament and the Council according to the co-decision procedure of Article 251 of the EC Treaty¹⁷⁸ on April 21, 2004. From the Commission Proposal of 2002, to the present text of the Liability Directive some changes were made. First, the Proposal had to go through the co-decision procedure of the European Parliament and the Council of Ministers where several amendments were made.¹⁷⁹ Secondly, in 2006, the Liability Directive was amended by Directive 2006/21/EC.¹⁸⁰ This amendment only inserted the management of extractive waste pursuant to the latter Directive into Annex III of the Liability Directive.¹⁸¹ Notably, recently also geological storage of carbon dioxide was included in the list of Annex III of the Directive.¹⁸² These amendments did not make great changes to the Proposal for the Directive of 2002.¹⁸³ However, the final text of the Liability Directive is at the core of this chapter. It will analyse the content of the Liability Directive in greater detail and determine more precisely the type of regime established by the Directive. It will show that many aspects of the Directive can be criticised to undermine the effectiveness of the Directive as a mechanism to protect the environment and a uniform implementation in the Member States. It will further show that the Directive deserves to contain both terms *environment* and *liability* in its title. Moreover, as already pointed out in the introduction, the liability regime set up by the Directive complements already existing environmental liability schemes and is at the same time of greater environmental benefit than any of the other schemes. However, while this is easier to establish for the term *environment*, it is more difficult for the term *liability*. Concerning the term *liability*, the title of the Directive is often perceived to be *misleading*.¹⁸⁴

¹⁷⁸ For the decision procedure compare Introduction to the Preamble of Directive 2004/35/EC.

¹⁷⁹ See description of C. Clarke: “The Proposed EC Liability Directive: Half-Way Through Co-Decision”, pp. 261 ff. and V. Fogleman: “Environmental Liability Directive”, pp. 102-103; L. Krämer: “Directive 2004/35/EC on Environmental Liability”, p. 30.

¹⁸⁰ Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the Management of Waste From Extractive Industries and Amending Directive 2004/35/EC, OJ 2006, L 102/15 ff.

¹⁸¹ Compare Article 15 of Directive 2006/21/EC.

¹⁸² Article 34 of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 On the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ 2009, L 140/114 ff.

¹⁸³ G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 2; in particular pointing out their similarity L. Krämer: “Directive 2004/35/EC on Environmental Liability”, p. 34.

¹⁸⁴ B. Becker: “Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden”, NVwZ, 2005, pp. 371-376 at p. 371; G. Betlem and E.H.P. Brans: “Environmental Liability in the EU: An Introduction”, p. 17; K. De Smedt: “Is Harmonisation always Effective? The Implementation of the Environmental Liability

In order to do as just stated, the following shall, first, present the underlying principles of the Liability Directive. Secondly, it will set out the main content of the Liability Directive. Based on these first two steps, it will conclude what type of regime the Directive sets up.

3.2 The underlying principles

The underlying principles of the Directive are the polluter pays principle and the preventive principle.¹⁸⁵ Both the polluter pays principle and the preventive principle are listed among others in Article 174(2) of the EC Treaty. Both represent basic principles of the environmental policy of the European Community.¹⁸⁶ These two principles are sometimes even referred to as *the* two fundamental principles of Community environmental policy.¹⁸⁷ It is due to its reflection of the two principles that the Liability Directive is said to implement fundamental principles of Community law.¹⁸⁸ The content of both principles shall, first, be described and thereafter it will be shown how they are reflected in the Liability Directive.

3.2.1 The polluter pays principle

3.2.1.1 Generally in Community law

The polluter pays principle has existed in Community law since 1973.¹⁸⁹ However it was not until 1987 that it found its way into the text of the EC Treaty,¹⁹⁰ following the entry into force

Directive”, p. 2; L. Diederichsen and M. Jerxsen: “Haftungsrisiken für Unternehmen durch verzögerte Umsetzung der Umwelthaftungsrichtlinie”, *UPR*, 2007, pp. 17-20 at p. 17; J. Duikers: “EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung”, *NR*, 2006, pp. 623-631 at p. 623; L. Knopp and K. Kwasnicka: “Die Umsetzung der europäischen Haftungsrichtlinie in Deutschland und Polen”, *WiRO*, 2008, pp. 353-358 at p. 353; H.-J. Muggenborg: “Das Verhältnis des Umweltschadensgesetzes zum Boden- und Gewässerschutzrecht”, *NVwZ*, iss. 1, 2009, pp. 12-18 at p. 12; G. Roller: “Liability”, p. 135; A. Scheidler: “Umweltschutz durch Umweltverantwortung – Das neue Umweltschadensgesetz”, *NVwZ*, iss. 10, 2007, pp. 1113-1119 at p. 1114; reason why referred to as *Environmental Damage Directive* by R. Slabbinck, H. Descamps and H. Bocken: “Implementation of the Environmental Damage Directive in Belgium (Flanders)”, *EL*, iss. 1, 2006, pp. 3-12 at p. 3.

¹⁸⁵ Representative for others M. Hinteregger: “International and Supranational Systems of Environmental Liability in Europe”, p. 8.

¹⁸⁶ For the polluter pays principle N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 30.

¹⁸⁷ M.-L. Larsson, *The Law of Environmental Damage – Liability and Reparation*, p. 242.

¹⁸⁸ B. Mullerat: “European Environmental Liability: One Step Forward”, p. 263; C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 2.

¹⁸⁹ First Environmental Action Programme of the European Community of 1973, OJ 1973, C 112/I ff.; Second Environmental Action Programme of the European Community of 1977, OJ 1977, C 139/I ff.; Third Environmental Action Programme of the European Community of 1983, OJ 1983, C 46/I ff.; first formal articulation at the European level of the principle had been made already one year earlier in the OECD Guiding Principles Concerning International Economic Aspects of Environmental Policies, OECD Doc. C 72/128 ff. at para. 4.

¹⁹⁰ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 30; M.R. Grossman: “Agriculture and the Polluter Pays Principle: An Introduction”, p. 11; M.-L. Larsson, *The Law of Environmental Damage – Liability and Reparation*, p. 90; J. Thornton and S. Beckwith: *Environmental Law*, p. 84.

of the Single European Act of 1986 on July 1, 1987.¹⁹¹ It is one of the fundamental principles of European environmental policy and enshrined in Article 174(2) of the EC Treaty. It is, furthermore, found in secondary legislation of the Community.¹⁹² It mainly means what it says: that the costs resulting from a polluting act should be carried by the person who caused the pollution and not by society as such.¹⁹³ Therewith it is first of all an economic principle¹⁹⁴ which aims at cost allocation and cost internalisation.¹⁹⁵ However, the formulation of the principle leaves some questions open.¹⁹⁶ The main difficulty surrounding the principle is the question of who is actually the polluter that is to bear the costs.¹⁹⁷ Furthermore, what costs exactly must the polluter bear?¹⁹⁸ Concerning the question which costs the polluter must pay the principle has undergone a change. In the beginning, the costs merely comprised the costs of pollution prevention and control and now the principle also extends to costs of restoration.¹⁹⁹ Furthermore, the principle is seen to have shifted from a merely economic principle to a liability principle.²⁰⁰ This will be seen in the following.

Hence, the polluter pays principle is one of the environmental principles of Community law according to which the person who caused the pollution has to bear the costs thereof and not society as such.

3.2.1.2 The Liability Directive

¹⁹¹ OJ 1987, L 169/1 ff.

¹⁹² See e.g. Preamble 2 of the Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, OJ 2008, L 24/8 ff.; Preamble 14 and Article 15 of the Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, OJ 2006, L 114/9 ff.; Preamble 11, 38 and Article 9 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, OJ 2000, L 327/1 ff.; Article 15 of Council Directive 91/156/EEC of 18 March 1991 Amending Directive 75/442/EEC On Waste, OJ 1991, L 78/32 ff.

¹⁹³ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 21; A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 39; in general M.-L. Larsson, *The Law of Environmental Damage – Liability and Reparation*, p. 90; E. Louka: *Conflicting Integration – Environmental Law of the European Union*, Oxford 2004, p. 16; J. Thornton and S. Beckwith: *Environmental Law*, p. 84.

¹⁹⁴ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 21; L. Krämer, *EC Environmental Law*, p. 28; M.-L. Larsson, *The Law of Environmental Damage – Liability and Reparation*, p. 90.

¹⁹⁵ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 21; M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 3; on cost allocation A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 39.

¹⁹⁶ M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 29.

¹⁹⁷ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, pp. 38 ff.; M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 3; L. Krämer, *EC Environmental Law*, p. 28; J. Thornton and S. Beckwith: *Environmental Law*, p. 84; E. Louka: *Conflicting Integration – Environmental Law of the European Union*, p. 16.

¹⁹⁸ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, pp. 42 ff.; M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 13.

¹⁹⁹ M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 30.

²⁰⁰ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, pp. 33 ff.; M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 30.

Even though the polluter pays principle did not make it into the first Article of the Commission Proposal of 2002, the polluter pays principle has been present throughout the whole developmental process of the Liability Directive.²⁰¹ Finally, in February 2004, the Commission announced the Liability Directive as the first EU law which specifically was based on the polluter pays principle.²⁰²

The principle can now be found in the Liability Directive in two ways. On the one hand, it is reiterated in the Preamble of the Directive²⁰³ and in its Article 1. There it is stated that the Liability Directive aims at establishing a framework of environmental liability based on the polluter pays principle. Thus, the principle is the underlying principle of the Directive. This already indicates that it is justified to call the principle a liability principle. On the other hand, the principle is reflected in the obligation of the polluter to bear the costs of preventive and remediation action according to Article 8 of the Liability Directive. The obligation under Article 8 of the Liability Directive will be discussed in more detail later on. Here it shall merely be mentioned, that the costs the polluter has to pay according to the Directive do not only comprise the costs of prevention of an environmental damage but also the costs of remedial action. Therewith, Article 8 of the Directive reflects the just mentioned development of the principle from covering merely preventive costs to also covering remedial costs.

Furthermore, the Liability Directive solves the problem of determining the polluter. Under the Directive it is the operator to whom the obligations of the Directive apply and the operator is defined in Article 2(6) of the Liability Directive. The exact determination of the polluter will also be explained later on.

In conclusion, the polluter pays principle as a fundamental environmental principle of Community law is an underlying principle of the Liability Directive. It is mentioned expressly in the Preamble and the operative part of the Directive and it is reflected in one of the main obligations of the Directive.

3.2.2 The preventive principle

3.2.2.1 Generally in Community law

²⁰¹ For the Green Paper see COM(1993) 47 final, p.5; for the White Paper COM(2000) 66 final, p. 11; for the Commission Proposal see Explanatory Memorandum COM(2002) 17 final, p. 3; see also comment by C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 2.

²⁰² Press Release Environmental liability: Commission welcomes agreement on new Directive, IP/04/246 of 20 February 2004.

²⁰³ Preambular 2 and 18 of the Liability Directive.

The relationship of the preventive principle with the polluter pays principle is a complementary one. The latter complements the former.²⁰⁴ As with the polluter pays principle, also the preventive principle played a role in European environmental law²⁰⁵ before it was inserted into the European Treaty through the Single European Act of 1986. Since it is, as the polluter pays principle a principle of the environmental policy of the Community enshrined in Article 174(2) of the EC Treaty it is also reflected in environmental secondary legislation of the Community.²⁰⁶ The preventive principle is based on the assumption that it is better to prevent an environmental harm than to cure it.²⁰⁷ Therefore, the principle involves a risk assessment to avoid harm.²⁰⁸ Harm can only be prevented if the possibility of this harm is known. Due to this risk assessment, the principle has been expanded and complemented by the more complex precautionary principle.²⁰⁹ Only broadly described, the precautionary principle requires that an action against a potential environmental harm has to be taken even in the absence of scientific certainty that this harm will really occur.²¹⁰ The latter principle is not expressly mentioned in the Liability Directive and it is not certain that it applies to the Directive.²¹¹ It shall therefore not be discussed here in more detail. The preventive principle

²⁰⁴ M.R. Grossman: "Agriculture and the Polluter Pays Principle: An Introduction", p. 31.

²⁰⁵ Enshrined also in the first three environmental action programmes: First Environmental Action Programme of the European Community of 1973, OJ 1973, C 112/I ff.; Second Environmental Action Programme of the European Community of 1977, OJ 1977, C 139/I ff.; Third Environmental Action Programme of the European Community of 1983, OJ 1983, C 46/I ff.

²⁰⁶ E.g. Preamble 34 of Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control, OJ 2009, L 131/57 ff.; Preamble 2 of Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the Contained Use of Genetically Modified Micro-Organisms, OJ 2009, L 125/75 ff.; Standard A4.1 (1) (d) of Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC, OJ 2009, L 24/30 ff.; Preamble 30 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives, OJ 2008, L 312/3 ff.; Article 3(1)(a) of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 Concerning Integrated Pollution Prevention and Control, OJ 2008, L 24/8 ff.; Article 1(1)(b) of Council Directive 2006/88/EC of 24 October 2006 on Animal Health Requirements for Aquaculture Animals and Products Thereof, and on the Prevention and Control of Certain Diseases in Aquatic Animals, OJ 2006, L 328/14 ff.

²⁰⁷ N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 61; A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 37; L. Krämer, *EC Environmental Law*, p. 25; E. Louka: *Conflicting Integration – Environmental Law of the European Union*, p. 19.

²⁰⁸ A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 37.

²⁰⁹ A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 37; suggesting that the principles should be used interchangeably L. Krämer, *EC Environmental Law*, p. 25; E. Louka: *Conflicting Integration – Environmental Law of the European Union*, p. 20.

²¹⁰ E. Louka: *Conflicting Integration – Environmental Law of the European Union*, p. 20.

²¹¹ Mention was made in the development process of the Directive only in the White Paper, COM(2000) 66 final, pp. 11, 13, 27, and the Directive requires a preventive action only in the event an *imminent threat of such damage occurring*, Article 5(1) of the Liability Directive; denies its application to the provisions in the Directive E. Rehlinger: "Implementation of the Environmental Liability Directive in Germany", *EL*, iss. 5, 2007, pp. 199-203 at p. 200.

can appear in two forms. It can either anticipate an environmental damage in its entirety or it can try to anticipate the spread of an already occurred damage.²¹²

Hence, the preventive principle intends to prevent an environmental damage or at least prevent its further spread.

3.2.2.2 The Liability Directive

Contrary to the polluter pays principle, the Liability Directive does not expressly mention the preventive principle, but implicitly formulates it as the objective of the Directive. Just above, it was stated that Article 1 of the Liability Directive formulates that the Directive is “based on the polluter pays principles”. It reads further that it aims “to prevent and remedy environmental damage”. This objective is enshrined already in the title of the Liability Directive “with regard to the prevention and remedying of environmental damage” and is reiterated several times in the Preamble of the Directive.²¹³

The preventive principle as an objective of the Liability Directive is also, though in a different way, reflected in the Directive in two ways. On the one hand, it is reflected in two obligations of the Liability Directive. One obligation is formulated by Article 5 of the Liability Directive.²¹⁴ This provision formulates the obligation to take the necessary preventive measures when an environmental damage has not yet occurred but there is an imminent threat of such damage to occur. Another obligation reflecting the preventive principle is provided for by Article 6(1)(a) of the Liability Directive.²¹⁵ This provision applies when damage has already occurred and establishes the obligation to immediately control, contain, remove or otherwise manage the damage in order to prevent further environmental damage. Thus, these two obligations show that the preventive principle is enshrined in the Directive in its two possible forms: once as a means to prevent any environmental damage to occur and once as a means to prevent further damage when damage has already occurred. On the other hand, the preventive principle is the very underlying idea of the liability system established by the Liability Directive. As pointed out at the very beginning of the

²¹² N. de Sadeeler: *Environmental Principles – From Political Slogans to Legal Rules*, p. 61.

²¹³ Preambulars 1, 2, 3, 11, 15, 18, 20 21, 23, 28 and 29 of the Liability Directive.

²¹⁴ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260.

²¹⁵ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260.

introduction, it is assumed that an environmental liability scheme will not only deal with the aftermath of an environmental damage but also prevent it.²¹⁶

Hence, the preventive principle is the implicitly declared objective of the Liability Directive which is reflected in the obligations of Article 5 and 6(1)(a) of the Liability Directive and in the idea of the liability scheme to be a mechanism preventing environment damage.

3.2.3 Conclusion

In conclusion, the polluter pays principle and the preventive principle are the underlying environmental principles of the Liability Directive. The preventive principle is aimed at preventing an environmental damage to occur and prevent occurred environmental damage from worsening. It is complemented by the polluter pays principle which comes into play when an environmental damage has occurred and causes costs. The principles are reflected in the obligations of the Liability Directive, are the objectives of the Directive and form its underlying basis.

3.3 Main content of the Liability Directive

The following shall make a substantive description of the main content of the Liability Directive. It will be seen that the Directive is really a framework directive. It only sets up a minimum liability scheme.²¹⁷ The basis of the Directive is Article 175(1) of the EC Treaty,²¹⁸ thus, allowing Member States to adopt more stringent measures.²¹⁹ This is further reflected in the great amount of discretion the Directive leaves to the Member States²²⁰ concerning crucial questions. This discretion is criticised for undermining a uniform liability scheme in all the

²¹⁶ COM(2000) 66 final, pp. 11-12; *Environmental Liability Directive enters into force*, Editorial Comment, p. 2; P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 257; A. Epiney: *Umweltrecht in der Europäischen Union*, p. 250; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 8.

²¹⁷ F. Coroner: "Environmental Liability Directive: how well are Member States handling transposition?", p. 226; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 13; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 204; H. Lopatta: "Perspectives from the European Commission – Overview and State of Play of the ELD", slide 4; C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 2.

²¹⁸ Compare Introduction to the Preamble of Directive 2004/35/EC; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 340.

²¹⁹ J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 340; C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 2; compare also Article 16(1) of the Liability Directive.

²²⁰ F. Coroner: "Environmental Liability Directive: how well are Member States handling transposition?", p. 226; K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 12; A. Epiney: *Umweltrecht in der Europäischen Union*, p. 253; H. Lopatta: "Perspectives from the European Commission – Overview and State of Play of the ELD", slide 4.

Member States.²²¹ Moreover, the Directive includes many open phrases und ambiguous wording. It does, furthermore, establish a narrow regime which does not take on suggestions made during the developmental process. Both latter features can be seen as the origins for the criticism that the regime established by the Directive is not an effective mechanism to protect the environment.²²² In order to assess these aspects and their criticism, the content of the Liability Directive will be described in two steps. First, the scope of application of the Directive will be set out in detail. Secondly, further important aspects of the Directive, the two liability schemes, the competences of the competent authority, the consequences of liability, the exemptions/defences and limitations of liability, the rules on access to justice and financial security will be addressed.

3.3.1 The scope of the Liability Directive

The scope of the liability Directive can be described in terms of its personal application, its material application and its temporal application.²²³ The description will show that the Directive is very limited in scope²²⁴ and therefore represents really a minimum approach. Moreover, it does not take on suggestions made during the developmental process²²⁵ of the Directive and comprises many vague terms.

3.3.1.1 Personal scope – the operator of an occupational activity

The personal scope describes which person falls under the obligations of the Liability Directive apply. This scope of the Directive is limited to the operators of occupational activities.²²⁶

Article 2(6) of the Liability Directive defines two types of operators. An operator is once defined as “any natural or legal, private or public person who operates or controls the occupational activity”. An operator in the sense of the Directive is further a person “to whom

²²¹ On the latter point see K. De Smedt: “Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive”, p. 12; A. Epiney: *Umweltrecht in der Europäischen Union*, p. 253.

²²² A. Epiney: *Umweltrecht in der Europäischen Union*, pp. 252-253; claiming that that is why it does not bring any step forward B. Becker: “Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden”, p. 371.

²²³ J.H. Jans and H.H.B. Vedder: *European Environmental Law*, pp. 340 ff.

²²⁴ F. Coroner: “Environmental Liability Directive: how well are Member States handling transposition?”, p. 226; K. De Smedt: “Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive”, p. 7; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 208; G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 3; G. Roller: “Liability”, p. 136.

²²⁵ “being watered down” B. Mullerat: “European Environmental Liability: One Step Forward”, p. 263.

²²⁶ M. Hinteregger: “International and Supranational Systems of Environmental Liability in Europe”, p. 20; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 340; B. Mullerat: “European Environmental Liability: One Step Forward”, p. 264; N. de Sadeleer: “The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat”, p. 68.

decisive economic power over the technical functioning of such an activity has been delegated” if the national law foresees this person to be liable. The examples listed of such persons are the holder of a permit or authorisation of such an activity, or the person registering and notifying such an activity. It is important to be aware that in particular from the first definition follows, that the operator must not be a private person, but also can be a public person. Thus, the Directive does not make a difference between private and public persons if they are in control of an occupational activity.²²⁷ The concept of the operator can certainly be seen to be a wide one.²²⁸ Through the two types of operators it opens the possibility for many liable persons. Also the word *control* over the occupational activity which is not more closely defined in the Directive seems to imply a very wide scope of application. It implies that not only the person which exercises control over the damaging activity is liable, but also the person controlling the occupational activity as such.²²⁹

Already concerning the determination of the liable operator the Liability Directive leaves some discretion to the Member States, reflecting its framework approach. On the one hand, Member States’ national laws can widen the scope for other liable persons. On the other hand, the Directive leaves it in its Article 9 expressly to the Member States’ national laws to allocate the costs in the case of multiple party causation. A rule determining which of several parties are to be held liable is very important for a liability regime. From the example of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980²³⁰ in the United States it is known that if this question is left open immense litigation among the liable persons is the consequence. The Commission, which took CERCLA as an example for a liability regime in its preparatory work of the Directive,²³¹ must have been aware of the importance of the regulation of the costs in such an instance. Yet, the Commission left this decision to the Member States national laws.

As stated above, only the operator of an occupational activity is liable according to the Directive. The term occupational activity is defined by Article 2(7) of the Liability Directive as

²²⁷ Evaluating this as an achievement of the Directive G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 6.

²²⁸ B. Becker: “Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden”, p. 374; L. Diederichsen and M. Jerxsen: “Haftungsrisiken für Unternehmen durch verzögerte Umsetzung der Umwelthaftungsrichtlinie”, p. 17; B. Mullerat: “European Environmental Liability: One Step Forward”, p. 264.

²²⁹ B. Mullerat: “European Environmental Liability: One Step Forward”, p. 265.

²³⁰ 42 U.S.C. 103.

²³¹ Annex II of Green Paper on Environmental Liability COM(1993) 47 final, pp. 30 ff.; Commission Proposal COM(2002) 17 final, pp. 10 ff.

any activity carried out in the course of an economic activity, a business or an undertaking, irrespective of its private or public, profit or non-profit character

This definition already appears to narrow down the scope of the Directive. Only if the activity is economic or a business or an undertaking it can fall within the scope of the Directive. However, there are entities whose activities may result in an environmental damage which will not be involved in an economic activity.²³²

Hence, the personal scope of the Liability Directive is limited to the operator of an occupational activity. It is a very wide definition of the operator with room left for the Member States discretion. However, the wideness of the definition of the operator is already narrowed down by the requirement of an occupational activity which needs to be of economic character or a business or an undertaking.

3.3.1.2 The material scope – environmental damage

The material scope describes what is substantially covered by the Liability Directive. The damage covered by the Directive is the key element of the scope of application.²³³ As will be seen now, the definition of the damage covered and its exceptions by the Directive are complex and narrow.²³⁴

Environmental damage

According to Article 3(1)(a) of the Liability Directive, the Directive covers *environmental damage* which is defined by Article 2(1) of the Liability Directive. It is seen as the great innovation of the Liability Directive that it covers environmental damage as such.²³⁵

²³² J.H. Jans and H.H.B. Vedder: *European Environmental Law*, pp. 340-341; See e.g. case C-343/95 *Diego Cali & Figli v. Servizi ecologici porto di Genova SpA (SEPG)*, Judgement of 18 March 1997, ECR [I-01574].

²³³ J. Duikers: “EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung”, p. 624; R. Ludwig / M. Petersen: “Aktuelle Fragen und Entwicklungen des europäischen Bodenschutzrechts”, p. 447; B. Mullerat: “European Environmental Liability: One Step Forward”, p. 263.

²³⁴ On the latter see P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 259; K. De Smedt: “Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive”, p. 7; M.R. Grossman: “Agriculture and the Polluter Pays Principle: An Introduction”, p. 24; M. Hinteregger: “International and Supranational Systems of Environmental Liability in Europe”, p. 13; L. Krämer: “Directive 2004/35/EC on Environmental Liability”, p. 36.

²³⁵ E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, p. 7; L. Diederichsen and M. Jerksen: “Haftungsrisiken für Unternehmen durch verzögerte Umsetzung der Umwelthaftungsrichtlinie”, p. 17; C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 4; N. de Sadeleer: “The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat”, p. 68; Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 4; J. Thornton and S. Beckwith: *Environmental Law*, p. 90.

The environment protected

The Directive does not cover the environment as a whole,²³⁶ but three elements of the environment. The environment that is protected are protected species and habitats, counted as one element, water and land. These three environmental elements are referred to under the Directive as *natural resources*.²³⁷

Protected species and natural habitats are defined in Article 2(3) of the Liability Directive. After the exclusion of the term biodiversity from the Liability Directive,²³⁸ its partly protection is reflected by the protection of certain species and habitats.²³⁹ The species protected are, as suggested already in the Commission White Paper,²⁴⁰ only the species of birds under the Wild Birds Directive of 1979.²⁴¹ The habitats under the Directive, as already suggested by the White Paper as well,²⁴² are only the habitats of species under the Habitats Directive of 1992.²⁴³ In July 2009, the protected areas under both Directives covered 24,5 percent of the Community land area.²⁴⁴ This is only a small percentage of the Community area covered, however, those sites increase relatively fast.²⁴⁵ Probably not only the designated protection sites under the Habitats Directive come within the scope of the Liability Directive, but all habitat types listed there.²⁴⁶ Also the habitats not listed in the Habitats Directive come within the scope of the environment of the Directive if a Member States designated such areas as protected areas under their national law. Thus, the material scope of the Directive in this respect can be enlarged by the Member States' national laws.²⁴⁷

²³⁶ J. Thornton and S. Beckwith: *Environmental Law*, p. 91; in this sense also M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 14.

²³⁷ Article 2(12) of the Liability Directive.

²³⁸ Term had been used by the Commission at earlier stages, Commission White Paper COM(2000) 66 final, p. 18; Commission Proposal COM(2002) 17 final, *inter alia* Article 2(1), (2), (8), (18).

²³⁹ They are elements of biodiversity, compare Questions and Answers Environmental Liability, Commission Memorandum MEMO/07/157 of 27 April 2007, p. 5; J. Thornton and S. Beckwith: *Environmental Law*, p. 91.

²⁴⁰ COM(2000) 66 final, p. 18.

²⁴¹ Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds, OJ 1979, L 103/1 ff.

²⁴² COM(2000) 66 final, p. 18.

²⁴³ Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ 1992, L 206/7 ff.

²⁴⁴ *Natura 2000*, European Commission DG Env Nature Newsletter, no. 26, July 2009, available at http://ec.europa.eu/environment/nature/info/pubs/docs/nat2000news/nat26_en.pdf, pp. 8-9.

²⁴⁵ In 2007, it was suggested that the protected areas under both Directives covered 17 percent of the Community land area, Questions and Answers Environmental Liability, Commission Memorandum MEMO/07/157 of 27 April 2007, p. 5.

²⁴⁶ B. Becker: "Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden", p. 372; G. Roller: "Liability", p. 137; opposing this interpretation J. Duikers: "EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung", pp. 624 ff.; N. de Sadeleer: "The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat", p. 70.

²⁴⁷ K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 7; J. Thornton and S. Beckwith: *Environmental Law*, p. 91.

Moreover, waters are according to Article 2(5) of the Liability Directive the waters of the Water Framework Directive of 2000.²⁴⁸ This definition is assumed to broaden the scope of application of the Directive to a certain extent,²⁴⁹ due to its wider scope of application. The term land is not further defined by the Liability Directive.

Compared with the definition of the environment made in chapter 1, the definition of the environment of the Liability Directive must be called narrow. The wide definitions comprise natural resources, human beings and even man-made things. The narrow definition comprises only natural resources, but as has been seen, many elements of nature classify as natural resources. It comprises not only the species as well as habitats protected by other secondary Community legislation it includes also more natural elements such as air. Thus, with this definition, the Liability Directive defines the environment protected narrower compared to other secondary Community legislation,²⁵⁰ CERCLA²⁵¹ and the Convention on Biodiversity.²⁵² Therefore it is justified to say that the Liability Directive takes a narrow definition of the environment.

Thus, the environment that comes within the scope of the Directive only are protected species and natural habitats according to the Wild Birds and the Habitats Directives, water and land.

The damage

Article 2(2) of the Liability Directive defines damage generally²⁵³ as

a measureable adverse change in the natural resource or measurable impairment of a natural resource service which may occur directly or indirectly

²⁴⁸ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, OJ 2000, L 327/1 ff.

²⁴⁹ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 6.

²⁵⁰ Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ 1985, L 175/40 ff. mentions *inter alia* the fauna and flora, soil, water, air, climate and the landscape, their inter-action and the cultural heritage.

²⁵¹ § 101(16) CERCLA of 11 December 1980, 42 United States Code 103, lists *inter alia* land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources.

²⁵² Article 2 of the Convention on Biodiversity of 5 June 1992, 1760 UNTS, pp. I-30619, lists as biodiversity "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems"; on this also M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 14.

²⁵³ B. Becker: "Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden", p. 372; P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 259.

Thus, there are two possible damages, a measurable adverse change and a measurable impairment of the natural resource service. The term *damage* is further qualified by Article 2(1) of the Liability Directive for each of the protected natural resources.

Damage for habitats, species and water is defined with reference to existing protection standards built in the abovementioned Directives.²⁵⁴ Damage to protected species and habitats is any damage that has *significant adverse effects* on reaching or maintaining their *favourable conservation status*.²⁵⁵ The norm states further that the significance of the effects should be assessed according to the baseline condition for which the criteria are set out in Annex I of the Directive. The baseline condition is the condition of the species or habitats at the time of the damage.²⁵⁶ The criteria to determine the adverse effects are for instance the species capacity of propagation, its viability or the habitats capacity for regeneration.

Water damage is defined as any damage that “significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential” as defined in the Water Framework Directive of 2000.

Damage to land is defined as any land contamination that 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

Damage to land, thus, only is damage when it poses a significant risk to human health. This reduces the application of the Directive to the protection of human health²⁵⁷ whereas the other definitions of damages cover damage to the environmental element as such.

The term damage under the Liability Directive, thus, always comprises two steps. First, according to the general definition there has to be a measurable adverse change of the natural resource or such impairment to its service. Secondly, the additional criteria specifically for each resource have to be fulfilled in order for the adverse change or

²⁵⁴ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 259; E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, p. 5; J. Duikers: “EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung”, p. 627; see also description by G. Roller: “Liability”, p. 136; N. de Sadeleer: “The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat”, p. 69.

²⁵⁵ *Favourable conservation status* is defined in Article 2(4) of the Liability Directive.

²⁵⁶ Article 2(14) of the Liability Directive.

²⁵⁷ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260; express regret about this choice of the Directive G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 7; in particular on damage to land see A. Layard: “The Europeanisation of Contaminated Land”, in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. G. Betlem and E.H.P. Brans, London 2006, pp. 129-147.

impairment to constitute damage under the Directive. Thus, the threshold for an environmental damage under the Directive is high.²⁵⁸

Furthermore, this complex definition of damage includes many open terms which leave room for interpretation and therefore also for the implementation in the Member States.²⁵⁹ Such terms are for instance *measureable* adverse change or impairment, even though explained a more in Annex I²⁶⁰ *significant adverse effect* and *significant risk*.²⁶¹

Lastly, it has to be noted that the Directive will only cover damage that is caused by an occupational activity. Article 3 of the Liability Directive which will be discussed in more detail later, provides that the Directive only covers environmental damage caused by an occupational activity. This has two implications. First, the Liability Directive does not cover a damage which is caused by another than an occupational activity. At the same time it implies that the Directive does not cover so called *orphan damage*.²⁶² This is damage for which it cannot be determined who or what caused it. This in turn highlights that the Directive strictly adheres to the above described polluter pays principle. Without a polluter, there is no one who has to bear the costs of compensation or remediation.

In summary, the term environmental damage is limited to damage to the resources of certain species and habitats, to water and land and only if they are caused by an occupational activity. This gives the Liability Directive a very narrow scope, even though Member States may enlarge the scope of the Directive marginally by designating further protected areas under their national laws. The term damage is formulated in a very complex way, defining what impact on the natural resources only comes under its scope. Vague terminology is used which leaves room for interpretation through the Member States in their implementation. All in all, the Directive does not make it easy to assess if environmental damage has occurred.²⁶³

Exceptions to the material scope of the Directive

There are two types of exceptions to the material scope of application of the Liability Directive. One type is the exceptions provided for directly in connection with the definitions

²⁵⁸ J. Thornton and S. Beckwith: *Environmental Law*, p. 91.

²⁵⁹ B. Mullerat: "European Environmental Liability: One Step Forward", p. 263.

²⁶⁰ Pointing to the difficulty of applying the criteria in Annex I N. de Sadeleer: "The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat", pp. 72-73.

²⁶¹ On the fact that the term "significant" is not defined L. Krämer: "Directive 2004/35/EC on Environmental Liability", p. 39.

²⁶² C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 7; Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", p. 6.

²⁶³ J. Thornton and S. Beckwith: *Environmental Law*, p. 92.

set out in Article 2 of the Liability Directive. The other one is found in Article 4 of the Liability Directive.

Exceptions under Article 2(1) of the Liability Directive

According to Article 2(1)(a) of the Liability Directive damage to protected species and natural habitats is no environmental damage under the Directive if it results from an act authorised under the Wild Birds or the Habitats Directive.²⁶⁴ It is, however, not always easy to distinguish between authorised and illegal activities.²⁶⁵ Furthermore, according to Article 2(1)(b) with reference to the Water Framework Directive, damage to water is no damage within the scope of the Directive if the damage is the result of new modifications to the physical characteristics of the water or the result of new sustainable human development activities.²⁶⁶

Thus, two exceptions to the scope of application of the Liability Directive are inherent in the definitions of environmental damage under Article 2(1) of the Liability Directive.

Exceptions under Article 4 of the Liability Directive

There are further numerous exceptions listed under Article 4 of the Liability Directive. They are of different character.

Two exceptions take environmental damage out of the scope of the Directive if it is caused by a certain event. An environmental damage does not come under the scope of the Directive if it has been caused by an act of armed conflict, hostilities, civil war or insurrection.²⁶⁷ It may neither have been caused by a natural phenomenon of exceptional, inevitable and irresistible character.²⁶⁸ Another exception takes out a damage from the scope of the Liability Directive if it was caused for a certain reason. This is the case for damage caused by activities which serve the purpose of national defence or international security.²⁶⁹ These first three exceptions reflect the idea of a liability scheme as an environmental protection mechanism. The duty to restore and compensate is an incentive not to cause damage. In these cases though, this incentive mechanism is not influential and therefore the duty to restore or compensate is excluded.

²⁶⁴ Article 2(1)(a) of the Liability Directive.

²⁶⁵ N. de Sadeleer: "The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat", p. 74.

²⁶⁶ Compare Article 4(7) of the Water Framework Directive.

²⁶⁷ Article 4(1)(a) of the Liability Directive.

²⁶⁸ Article 4(1)(b) of the Liability Directive.

²⁶⁹ Article 4(6) of the Liability Directive.

Another exception renders the Directive inapplicable when it is not clear who exactly caused the damage to what extent.²⁷⁰ This is the case if the damage was caused by a diffused character and where it is not possible to establish a causal link between the activities of the operators and the damage. This underlines that the Directive requires a causal link between the damage and the activity of the operator.²⁷¹ Furthermore, this emphasises again that the Directive does not cover so called *orphaned damages*. It addresses only specific and identifiable incidents attributable to an operator and not damages which are caused by society in general.²⁷²

Lastly, one exception determines the relationship between the Liability Directive and international civil liability conventions. As suggested by the Proposal for the Directive in 2002, the Liability Convention does not apply in cases where the damage arises from activities covered by one of the listed civil liability conventions in Annex III and IV of the Directive.²⁷³ The conventions concern civil liability for oil pollution damage,²⁷⁴ damage in connection with carriage of hazardous substances or dangerous goods²⁷⁵ and nuclear energy.²⁷⁶ This illustrates the aim of the Directive to complement and not to replace existing regimes.²⁷⁷ However, the form of this exception may be criticised. The damages fall outside of the scope of the Liability Directive already in those instances where they are resulting from the activities covered by the listed conventions. They do not need to be actually compensated and restored under the liability regime of one of the Conventions. Thus, liability gaps are

²⁷⁰ Article 4(5) of the Liability Directive

²⁷¹ J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 342.

²⁷² *Environmental Liability Directive enters into force*, Editorial Comment, p. 4.

²⁷³ Article 4(2) of the Liability Directive requires that they are in force in the Member State while Article 4(4) of the Liability Directive does not require this for the conventions concerning nuclear risk, on this see L. Krämer: "Directive 2004/35/EC on Environmental Liability", p. 42.

²⁷⁴ International Convention on Civil Liability for Oil Pollution Damage of 27 November 1992, 973 UNTS, pp. 3 ff.; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 27 November 1992, 1110 UNTS, pp. 57 ff.; the International Convention on Civil Liability for Bunker Oil Pollution Damage of 23 March 2001, LEG/CONF 12/19 of 27 March 2001.

²⁷⁵ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 3 May 1996, 35 ILM 1996, pp. 1415 ff.; the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels 10 October 1989, UN Doc. ECE/TRANS/79.

²⁷⁶ Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, 956 UNTS, pp. 251 ff.; the Brussels Supplementary Convention of 31 January 1963, 2 ILM 1963, pp. 685 ff.; the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, 1063 UNTS, pp. 266 ff.; the Vienna Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, 36 ILM 1997, pp. 1473 ff.; the Joint Protocol of Relating to the Application of the Vienna Convention and the Paris Convention 21 September 1988, 1672 UNTS, pp. 293 ff.; the Brussels Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971, 974 UNTS, pp. 255 ff.

²⁷⁷ J. Thornton and S. Beckwith: *Environmental Law*, p. 90.

created by this undifferentiated precedence of the civil liability conventions.²⁷⁸ An environmental damage will escape the scope of application of the Liability Directive even if it does not have to be restored under one of the Conventions and will, thus, remain uncompensated and not restored. Moreover, none of the Conventions covers interim losses²⁷⁹ which, as will be seen, are covered by the Liability Directive. Therefore the restoration of an environmental damage will also not be as broad under the civil liability conventions as under the Liability Directive.²⁸⁰

Thus, the narrow definition of environmental damage is further narrowed by the exceptions listed in connection with the definitions of Article 2 and Article 4 of the Liability Directive. All in all, it is therefore justified to call the material scope of application of the Liability Directive a narrow one.

3.3.1.3 Temporal application – no retroactivity

The temporal application determines for which period in time the provisions of the Directive are applicable. Article 17 of the Liability Directive states that the Directive only applies prospectively and not retroactively. This means that the Directive only covers damage which occurred after the entry into force of the Directive on April 30, 2007.²⁸¹ However, Article 17 of the Directive provides for two exceptions according to which the Directive does not apply to damages that occurred after the entry into force. One exception is made if damage occurs after the date of entry into force of the Directive but is derived from a specific activity that took place entirely before this date. It was intentionally completely left to the Member States national laws to deal with this so-called *historic pollution*.²⁸² The other exception is made for a damage which is the result of an emission, event or incident which occurred more than 30 years ago.²⁸³ Moreover, there is no guidance for the Member States on how to determine the commencement of a continued damage. Therefore, there is also room for discretion in the timely application of the Liability Directive.²⁸⁴

²⁷⁸ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 258.

²⁷⁹ E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, p. 18.

²⁸⁰ Pointing out that the regimes of the civil liability conventions are *not as refined* as the regime set up by the Liability Directive G. Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 6.

²⁸¹ Compare Article 19(1) of the Liability Directive.

²⁸² B. Mullerat: “European Environmental Liability: One Step Forward”, p. 263.

²⁸³ Considers this exception to be unusual V. Fogleman: “Environmental Liability Directive”, p. 105.

²⁸⁴ B. Mullerat: “European Environmental Liability: One Step Forward”, p. 264.

Hence, the Liability Directive only applies to damage that occurred after the April 30, 2007, except where it is caused by an activity that took place entirely before that date or if 30 years passed between the cause of the damage and its occurrence.

3.3.2 Two liability schemes – conditions of liability

Also the two liability systems of the Directive give a picture of the Directive as a limited regime. The Liability Directive sets up a *twin-track*²⁸⁵ regime. It distinguishes between the standard of liability with regard to the type of the activity and the type of environmental damage.²⁸⁶ The first system is a strict liability system, the second system is fault based. The two systems are seen to be complementary.²⁸⁷

3.3.2.1 The strict liability scheme

The strict liability system under the Liability Directive is the general rule.²⁸⁸ It is set out by Article 3(1)(a) of the Liability Directive. Under this provision strict liability arises only for environmental damage caused or any imminent threat of the damage occurring by any of the occupational activities listed in Annex III of the Directive.

Annex III lists 12 activities which are covered by other Community directives. These activities comprise the operation of polluting operations,²⁸⁹ operations subject to permits for discharge of dangerous substances into water and groundwater,²⁹⁰ waste management operations,²⁹¹ manufacturing, storage or use of dangerous substances and preparations,²⁹²

²⁸⁵ B. Mullerat: “European Environmental Liability: One Step Forward”, p. 264.

²⁸⁶ See description of the regime of P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 258; E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, p. 2 ff.; M.R. Grossman: “Agriculture and the Polluter Pays Principle: An Introduction”, p. 23; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, pp. 342-343; C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 9; Roller: “Liability”, pp. 135 ff.

²⁸⁷ Questions and Answers Environmental Liability, Commission Memorandum MEMO/07/157 of 27 April 2007, p. 2.

²⁸⁸ L. Diederichsen and M. Jerksen: “Haftungsrisiken für Unternehmen durch verzögerte Umsetzung der Umwelthaftungsrichtlinie”, p. 17; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 205; G. Roller: “Liability”, p. 135.

²⁸⁹ Council Directive 96/61/EC of 24 September 1996 Concerning Integrated Pollution Prevention and Control, OJ 1996, L 257/26 ff.; Council Directive 84/360/EEC of 28 June 1984 on the Combating of Air Pollution from Industrial Plants, OJ 1984, L 188/20 ff.

²⁹⁰ Council Directive 76/464/EEC of 4 May 1976 on Pollution Caused by Certain Dangerous Substances, Discharged into the Aquatic Environment of the Community, OJ 1976, L 129/23 ff.; Council Directive 80/68/EEC of 17 December 1979 on the Protection of Groundwater Against Pollution Caused by Certain Dangerous Substances, OJ 1980, L 20/43 ff.; Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, OJ 2000, L 327/1 ff.

²⁹¹ Council Directive 75/442/EEC of 15 July 1975 on Waste, OJ 1975, L 194/39 ff.; Council Directive 91/689/EEC of 12 December 1991 on Hazardous Waste, OJ 1991, L 377/20 ff.; Council Regulation (EEC) No

plant protection products and biocidal products,²⁹³ transport of dangerous goods by road, rail and vessels²⁹⁴ and release of genetically modified organisms.²⁹⁵ The activities listed in the Annex are the ones that bear the danger to cause an environmental damage in them.²⁹⁶ As with regard to the definitions of environmental damage, the Liability Directive integrates with other environmental Community legislation in order to establish a complementary regime. Even though the strict liability regime under the Directive is limited to the occupational activities listed in its Annex III, Article 16(1) of the Liability Directive expressly points to the possibility of Member States to add more activities to that list.

The paragraph does not state expressly that the liability it establishes is strict and that it applies to all environmental damages that fall within the scope of the Directive. That derives as an *argumentum e contrario* from Article 3(1)(b) of the Liability Directive.²⁹⁷ The latter paragraph explicitly mentions damage to protected species and natural habitats and the requirement of fault or negligence as will be seen while the former paragraph does not do so.

259/93 of 1 February 1993 on the Supervision and Control of Shipments of Waste within, into and out of the European Community, OJ 1993, L 30/1 ff.; Council Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste, OJ 1999, L 182/1 ff.; Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the Incineration of Waste, OJ 2000, L 332/91 ff.; Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the Management of Waste From Extractive Industries and Amending Directive 2004/35/EC, OJ 2006, L 102/15 ff.

²⁹² Council Directive 67/548/EEC of 27 June 1967 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Classification, Packaging and Labelling of Dangerous Substances, OJ 1967, L 196/1 ff.; Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 Concerning the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Classification, Packaging and Labelling of Dangerous Preparations, OJ 1990, L 200/1 ff.; Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 On the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ 2009, L 140/114 ff.

²⁹³ Council Directive 91/414/EEC of 15 July 1991 Concerning the Placing of Plant Protection Products on the Market, OJ 1991, L 230/1 ff.; Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 Concerning the Placing of Biocidal Products on the Market, OJ 1998, L 123/1 ff.

²⁹⁴ Council Directive 94/55/EC of 21 November 1994 on the Approximation of the Laws of the Member States with Regard to the Transport of Dangerous Goods by Road, OJ 1994, L 319/7 ff.; Council Directive 96/49/EC of 23 July 1996 on the Approximation of the Laws of the Member States with Regard to the Transport of Dangerous Goods by Rail, OJ 1996, L 235/25 ff.; Council Directive 93/75/EEC of 13 September 1993 Concerning Minimum Requirements for Vessels Bound for or Leaving Community Ports and Carrying Dangerous or Polluting Goods, OJ 1993, L 247/19 ff.

²⁹⁵ Council Directive 90/219/EEC of 23 April 1990 on the Contained Use of Genetically Modified Micro-organisms, OJ 1990, L 117/1 ff.; Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, OJ 2001, L 106/1 ff.

²⁹⁶ *Risky activities* E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, p. 3; A. Epiney: *Umweltrecht in der Europäischen Union*, p. 251; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 342; “high-risk activities” B. Mullerat: “European Environmental Liability: One Step Forward”, p. 264; Roller: “Liability”, p. 135; *activities that are considered hazardous* P. Wennerås: “Permit Defences in Environmental Liability Regimes – Subsidizing Environmental Damage in the EC?”, pp. 169-170.

²⁹⁷ Coming to this conclusion by juxtaposing the two norms L. Krämer: “Directive 2004/35/EC on Environmental Liability”, p. 32.

Moreover, strict liability arises not only when the activity already has caused damage but also when it caused an imminent threat of such damage. The Liability Directive defines imminent threat of damage as a sufficient likelihood that environmental damage will occur in the near future in Article 2(9). The Directive does not provide for a definition of causation,²⁹⁸ thus, leaves this to the discretion of the Member States.²⁹⁹ It also makes no remarks on the burden of proof of causation. Therewith it stays behind of what has been suggested at earlier stages of the developmental process of the regime.³⁰⁰

Thus, the strict liability system of Article 3(1)(a) of the Liability Directive applies to all environmental damage as defined by the Directive, but limited to the ones caused by an occupational activity listed in Annex III of the Liability Directive.

3.3.2.2 The fault based liability scheme

The fault based liability regime is as just mentioned enshrined in Article 3(1)(b) of the Liability Directive. Under this norm liability can arise due to occupational activities other than those listed in Annex III of the Liability Directive. However, contrary to the strict liability under Article 3(1)(a) of the Liability Directive, this norm only covers damage or imminent threat of damage to protected species and natural habitats.³⁰¹ Thus, only the aspects of biodiversity protected under the Directive are covered. Moreover, this liability only arises when the operator was at fault or negligent. The Directive does not provide for a definition of fault and negligence. Hence, this is another issue where the Directive leaves room for the Members States' discretion. The reason why damage to protected species and natural habitats by occupational activities not listed in Annex III is covered by the Directive is that they are seen as particularly vulnerable. Therefore, it was regarded as necessary not to limit the scope of activities to the ones listed. However, it does not seem convincing why not all environmental damage is also covered by the fault based liability scheme. Damage to the environment is not less worthy to be restored when it was caused by an activity other than the ones listed in Annex III of the Liability Directive.³⁰²

²⁹⁸ B. Becker: "Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden", p. 373; Points to the vagueness of the Directive concerning causation K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 10.

²⁹⁹ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 261.

³⁰⁰ Commission White Paper COM(2000) 66 final, p. 17; points out the importance of an ease of the burden of proof for environmental damage P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 262.

³⁰¹ See also on this J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 342.

³⁰² E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 6; it is probably for the aim of a precise scope that these

Hence, the fault based liability scheme of Article 3(1)(b) of the Liability Directive only applies to damage or an imminent threat thereof to protected species and habitats, however, can also be caused by an occupational activity which is not listed in Annex III of the Liability Directive.

3.3.3 Competences of the competent authority

The competent authority plays a central role in the Liability Directive. According to Article 11 of the Liability Directive, Member States shall designate the competent authority which fulfils the duties under the Directive. The duties are, on the one hand, to determine whether the conditions for liability of an operator of an occupational activity are fulfilled.³⁰³ On the other hand, when the conditions for liability of the operator are fulfilled, the competent authority may require preventive or remedial actions from the operator.³⁰⁴ It may further take the necessary preventive or remedial actions itself³⁰⁵ and then recover the costs from the operator.³⁰⁶ However, if the competent authority has taken a measure, it is within the discretion of the competent authority whether to recover the full costs or not. According to Article 8(2) of the Liability Directive the authority may decide not to recover the full costs if the expenditure to do so would be greater than the recoverable sum or if the operator cannot be identified.

Two ambiguities exist concerning these competences of the competent authority. On the one hand, it is not clear if the competent authority is obliged to require from the operator the preventive or remedial action or if this is a discretionary decision of the authority.³⁰⁷ Article 5(3) and Article 6(2) of the Liability Directive state that the competent authority *may* make these requests for action. This suggests a discretionary power. Contrary to this, Article 5(4) and Article 6(3) of the Liability Directive oblige the competent authority to require from the operator the preventive or remedial action. This suggests an obligation of the authority. On the other hand, a similar problem exists concerning the right of the competent authority to take the preventive or remedial measure itself. It is not clear whether it is subsidiary to any

regimes are limited, compare statement made for damage to biodiversity Questions and Answers Environmental Liability, Commission Memorandum MEMO/07/157 of 27 April 2007, p. 5.

³⁰³ Article 11(2) of the Liability Directive; on the competent authority see also M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", pp. 16 ff.

³⁰⁴ Article 5(a)-(c) and Article 6(2) (a)-(d) of the Liability Directive.

³⁰⁵ Article 5(d) and Article 6(e) of the Liability Directive.

³⁰⁶ Article 8(2) of the Liability Directive; calls it the *indirect financial liability* of the operator C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 5.

³⁰⁷ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 260; J. Duikers: "EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung", p. 628.

action of the operator or can be undertaken alternatively by the competent authority. Article 5(3) and Article 6(2) of the Liability Directive state that the competent authority may *at any time* take the measures itself. Thus, this implies that the competent authority is free to act any time. Contrary to this, Article 5(4) and Article 6(3) of the Liability Directive allow the competent authority to take the measures itself “if the operator fails to comply with its obligations [...], cannot be identified or is not required to bear the costs”. Hence, this implies that action of the competent authority is subsidiary to any action by the operator. A solution to these contradictory provisions of the Directive is to read Article 5(4) and 6(3) to set out the conditions for the right of the authority to take the preventive or remediation measure itself.³⁰⁸ Hence, it is in general within the discretion of the competent authority to make requests for action to the operator. However, if the competent authority wants to take preventive or remedial measures itself it must first make a request for action to the operator and only if the operator fails to act, or another of the listed reasons applies, the competent authority may take the action. Thus, the competent authority is only obliged to require action from the operator if it wants to make use of its right to take action itself and this right is subsidiary to the action taken by the operator.³⁰⁹

Moreover, unlike earlier drafts of the Liability Directive,³¹⁰ the competent authority is not anymore under an obligation to act in the event that the operator fails to take action.³¹¹ Hence, the environment may remain unrestored in such a case. Furthermore, with these competences under the Directive, the competent authority is the only entity that can take direct action against the operator.³¹²

³⁰⁸ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260; J. Duikers: “EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung”, p. 628.

³⁰⁹ Like this P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260; E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, p. 8; V. Fogleman: “Environmental Liability Directive”, pp. 105-106; limited to Article 6(3) of the Liability Directive due to the wording *last resort* J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 343; A. Vakrou: “The Environmental Liability Directive (‘ELD’), Implementation Process in EU & Current State of Play”, European Commission, DG Environment, Conference on ELD, Culturgest, Lisbon, 04.April.2007, available at [http://www.evalue.pt/30/app_alexandra_vakrou_\(ce\).pdf](http://www.evalue.pt/30/app_alexandra_vakrou_(ce).pdf); disagreeing B. Mullerat: “European Environmental Liability: One Step Forward”, p. 265.

³¹⁰ Article 4(1) and Article 5(1) of the Commission Proposal for a Directive, COM(2002) 17 final, pp. 40-41.

³¹¹ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, pp. 260-261; E.H.P. Brans: “Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages”, p. 8; A. Epiney: *Umweltrecht in der Europäischen Union*, p. 251; V. Fogleman: “Environmental Liability Directive”, p. 106; blames this change on the strict application of the polluter pays principle L. Krämer: “Directive 2004/35/EC on Environmental Liability”, p. 37-38; B. Mullerat: “European Environmental Liability: One Step Forward”, p. 266.

³¹² B. Mullerat: “European Environmental Liability: One Step Forward”, p. 267.

Hence, the competent authority designated by the Member States is the central body regulating and enforcing the liability of operators.

3.3.4 Preventive action and remedial action – consequences of liability

The consequences of the liability under the Liability Directive are found in Articles 5 to 8 of the Liability Directive. They can be divided into the *primary* obligation to prevent or restore and the *secondary* obligation to bear the costs of these measures.³¹³ As already seen above, they in particular implement the preventive and the polluter pays principle in the Directive.

3.3.4.1 The *primary* obligations

The primary obligations of the operator are the obligation to prevent an environmental damage and to restore an environmental damage. Which of the obligations applies depends on the circumstances causing the liability of the operator.

If the operator has caused an imminent threat of environmental damage, he is to take the necessary preventive measures without delay under Article 5 of the Liability Directive. The Directive does not further define what the necessary preventive measures are. However, by determining the costs the polluter has to pay for the environmental damage through the costs of prevention and remediation the Directive sidesteps the problem of determining the value of an environmental damage.³¹⁴ This was already suggested by the Green Paper of 1993.³¹⁵ The obligation in Article 5 of the Liability Directive in particular reflects the preventive principle.³¹⁶

If the operator has already caused an environmental damage, he or she must undertake the remedial actions set out in Art 6 and of the Liability Directive. Under Article 6 of the Liability Directive the operator is under an obligation to inform the competent authority about the damage. Moreover, according to Article 6(1)(a) of the Liability Directive, and also in line with the preventive principles,³¹⁷ the operator must take all practicable steps to control, contain, remove or otherwise manage the damage in order to prevent further damage.

³¹³ Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 4; G. Betlem: “Transnational Operator Liability”, in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. G. Betlem and E.H.P. Brans, London 2006, pp. 149-188 at pp. 173 ff.

³¹⁴ Sees this very positive P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 265; C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 6.

³¹⁵ COM(1993) 47 final, p. 11.

³¹⁶ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260.

³¹⁷ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260.

Furthermore, under Article 6(1)(b) of the Liability Directive the operator must take the remedial measures in accordance with Article 7 of the Liability Directive. This norm obliges the operator to decide for the remedial measures in accordance with Annex II of the Liability Directive and submit them to the competent authority for approval. Annex II sets out the aims of the restoration measures and criteria for determining the appropriate remedial measure.³¹⁸ It differentiates for this between damage to water, protected species and natural habitats, and damage to land. For the first group of damages the Annex sets out a three types of restoration measures.³¹⁹ The *primary* restoration measure is a measure that restores the natural resource to the baseline condition. The *complementary* measure is a measure that compensates for interim losses due to the fact that the baseline condition will not be reached. The *compensatory* measures is a measure that compensates interim losses that occur in the period between the damage and the *primary* restoration. Criteria for the choice of one of the restoration measure are *inter alia* the effects on public health and safety, the costs of implementation and the likelihood of success. For land damage the Annex does not request *primary* restoration to the baseline condition.³²⁰ It requires the removal of the relevant contaminants from the land so that the damage no longer poses a risk to human health.

Thus, the *primary* obligations of the operator which caused an imminent threat of damage, is to take preventive action so that the damage does not occur. The operator that has already caused an environmental damage is under the obligation to prevent further damage and to restore the environment.

3.3.4.2 The *secondary* obligations

According to Article 8 of the Liability Directive, the operator has to bear the costs of both, preventive and restoration actions. What the costs are comprise derives from the definition of costs in Article 2(16) of the Liability Directive. The definition of costs is very wide. Costs are all costs which are required by the need to prevent and restore the environment. They include *inter alia* the costs assessing the environmental damage or the imminent threat thereof, administrative, legal and enforcement costs, the costs of data collection and monitoring and

³¹⁸ See also description by B. Becker: "Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden", pp. 374-375; P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 263-264; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", pp. 17 ff.; L. Krämer: "Directive 2004/35/EC on Environmental Liability", pp. 45-46; B. Mullerat: "European Environmental Liability: One Step Forward", pp. 265 ff.

³¹⁹ 1. of Annex II of the Liability Directive.

³²⁰ 2. of Annex II of the Liability Directive.

supervision costs. Thus, the operator must pay for all possible costs which arise from the environmental damage or the threat thereto.

This provision implements the polluter pays principle. However, it might be criticised for not doing so adequately. One can argue that the polluter pays principle is weakened by the fact that the public authority is, as seen above, not anymore under an obligation to take preventive or remedial measures itself in cases where the polluter is not able to restore the environment.³²¹ If the competent authority does not take any action then the operator as the polluter will never have to pay any costs.

Hence, the *secondary* obligation of the polluter is to bear the costs of preventive or restoring action. The operator can do this directly by undertaking the measures of prevention and restoring. The operator carries the costs indirectly if it is the competent authority that takes the measure and recovers the costs from the operator.³²² This obligation of the operator implements the polluter pays principle even if its effectiveness can be questioned.

3.3.5 Exemptions/defences from liability and limitation

The Directive provides for exemptions from liability that can be invoked by the operator as a defence under Article 8(3) and (4) of the Liability Directive which limit the regime established by the Directive. Under Article 4(3) of the Liability Directive, operators can limit their liability. Most of these possibilities of the operator to escape the obligations under the Directive are subject to the national laws of the Member States.³²³

3.3.5.1 Exemptions/defences under Article 8(3) and (4) of the Liability Directive

Before the two exemptions of Article 8(3) and (4) of the Liability Directive are set out, it shall be seen, first, from which obligation exactly the operator can be actually exempted.

According to the wording of Article 8(3) and (4) of the Liability Directive, exemption from liability means merely the exemption from paying the costs of prevention and remediation.³²⁴ This would mean that the operator is never exempted from taking the *primary*

³²¹ *Sad illustration* of the application of the polluter pays principle L. Krämer, *EC Environmental Law*, p. 28; *drawback* of the Liability Directive Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 7.

³²² The “indirect financial liability” of the operator C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 5.

³²³ For Article 8(4) of the Liability Directive B. Mullerat: “European Environmental Liability: One Step Forward”, p. 267; C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 12.

³²⁴ R. Slabbinck, H. Descamps and H. Bocken: “Implementation of the Environmental Damage Directive in Belgium (Flanders)”, p. 11.

obligations.³²⁵ However, when read in conjunction with Article 5(4) and 6(3) of the Liability Directive, the exemptions could also comprise the obligation to take the preventive or remedial measure.³²⁶ As just seen above, the competent authority is only allowed to act when no operator is taking action because he cannot be identified or is *not required to bear the costs* according to Article 8 of the Liability Directive. Thus, the action of the competent authority steps in at the place of the action of the operator. This subsidiary character of the right of action of the competent authority would be undermined if the authority was allowed to take action because the operator is exempted from bearing the costs but the operator remains under the obligation to take the preventive or remediation action as well. Hence, following a contextual interpretation taking into account Article 5(4) and 6(3) of the Liability Directive the exemptions also comprise the obligation to take the preventive or remedial measure.³²⁷ However, the wording of Article 8 of the Liability Directive is unambiguous in stating that the operator is only exempted from bearing the costs. Thus, this provision is a primary example for the uncertainties in the text of the Liability Directive. It is not clear if the exemption only applies to the secondary obligation of the operator to bear the cost, or if it also applies to the primary obligation to prevent and restore.

Nevertheless, the content of the exemptions shall still be described, and in line with the wording, refer only to the exemption from the obligation to pay the costs. According to Article 8(3) of the Liability Directive an operator is exempted from its obligations to bear the costs of preventive and remedial action in two cases. He is exempted from paying the costs when the damage or imminent threat thereof was caused by a third party despite all the appropriate safety measures were in place. Further, he does not have to bear the costs when the damage or imminent threat occurs due to the compliance with a compulsory order or instruction from a public authority.

Under Article 8(4) of the Liability Directive Member States can exempt an operator only from the obligation to bear the costs of remedial action under two conditions. First, the operator must neither have been at fault nor negligent. Secondly, the damage must have been caused either by an emission or an event expressly authorised by and enacted in compliance with the national laws implementing the instruments of Annex III of the Liability Directive, or the emission or activity was not considered likely to cause environmental damage

³²⁵ Winter, J.H. Jans, R. Macrory and L. Krämer: “Weighing up the Liability Directive”, p. 4

³²⁶ J. Duikers: “EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung”, p. 629.

³²⁷ For other reasons in this sense the opinion of the Study on the Impact on the Directive on Environmental Liability commissioned by the Flemish Ministry for the Environment described by R. Slabbinck, H. Descamps and H. Bocken: “Implementation of the Environmental Damage Directive in Belgium (Flanders)”, p. 8.

according to the scientific and technical knowledge at the time they took place. The former exception is known as the so-called *permit defence*.³²⁸ The latter is referred to as the *state of art defence*.³²⁹ Both possibilities are very much criticised for undermining the efficiency of the polluter pays principle³³⁰ and therewith the liability system under the Directive. The compromise solution of the Directive is to leave it up to the Member States to make use of these defences.³³¹ On the other hand, however, it is observed that the scope of these defences should not be overestimated.³³² For instance, according to the Directive, the burden of prove for these exceptions lies with the operator and it might not always be easy for him to proof that he was not negligent, not at fault and acting in accordance with a permit.³³³ However, these exceptions clearly narrow the liability of operators under the Directive decisively.

In conclusion, it is not clear if the Liability Directive exempts the operator under Article 8 of the Liability Directive only from its secondary obligation to bear the costs of preventive or remedial action or also from the primary obligation to take such action. However, under Article 8(3) of the Liability Directive it provides for an exemption from the obligation of the operator concerning preventive and remedial actions. Under Article 8(4) of the Liability Directive the operator can be exempted only from its obligations concerning remedial measures.

3.3.5.2 Limitation under Article 4(3) of the Liability Directive

³²⁸ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 262; K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 8; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 344; L. Krämer: "Directive 2004/35/EC on Environmental Liability", p. 33; P. Wennerås: "Permit Defences in Environmental Liability Regimes – Subsidizing Environmental Damage in the EC?", p. 170.

³²⁹ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 262; V. Fogleman: "Environmental Liability Directive", p. 110; K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 8; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 205; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 21; B. Mullerat: "European Environmental Liability: One Step Forward", p. 267.

³³⁰ B. Becker: "Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden", pp. 375-376; K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 8; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 208; calls it to be against the system P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 263.

³³¹ K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 9; L. Krämer: "Directive 2004/35/EC on Environmental Liability", pp. 33-34.

³³² Describes them as very narrow V. Fogleman: "Environmental Liability Directive", p. 111; Roller: "Liability", p. 139.

³³³ K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 9.

The Liability Directive does not provide for a certain ceiling of liability.³³⁴ However, Article 4(3) of the Liability Directive foresees the possibility for an operator to limit liability if he or she may do so according to national legislation implementing certain conventions.³³⁵ Even though the limitation is listed in Article 4 of the Liability Directive, it is not a limitation on the scope of application of the Convention but a limitation of the liability that arises under the Directive. However, this is the only possibility of limiting the liability arising under the Directive. Hence, In the absence of a general limitation of the liability under the Directive, Article 4(3) of the Liability Directive provides for a narrow possibility of limitation.

3.3.6 Access to justice

It was assumed that the Liability Directive would sidestep the difficult question of who possessed the right to bring a legal action.³³⁶ However, the Liability Directive answers this question. While the White Paper of 2000³³⁷ foresaw a possibility for public interest groups to bring a claim directly against the operator, this possibility does not exist anymore since the Commission proposal of 2002.³³⁸ However, there are two possibilities of natural or legal persons to take action concerning damage to the environment.

In its Article 12, the Liability Directive gives natural or legal persons the possibility to submit any observation concerning an instance of environmental damage to the competent authority and request the competent authority to take action concerning an environmental damage or an imminent threat thereof. This right of request for action is subject to the conditions that the person is affected or likely to be affected by the environmental damage or has either a sufficient interest in an environmental decision relating to that damage or, alternatively, alleges the impairment of a right if this is required by national law. According to the norm, it is expressly up to the Member States to determine what falls under *sufficient*

³³⁴ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 3; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 21; L. Krämer: "Directive 2004/35/EC on Environmental Liability", p. 33.

³³⁵ Convention on Limitation of Liability for Maritime Claims of 19 November 1976, 1456 UNTS, pp. 222 ff.; Strasbourg Convention on Limitation of Liability in Inland Navigation of 4 November 1988, reprinted in eds. H. Descamps, R. Slabbinck and H. Bocken: *International Documents on Environmental Liability*, Berlin 2008, pp. 241 ff..

³³⁶ I. Doolittle, "A Guide to EC Regulation: Environmental Liability", p. 4.

³³⁷ COM(2000) 66 final, p. 22; B. Mullerat: "European Environmental Liability: One Step Forward", p. 267.

³³⁸ Article 14 COM(2002) 17 final, p. 44; P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 265; E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 8; K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 12; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 208; Roller: "Liability", p. 138.

interest and impairment of a right. Thus, also the conditions for the right of persons to request for action are partly left up to the Member States' national laws.

Furthermore, in Article 13(1) of the Liability Directive natural and legal persons as *referred to in Article 12(1)* are entitled to initiate judicial or administrative review procedures concerning actions or omissions of the competent authority under the Directive. They are, thus, in a way controlling the competent authority.³³⁹ It is not so clear if any natural or legal person can bring an initiative under this norm. It could be concluded from the referral of the norm to Article 12(1) that only persons who made a request under Article 12 of the Liability Directive can initiate the procedures under this norm.³⁴⁰ Against this interpretation speaks that also the operator can make use of this norm for his appeal against decisions of the competent authority.³⁴¹ The Commission explicitly confirmed that the norm also comprises the right of appeal of the operator.³⁴² Hence, despite the referral to Article 12 of the Liability Directive, the right under Article 13 of the Liability Directive is not confined to natural or legal persons that made a request for action. In its second paragraph the norm reiterates that it is without prejudice to the national rules on access to justice, meaning the conditions for standing of persons before a court or administration and the potential exhaustion of administrative review possibilities before going to court.

Thus, individual and legal persons cannot bring an action against the operator directly but have the right to submit observations and request action from the competent authority and initiate administrative and judicial review procedures against actions or omissions of the authority.

3.3.7 Financial security

Contrary to the option pointed out in the Green Paper of 1993,³⁴³ but in line with the White Paper of 2000³⁴⁴ and the Directive Proposal of 2002,³⁴⁵ the Liability Directive in Article 14(1) merely obliges Member States to take measures to encourage the development of financial

³³⁹ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 265.

³⁴⁰ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 9.

³⁴¹ V. Fogleman: "Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions", *EL*, iss. 4, 2006, pp. 127-146 at p. 144.

³⁴² Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage of 19 September 2003, 2002/0021 (COD), p. 13.

³⁴³ COM(1993) 47 final, pp. 11 ff.

³⁴⁴ COM(2000) 66 final, p. 23.

³⁴⁵ Article 16 COM(2002) 17 final, p. 45.

security instruments. It does not establish the obligation of operators of certain activities to cover potential environmental damage by insurance.³⁴⁶ This rule reflects the compromise character of the Liability Directive.³⁴⁷ The difficult decision whether an obligation of financial insurance should be installed is left to the Member States. However, before April 30, 2010, the Commission must present a report on the effectiveness of the Liability Directive concerning the actual remediation of environmental damages.³⁴⁸

Also, this aspect of the Liability Directive is connected to the polluter pays principle which is again not implemented in the most desirable way. Only if the polluter is forced to pay for a financial insurance of an environmental damage or an imminent threat thereof, it will still be the polluter who bears the preventive or restoration costs even in the event of insolvency. In the absence of such a financial insurance the polluter will not pay in the case of insolvency, but society in general.³⁴⁹

Hence, the Liability Directive does not provide for an obligation of operators to cover potential environmental damage by insurance but merely obliges Member States to take measures to encourage the development of financial security instruments.

3.3.8 Conclusion

In conclusion, the Liability Directive has in itself firstly a narrow scope of application, secondly only sets up a minimum liability scheme with a great amount of discretion left to the Member States concerning crucial questions and it includes many open phrases and ambiguous wording. In particular, the personal and material scope of application of the Directive is narrow because it is limited to environmental damage caused by operators of occupational activities as well as only applies to damage to protected species under the Wild Birds Directive, to natural habitats protected under the Habitats Directive, to waters covered by the Water Framework Directive and land. Moreover, the Directive did not take advantage of the possibilities for its content that had been suggested during the drafting period. For instance, the suggestions to insert in the liability system an ease of burden of proof, the possibility of legal or natural persons to bring a claim directly against the operator or an obligatory insurance for environmental damage did not find their way into the Liability

³⁴⁶ V. Fogleman: "Environmental Liability Directive", p. 112; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 22; L. Krämer: "Directive 2004/35/EC on Environmental Liability", p. 33.

³⁴⁷ B. Mullerat: "European Environmental Liability: One Step Forward", p. 268.

³⁴⁸ Article 14(2) of the Liability Directive.

³⁴⁹ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 264.

Directive. Moreover, operators can escape liability under one of the exceptions or due to a lack of proof. In addition, the great amount of discretion is seen to undermine a uniform implementation of the Directive in the Member States. All of these aspects can be criticised to diminish the effectiveness of the Directive as a mechanism to protect the environment. Nevertheless, even if these aspects of the Directive can be criticised, it has to be kept in mind that it is a framework directive only aiming at a minimum harmonisation of the Member States' national laws. This has two implications. The Directive does not aim at harmonising fully national laws and therefore it should not be criticised for not doing so. Furthermore, Member States are free to enlarge the narrow scope of application in any way they want. They have, in particular, discretion to determine the liable operator to a certain extent, to bring more protected areas within the scope of the Directive, to determine part of the temporal scope of application, to define causation and fault and negligence, to decide on the disputed application of the *permit defence* and the *state of the art defence* and to introduce an obligation for operators to obtain a financial insurance for potential environmental damage. Lastly, the analysis of the main content of the Directive showed that *environment* is clearly, though only in a narrow form, a notion of the Directive. If the same holds true for the notion *liability* will be seen in the following.

3.4 Liability and the Directive

It remains to answer the question if the term *liability* is also an underlying notion of the Directive and whether it really constitutes a *liability* directive. While the previous section showed that the Liability Directive can be criticised in some respects, this section will emphasise its remarkable achievement concerning the type of liability it establishes. The following section shall first assess why the Directive sets up a liability regime at all and what type of liability is actually found in the Liability Directive. After this, it shall describe the complementary character of the Liability Directive in relation to existing civil liability schemes.

3.4.1 Liability in the Directive

As seen above, the term liability is very much used in the context of the Liability Directive. Yet its name is perceived to be *misleading*. The following shall explain why the title of the Directive is perceived to be *misleading* and establish that the Liability Directive, nevertheless, deserves to comprise the term *liability* in its title. For this, it will first be shown that the traditional type of civil liability in the form of tort law as defined in chapter 1 is not covered

by the Directive. Secondly, it will be suggested that the public law regime in the form of administrative mechanisms for the field of environmental damage of the Directive deserves to be treated as a liability system.

3.4.1.1 No civil liability

Usually, only the traditional system of civil liability is associated with the term *liability*. In the context of environmental damage this is mainly the liability under tort law as a form of civil liability. However, the Liability Directive does not contain a traditional tort liability system or any other civil liability system.³⁵⁰ In chapter 1, civil liability was defined as liability under civil law where one private party can bring a claim against another private party if the former's private interests have been infringed by the latter. Liability under tort law as a special form of civil liability arises outside of any contract for damage to property, person or economic loss.

The first criterion, namely that civil liability is liability under civil law, does not help to determine whether civil liability is found in the Directive or not. The Directive does not state expressly what type of liability it is setting up. Furthermore, also the second criterion of the definition, the liable person, does not help to exclude civil liability as a type of liability from the scope of the Directive. Under civil liability the liable person is a private person. This can also be the state if acting in its private capacity through its representatives. Under the Directive, it is the operator who is the liable person, which according to Article 2(6) of the Liability Directive, can be any natural or legal, private or public person. Thus, any person that is an operator can be held liable under the Directive. Of course this can be also the state if it is the owner of an occupational activity, acting through natural or legal persons. But then the state is not liable in its public capacity, but in its private capacity as the owner of an occupational activity. Thus, as in a civil liability system under the Liability Directive it is private persons who are held liable, and this can even be the state acting in its capacity as an owner of an occupational activity.

However, the interests protected by the Directive exclude the traditional subject of civil liability from the scope of the Directive. Civil liability and its liability under tort law protect traditional private interests only. The only protected interest of the Directive is the

³⁵⁰ For civil liability see L. Knopp and K. Kwasnicka: "Die Umsetzung der europäischen Haftungsrichtlinie in Deutschland und Polen", p. 353; H. Lopatta: "Perspectives from the European Commission – Overview and State of Play of the ELD", slide 2.

environment defined by Article 2(1) of the Liability Directive which is a public interest.³⁵¹ The Directive does not apply to damage to property, person or pure economic loss at all.³⁵² This is underlined by Article 16(2) of the Liability Directive which implies that such damage cannot be recovered under the Directive. Hence, the scope of the Liability Directive which only protects the environment as such excludes the traditional subject of civil liability.

Furthermore, also the provisions on who can bring an action against the operator exclude the traditional civil liability system. Under a civil liability system it is the private party which claims the breach of its private interests. According to Article 5 and 6 of the Liability Directive it is the competent authority only that can ask the operator to take action to prevent environmental damage or to restore it.³⁵³ The competent authority is set up by the state and is therefore a state authority. Moreover, it does not enforce the interests of the state as its own interests but the interests of the general public and, thus, operates on the latter's behalf.³⁵⁴ In particular, Article 3(3) of the Liability Directive underlines that other private persons may not bring a claim for compensation as a consequence of an environmental damage. Private persons may under Article 12³⁵⁵ and 13 of the Liability Directive only submit observations and request the competent authority to take action and initiate administrative or judicial proceedings against the competent authority if their interests are infringed.³⁵⁶ Thus, also the provisions concerning the right of action against the operator exclude traditional civil liability from the Directive's scope.

³⁵¹ E.g. the Commission in its White Paper COM(2000) 66 final, p. 21; for environmental quality M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", p. 377; see also formulation of the definition of *services* and *natural resource services* in Article 2(13) of the Environmental Liability Directive which are *inter alia* functions performed by a natural resource for the public.

³⁵² *Environmental Liability Directive enters into force*, Editorial Comment, p. 2; V. Fogleman: "Environmental Liability Directive", p. 114; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", pp. 13-14; M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", pp. 388-389; H. Lopatta: "Perspectives from the European Commission – Overview and State of Play of the ELD", slide 2; Roller: "Liability", p. 136.

³⁵³ Contrary to its wording, Preamble 10 of the Liability is understood to imply that the competent authority can also take civil actions by G. Betlem: "Trial Smelter II: Transnational Applications of CERCLA", *JEL*, vol. 19, 2007, pp. 389-397 at p. 394.

³⁵⁴ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 8; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 9.

³⁵⁵ In particular, Article 12(1)(c) of the Liability Directive reads for the conditions of natural or legal persons to submit an observation or a request for action to the competent authority "alleging the impairment of a right, where administrative procedural law of a Member State requires this".

³⁵⁶ Describes it as a *logical consequence* from the character of a public law regime that persons cannot bring actions directly against the operator B. Mullerat: "European Environmental Liability: One Step Forward", p. 267; in this sense also F. Coroner: "Environmental Liability Directive: how well are Member States handling transposition?", p. 227.

Hence, the Liability Directive does not comprise a traditional civil liability system. However, the term *liability* is associated with civil liability. This is the reason why the title of the Liability Directive is perceived to be *misleading*.

3.4.1.2 Administrative mechanisms which establish a liability system

Having said that the system of the Liability Directive does not comprise traditional forms of civil liability, it shall be explained why the title of the Directive still deserves to comprise the term *liability*. For this it will be shown that the Liability Directive establishes a system that qualifies as an environmental liability system. Then it will set out the general features of this liability system and its benefits for environmental protection.

Liability under administrative procedures

The system set up by the Liability Directive is a liability system which establishes the liability of the operator of an occupational activity under administrative law. In line with the Proposal for the Directive of 2002, the Directive sets up a public law system in the form of administrative mechanisms. As pointed out above, it describes the competences of a public authority, the competent authority, to request the operator that has caused an environmental damage or an imminent threat thereof to take the necessary preventive or restoration measures. In fact, the Directive's system fulfils all the general features of a liability system. In chapter 1, civil liability was defined as an obligation of a person to pay compensation or to restore a damage caused by an action or omission by that person. Depending on the standard of liability, fault might be a further requirement. Under the Liability Directive the operator of an occupational activity is obliged to take preventive and remediation action and bear the costs thereof if he or she has caused an environmental damage. Thus, the system set up by the Liability Directive comprises in fact these general features of liability.

However, as previously pointed out, the liability system that the Directive provides for does not fall under the traditional definition of civil liability. Due to the fact that it obviously establishes the liability of the operator of an occupational activity it is a logical consequence that it then sets up a liability system of a different type.³⁵⁷ Since it does not fit in the traditional category of civil liability it could be seen to establish a liability system *sui generis*³⁵⁸ or since it operates through administrative mechanisms an *administrative liability*

³⁵⁷ M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", p. 390.

³⁵⁸ C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 2; refers to it as a new form of environmental liability, G. Betlem: "Transnational Operator Liability", p. 187.

system.³⁵⁹ Others again refer to it as a *public liability* scheme.³⁶⁰ Objections exist against all these terms. The description as a public liability system might be misleading. On the European level public liability rather describes the liability of a public authority.³⁶¹ The Liability Directive, however, establishes the liability of a private party, a private or a public entity acting as the operator of an occupational activity. The name administrative liability might imply the liability of an administration and therewith the liability of a public authority as well. Moreover, the term administrative liability is not widely used and therefore can also cause confusion as to the type of liability established by the Liability Directive. Lastly, the suggestion to call it a system *sui generis* does not seem entirely correct either. The administrative mechanisms set up by the Liability Directive are not new but applied in the Member States of the Community.³⁶² What is, however, new about the Directive is that it sets up these administrative mechanisms under the title *liability*, or more precisely under the title *environmental liability*. As stated in chapter 1, the term environmental liability describes a liability for environmental damage without taking a stand on the type of liability. In order to avoid confusion of uncertain terminology it seems reasonable not to describe the liability system of the Directive with a particular term. It seems best to describe it by naming its concrete features: an *environmental liability system* which holds operators of occupational activities liable using administrative mechanisms.

The character of the Liability Directive as a *liability* directive is further underlined by the features reflecting the core of the polluter pays principle. As stated in the beginning of this

³⁵⁹ E.K. Czech: "Liability for Environmental Damage according to Directive 2004/35/EC, p. 322; H. Lopatta: "Perspectives from the European Commission – Overview and State of Play of the ELD", slide 2; R. Slabbinck, H. Descamps and H. Bocken: "Implementation of the Environmental Damage Directive in Belgium (Flanders)", pp. 3, 8.

³⁶⁰ Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", p. 3.

³⁶¹ See definition of public liability of Recommendation No. R (84) 15 of the Committee of Ministers to Member States of 18 September 1984 Relating to Public Liability, Council of Europe, p. 2.

³⁶² For Portugal see A. Aragao: "Environmental Liability Directive in Portugal", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, pp. 8-9; for Hungary see G. Bándi: "Environmental Liability Directive – Hungary", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, p. 1; for Germany see B. Becker: "Das neue Umweltschadensgesetz und das Artikelgesetz zur Umsetzung der Richtlinie über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden", NVwZ, iss. 10, 2007, pp. 1105-1113 at p. 1106; for Finland see A. Ekroos: "Environmental Liability Directive – Finland", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, p. 1; for United Kingdom see M. Lee and R. Macrory: "Environmental Liability Directive – UK (England and Wales)", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>; for Italy see M. Montini: "Environmental Liability Directive – Report for Italy", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, p. 1; for Spain see A.-M. Moreno / A. García Ureta: "Implementation of the Environmental Liability Directive in Spain", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, pp. 1 ff.; for Denmark see P. Pagh: "Environmental Liability Directive – Danish Report", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, p. 1; for Estonia see H. Veinla: "Implementation of Environmental Liability Directive in Estonia", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, p. 2.

chapter, the polluter pays principles can be classified as a liability principle as it concerns the allocation of costs of an environmental damage. In line with the principle, the environment is not protected as such under the Directive but only in so far as the damage has been caused by an identifiable polluter. If the polluter is not identified and the damage is a so called *orphan damage* the environment remains without restoration. Further in line with the principle, the obligation of the competent authority to prevent or to restore environment damage was not inserted in the final text of the Liability Directive.³⁶³ Therefore it is seen not to establish any other regime than a liability regime.³⁶⁴

Thus, the Liability Directive sets up a liability system. It establishes the liability of operators of occupational activities using traditional administrative mechanisms. The innovation the Directive brings about, however, is that it sets them up under the heading of *liability*.

The features and environmental benefits of the liability system

From the system established by the Liability Directive, general features of such a liability system can be concluded and its theoretical benefits as a mechanism to protect the environment can be assessed.

The features

As for the traditional system of civil liability the features can be described in respect of the parties involved, their relationship, the legal interests involved, the conditions for compensation or remediation and the type of law of the system. The parties involved are a public authority and a private party, the operator of an occupational activity. It is the private polluter, the operator, which is held liable according to administrative mechanisms applied by the public authority. In this respect it differs from civil liability under which it is another private party holding the polluter liable. The public authority enforces a legal interest which does not belong to itself but to the general public.³⁶⁵ The liability under administrative mechanisms has therefore the character of a *trusteeship system*.³⁶⁶ It does not compensate the

³⁶³ L. Krämer: "Directive 2004/35/EC on Environmental Liability", pp. 37-38.

³⁶⁴ V. Fogleman: "Environmental Liability Directive", p. 101.

³⁶⁵ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 7; on the fact that environmental elements are often not owned P. Wetterstein: "A Proprietary or Possessory Interest: A Condition Sine Qua Non for Claiming Damages for Environmental Impairment", pp. 46 ff.

³⁶⁶ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 7; P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 261.

state as the owner of the environment but the state enforces the interests of the environment as such as an interest of the general public.³⁶⁷ Moreover, the relationship of the persons involved under a civil liability is one of equals whereas under environmental liability it is a hierarchical one. This liability system uses the traditional administrative mechanisms of an authority against the operator as a private party. These mechanisms are injunctions, fines, suspensions and other such mechanisms.³⁶⁸ It is, thus, a regulatory command and control system.³⁶⁹ In the environmental context this means that a state authority requires the prevention and/or remedying of environmental damage from a private person. The private party is held liable only by a public authority and not by other private parties. Other private persons can merely initiate actions by making requests to the public authorities.³⁷⁰ They can, however, never file a claim directly against the operator of an occupational activity under this scheme.³⁷¹ Thus, the system has a bilateral relationship between the parties involved: public authority – operator.³⁷² Moreover, the legal interests involved are public interests.³⁷³ The requirement of a financial loss as a condition to pay compensation or to restore is not necessary because the environment is not necessarily of economic value. Hence, as stated several times above, the liability established by the Liability Directive is a public law system in the form of administrative mechanisms. Nevertheless, and taking into account the obligations imposed on the operator by the Liability Directive, aspects of traditional tort and therefore civil law are all the same present. While the duty of the operator to prevent environmental damage is a public law obligation,³⁷⁴ the obligations to restore and carry the costs of the restoration resembles traditional tort law and are therefore of a civil liability character.³⁷⁵ Moreover, the aspects of

³⁶⁷ P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 261.

³⁶⁸ A. Kiss and D. Shelton: *Manual of European Environmental Law*, Cambridge 1993, p. 65.

³⁶⁹ G. Betlem: “Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws”, p. 121; M. Lee: *EU Environmental Law: Challenges, Change and Decision-Making*, p. 204; see further description by C’M’S’ Cameron McKenna: *Study of Civil Liability Systems for Remedying Environmental Damage*, Final Report EU White Paper on Environmental Liability of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf, pp. 11-12.

³⁷⁰ A. Kiss and D. Shelton: *Manual of European Environmental Law*, p. 65.

³⁷¹ V. Fogleman: “Environmental Liability Directive”, p. 102; B. Mullerat: “European Environmental Liability: One Step Forward”, p. 264.

³⁷² C. Pirotte: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, p. 4.

³⁷³ Compare M.-L. Larsson: *The Law of Environmental Damage – Liability and Reparation*, p. 403; M. Lee: “From Private to Public Law: The Multiple Faces of Environmental Liability”, p. 390.

³⁷⁴ Derived from the type of obligations in German law P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260; J. Duikers: “EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung”, p. 627.

³⁷⁵ Also derived from the type of obligations in German law P. Beyer: “Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung”, p. 260.

fault liability and classical available defences of the operator are seen to be *traces of civil liability*.³⁷⁶ The same holds true for the classical defences if the damage has been caused by an act of war, a natural phenomenon and a third party.³⁷⁷ Therefore the liability system of the Directive could also be seen to be of a mixed public and private law character.³⁷⁸ However, the Directive operates merely through administrative mechanisms and therefore classifies as a public law system in the form of administrative mechanisms. Thus, it is more appropriate to call it a public law system³⁷⁹ with aspects of civil law.

Hence, the features of the liability system established by the Directive are that it describes the liability of the operator of an occupational activity for environmental damage, which is held liable by a public authority in the role of a *trustee* for the environment, as an interest of the general public. It is a public law system using administrative mechanisms.

The environmental benefits

The environmental benefits of the Liability Directive's system are in fact what makes the Directive so remarkable. In particular, compared to the traditional civil liability systems the Directive's liability system has many environmental benefits. For instance, as has been described in chapter 1, the environmental benefits under the traditional civil liability system are merely incidental. Civil liability for environmental damage will only arise if a private interest is damaged at the same time. According to the liability established by the Liability Directive an environmental damage will give rise to liability without the infringement of a

³⁷⁶ G. Betlem and E.H.P. Brans: "Environmental Liability in the EU: An Introduction", p. 18; describing the opinion of the Study on the Impact on the Directive on Environmental Liability commissioned by the Flemish Ministry for the Environment R. Slabbinck, H. Descamps and H. Bocken: "Implementation of the Environmental Damage Directive in Belgium (Flanders)", p. 8.

³⁷⁷ Compare for example the civil liability Regulation Article 3(1)(a) and (b) of Annex I to Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents, OJ 2009, L 131/24 ff.

³⁷⁸ G. Betlem and E.H.P. Brans: "Environmental Liability in the EU: An Introduction", p. 17; P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 260; speaks of an overlap with civil liability F. Coroner: "Environmental Liability Directive: how well are Member States handling transposition?", p. 226.

³⁷⁹ F. Coroner: "Environmental Liability Directive: how well are Member States handling transposition?", p. 226; J.H. Jans and H.H.B. Vedder: *European Environmental Law*, p. 343; L. Knopp and K. Kwasnicka: "Die Umsetzung der europäischen Haftungsrichtlinie in Deutschland und Polen", p. 354; reason why approach of the Directive is called a *relatively drastic departure from the classical concept of environmental liability* L. Krämer, *EC Environmental Law*, p. 188; R. Ludwig and M. Petersen: "Aktuelle Fragen und Entwicklungen des europäischen Bodenschutzrechts", p. 447; B. Mullerat: "European Environmental Liability: One Step Forward", p. 264; E. Rehinder: "Implementation of the Environmental Liability Directive in Germany", p. 203; *essentially a public law regime* J. Thornton and S. Beckwith: *Environmental Law*, p. 90.

private interest.³⁸⁰ Thus, the liability system established by the Directive has the great environmental benefit that it establishes liability for pure environmental damage.

The features of focusing on the environment as an interest that needs to be protected regardless of any private interests,³⁸¹ and the role of the state authority as a *trustee* for protecting the environment as such, might give more environmental implications to the Liability Directive. Due to these features the Liability Directive can be seen as a tool contributing to the principle of intergenerational equity. This principle is part of the concept of international environmental law as an element of sustainable development.³⁸² Intergenerational equity comprises the need to preserve natural resources for the benefit of future generations.³⁸³ The Directive can be seen to do exactly so by providing for a mechanism to protect mainly the environment as such. Thus, the Directive's liability system and its environmental benefits serve the principle of intergenerational equity.

Hence, the environmental benefits are that under this liability system liability arises for pure environmental damage and that it is further a tool contributing to the principle of intergenerational equity. Thus, in theory, a system established by the Directive should be a better *protector* of the environment than a traditional liability system.³⁸⁴

3.4.2 The complementary character of the Liability Directive

Since the Liability Directive does not comprise traditional civil liability it leaves room for those types of liability under the Member States' national laws. The situation in which civil liability will come into play is when an environmental damage occurred to a natural resource

³⁸⁰ P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 257; E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 8; Roller: "Liability", p. 136; P. Wetterstein: "Introduction", p. 1.

³⁸¹ Except for damage to land, see above description of the material scope of the Directive concerning Article 2(1)(c) of the Liability Directive.

³⁸² P. Sands: *Principles of International Environmental Law*, 2nd edition, Cambridge 2003, p. 253.

³⁸³ Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) of 1987, UN Doc. A/42/427, p. 40; Principle 2 of the New Delhi Declaration of Principle of International Law Relating to Sustainable Development of 2002 by the International Law Association, available at www.cisd.org/pdf/new_delhi_declaration.pdf; G. Loibl: "The Evolving Regime on Climate Change and Sustainable Development", in: *International Law and Sustainable Development, Principles and Practice*, eds. N. Schrijver and F. Weiss, Leiden 2004, pp. 97-118 at p. 109; M.-C. Cordonier Segger: "Significant Developments in Sustainable Developments Law and Governance: A Proposal", *NRF*, vol. 28, 2004, pp. 61-74 at p. 63; A. Jóhannsdóttir: "Considerations on the Development of Environmental Law in the Light of the Concept of Sustainable Development", *YM*, iss. 2, 2005, pp. 27-48 at p. 34; P. Sands: *Principles of International Environmental Law*, p. 253; T. Wälde: "Natural Resources and Sustainable Development: From 'Good Intentions' of 'Good Consequences'", in: *International Law and Sustainable Development, Principles and Practice*, eds. N. Schrijver and F. Weiss, Leiden 2004, pp. 119-150 at pp. 123-124.

³⁸⁴ J. Thornton and S. Beckwith: *Environmental Law*, p. 90.

which is owned by someone and is subject to private property rights³⁸⁵ or where the damages causes also damage to a person or economic loss. If environmental damage also causes damage to person or property or economic loss it is for the Member States' civil liability systems to deal with this damage.³⁸⁶ This is in particular revealed in Article 16(2) of the Liability Directive. The Article addresses the possibility of Member States to prohibit double recovery of costs that might occur from an action taken by the competent authority and for example of the owner of the damaged natural resource. Moreover, directives only harmonise Member States' laws to a certain extent.³⁸⁷ As just seen above, the content of the Liability Directive does not comprise traditional civil liability. Therefore, Member States remain free to apply their traditional liability systems to traditional damages in connection with an environmental damage.

Thus, the environmental liability system set up by the Liability Directive and the traditional civil liability systems under the Member States' national laws coexist. Their relationship is a complementary one. Mere environmental damage which usually escapes the civil liability system is covered by the environmental liability system established by the Liability Directive. The traditional damage of damage to property or person and economic loss which escapes the environmental liability system of the Liability Directive will be covered by Member States' traditional liability systems.

Hence, the Liability Directive leaves room for traditional civil liability under the Member States' national laws for damage to property and person and economic loss. It functions as a complementary system that benefits the environment as a public interest.

3.4.3 Conclusion

In conclusion, since the system established by the Liability Directive does not fit under the heading of traditional civil liability, its title is often perceived to be *misleading*. However, it represents a *liability* directive as it provides the liability of operators of occupational activities

³⁸⁵ E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 7.

³⁸⁶ *Environmental Liability Directive enters into force*, Editorial Comment, p. 2; E.H.P. Brans: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", p. 10; V. Fogleman: "Environmental Liability Directive", p. 114; M. Hinteregger: "International and Supranational Systems of Environmental Liability in Europe", p. 14; M. Lee: "From Private to Public: The Multiple Faces of Environmental Liability", pp. 388-389; C. Pirotte: "A Brief Overview of Directive 2004/35/EC on Environmental Liability", p. 12; Roller: "Liability", p. 136; Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", p. 4.

³⁸⁷ See e.g. D. Chalmers and A. Tomkins: *European Union Law – Texts and Materials*, New York 2007, p. 133; P. Craig and G. De Búrca: *EU Law – Texts, Cases, And Materials*, 4th edition, New York 2008, p. 85; T.C. Hartley: *The Foundations of European Community Law*, pp. 103 ff.

under public law in form of administrative mechanisms. These traditional administrative mechanisms are for the first time referred to as a *liability* system which is the source of terminological confusion surrounding the Liability Directive. That is why it seems better not to try to give the environmental liability established by the Liability Directive a name but to describe it, as done previously, as the liability of operators of an occupational activity under administrative mechanisms. The traditional system of civil liability which is not found in the Liability Directive remains with the Member States' national laws for traditional damage connected to an environmental damage. Due to the different interests protected under the Directive and under national law the two systems can be seen to be complementary.

3.5 Final conclusion

In conclusion, the underlying principles of the Liability Directive are basically the polluter pays principle and the preventive principle. They are both reflected in the obligations of the Liability Directive as well as being its objectives and underlying basis. Many aspects within the Directive can be criticised as to undermine its effectiveness of a mechanism to protect the environment. The criticism concerning the difficult and sometimes complex wording is justified. However, other points of criticism can be rebutted by take into consideration the character of the Directive as a framework directive which only has the aim of minimum harmonisation of the Member States' national laws. Even though its title is perceived to be *misleading*, the Directive deserves to contain both terms *environment* and *liability*. It establishes a liability system for pure environmental damage which has remarkable environmental benefits compared to the traditional civil liability system. It is a system based on classical administrative mechanisms and therefore comes under the heading of public law. Even though the administrative mechanisms are not new their usage under the heading *liability* is. All in all, despite all its weaknesses it, nevertheless, brought into focus traditional administrative mechanisms as a form of liability for pure environmental damage. This liability addresses liability for environmental damage better than any of the traditional civil liability systems. The Liability Directive is therefore really a *liability* directive.

Chapter 4: The implementation process – problems and improvement of national environmental liability systems?

4.1 Introduction

The deadline for the implementation of the Liability Directive by the Member States was April 30, 2007.³⁸⁸ The process of implementation has been cumbersome.³⁸⁹ By April 30, 2007 only three Member States, Italy, Lithuania and Latvia had notified transposition of the Directive into their national law.³⁹⁰ The Commission filed several applications with the European Court of Justice in 2008 to judge upon the Member States failure to implement the Liability Directive.³⁹¹ Against some of them the European Court of Justice delivered a judgement for failure to comply with the obligation of implementation.³⁹² Some were removed from the list of the Court's register before a judgement was delivered.³⁹³ Finally, in

³⁸⁸ Compare Article 19 of the Liability Directive.

³⁸⁹ See article of K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", pp. 2 ff.

³⁹⁰ Press Release Environment: Liability Directive ensures polluters pay, IP/07/581 of 27 April 2007; by February 2009 it had only been 18 states, in addition that were Hungary, Germany, Romania, Slovakia, Sweden, Spain, Estonia, Cyprus, Malta, Bulgaria, the Netherlands, Czech Republic, Poland, Portugal, Denmark, see for this figure K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 2; by April 2009 it had only been 20, in addition that were Ireland and the United Kingdom, for this figure see e-mail from H. Lopatta, legal and policy officer of the European Commission, Directorate General for Environment, Infringements Unit A.2, of 16 July 2009.

³⁹¹ Case C-328/08 *Commission of the European Communities v. Republic of Finland*, Action brought on 17 July 2008, OJ 2008, C 236/12; case C-368/08, *Commission of the European Communities v. Greece*, Action brought on 8 August 2008, OJ 2008, C 247/11; case C-329/08, *Commission of the European Communities v. Kingdom of Belgium*, Action brought on 18 July 2008, OJ 2008, C 272/8; case C-330/08, *Commission of the European Communities v. French Republic*, Action brought on 18 July 2008, OJ 2008, C 272/9; case C-331/08, *Commission of the European Communities v. Luxemburg*, Action brought on 18 July 2008, OJ 2008, C 272/9; case C-402/08, *Commission of the European Communities v. Republic of Slovenia*, Action brought on 18 September 2008, OJ 2008, C 285/30; case C-417/08, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Action brought on 22 September 2008, OJ 2008, C 301/25 f.; case C-418/08, *Commission of the European Communities v. Ireland*, Action brought on 22 September 2008, OJ 2008, C 301/26; case C-422/08, *Commission of the European Communities v. Republic of Austria*, Action brought on 24 September 2008, OJ 2008, C 301/26.

³⁹² Case C-328/08, *Commission of the European Communities v. Republic of Finland*, Judgement of 22 December 2008, OJ 2009, C 44/22; case C-368/08, *Commission of the European Communities v. Greece*, Judgement of 19 Mai 2009, OJ 2009, C 153/16; case C-330/08, *Commission of the European Communities v. French Republic*, Judgement of 11 December 2008, OJ 2009, C 32/11; case C-331/08, *Commission of the European Communities v. Luxemburg*, Judgement of 24 March 2008, OJ 2009, C 113/13; case C-402/08, *Commission of the European Communities v. Republic of Slovenia*, Judgement of 12 March 2009, OJ 2009, C 113/13 f.; case C-417/08, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Judgement of 18 June 2009, available at http://curia.europa.eu/jcms/jcms/j_6/; case C-422/08, *Commission of the European Communities v. Republic of Austria*, Judgement of 18 June 2009, available at http://curia.europa.eu/jcms/jcms/j_6/.

³⁹³ Case C-329/08, *Commission of the European Communities v. Kingdom of Belgium*, Order of the President of the Court of 6 March 2009, OJ 2009, C 113/29; case C-418/08, *Commission of the European Communities v. Ireland*, Order of the President of the Court of 27 March 2009, available at http://curia.europa.eu/jcms/jcms/j_6/.

July 2009, 23 Member States have notified full implementation of the Directive³⁹⁴ and, thus, only 4 Member States are missing.³⁹⁵ The following shall address the problems of implementation in the Member States in general. It shall then analyse in how far the implementation of the Liability Directive improves the national liability regimes concerning environmental damage by analysing Germany as an example. As will be seen, the implementation in Germany illustrates the achievements of the Liability Directive. Attention shall especially be paid to the role of the liability regime established by the Liability Directive.

4.2 General problems of implementation

The problems concerning the implementation of the Liability Directive are diverse. On the one hand, there are the problems that probably led to the implementation process being so cumbersome. On the other hand, the implementation in the Member States is problematic with regard to the effectiveness of the liability regime established by the Directive.

4.2.1 Reasons for implementation difficulties

The reasons for the implementation difficulties of the Liability Directive can be assumed to be the discretion left to the Member States, vague and unclear formulations in the Directive, the general problems related to the diverse languages in such an implementation process and the need to implement into existing law. The type of environmental liability established by the Directive might also have posed problems to the implementation process.

One of the difficulties is probably the wide discretion that has been left to the Member States. As observed in chapter 3, the discretion covers crucial points of the Directive. This includes the scope of the liability regime, the permit and state of the art defence and the compulsory financial security.³⁹⁶ They are crucial because they are seen to have decisive influence on the effectiveness of the liability regime regarding its aims: to prevent and restore environmental damage. Moreover, in particular the two defences were very much disputed for the over ten years lasting developmental process of the Directive³⁹⁷ and this controversy was

³⁹⁴ Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, and United Kingdom, e-mail from H. Lopatta of 16 July 2009.

³⁹⁵ Austria, Finland, Greece and Slovenia, e-mail from H. Lopatta of 16 July 2009.

³⁹⁶ K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", pp. 2 ff.

³⁹⁷ K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 8; V. Fogleman: "Environmental Liability Directive", p. 110; at least the permit defence, E. Reh binder: "Implementation of the Environmental Liability Directive in Germany", p. 201.

passed on to the Member States by leaving implementation up to their discretion. Thus, the Member States are expected to make a decision in three years on an issue that could not be decided on at the European level for a decade. In addition, the decision on the defences by the Member States was confronted with the different traditions in the Member States. In some Member States the defences are common³⁹⁸ and used, in others they are not.³⁹⁹ Hence, the discretion left to the Member States concerning crucial and controversial points of the Liability Directive certainly prolonged the implementation process.

The uncertainties in the text of the Liability Directive have probably contributed to implementation problems as well. As stated in chapter 3, the Directive is very complex and unclear concerning some of the aspects of the liability regime it establishes. The definition of an environmental damage has been identified to be a very complex one. Uncertainty exists in particular concerning the relationship of action by the competent authority and the operator and if the exemptions under Article 8 of the Liability Directive only apply to the costs or also to the primary obligation to prevent and restore.

Moreover, the implementation process of the Liability Directive reflects general implementation problems of directives into the Member States' national laws. The problems that go generally together with the implementation of a directive are the problem of translating directives into the diverse languages of the Member States and also that directives usually have to be integrated into a system of already existing national legislation. An example for the problems caused by the translation into the different languages is the implementation in Italy and Poland. Italy has implemented the Liability Directive with Decree of April 3, 2006.⁴⁰⁰ Apparently it is not clear by the wording of the Italian Decree if it establishes strict liability at all and if only the operator or also other persons can be held liable.⁴⁰¹ In the case of Poland, the official translation of the Directive into Polish seems to hold translation disparities.⁴⁰² This made the implementation in Poland a difficult one from

³⁹⁸ E.g. in German law and in Polish law, G. Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", pp. 9-10.

³⁹⁹ E.g. in English law, V. Fogleman: "The Environmental Liability Directive and its Impacts on English Environmental Law", *JPL*, 2006, pp. 1443-1456 at p. 1454; in Belgium law concerning the permit defence, R. Slabbinck, H. Descamps and H. Bocken: "Implementation of the Environmental Damage Directive in Belgium (Flanders)", p. 9.

⁴⁰⁰ Decree 152/2006 of the President of the Republic of 3 April 2006, Suppl. OJ of the Italian Republic, 14 April 2006, no. 88.

⁴⁰¹ M. Alberton: "Saint George and the dragon: transposing the Environmental Liability Directive in Italy", *EL*, iss. 6, 2007, pp. 235-241 at pp. 237 ff.

⁴⁰² L. Knopp and K. Kwasnicka: "Die Umsetzung der europäischen Haftungsrichtlinie in Deutschland und Polen", pp. 356-357.

the beginning and eventually led to linguistic incorrectness of the implementation act.⁴⁰³ For instance, Article 4(2)(c) of the Polish implementation act states that it does not apply to activities of which it is the purpose to protect from natural disaster. Article 4(6) of the Liability Directive, however, states that such action is only excluded from the scope of the Directive if the protection from natural disaster is its *sole purpose*. The Polish implementation therefore changes the meaning of the Directive significantly.⁴⁰⁴ Furthermore, in almost all of the Member States the Liability Directive had to be implemented into already existing law⁴⁰⁵ which is not always an easy task.

Lastly, the administrative liability system envisaged by the Liability Directive might have caused some problems in the implementation process into the Member States national law. For instance, Polish scholars have pointed out that the Liability Directive did not make it entirely clear which type of system it aims to set up.⁴⁰⁶ From a Danish point of view it seemed to be clear that the Liability Directive sets up the described administrative liability scheme. However, it was held from experience with Danish administrative liability on environmental damage that it was not adequate to remedy environmental damage.⁴⁰⁷ Nevertheless, most of the Member States national laws knew before the implementation of the Liability Directive the form of administrative liability established by the Directive.⁴⁰⁸ This leads to the

⁴⁰³ Law of 13 April 2007, o zapobieganiu szkodom w środowisku i ich naprawie, Dziennik Ustaw z 2007 r. Nr. 75 poz. 493.

⁴⁰⁴ L. Knopp and K. Kwasnicka: "Die Umsetzung der europäischen Haftungsrichtlinie in Deutschland und Polen", p. 357; further on the incorrect implementation in Poland J. Jendroska and M. Bar: "Transposition of Directive 2004/35/EC (ELD) in Poland: issues of concern", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

⁴⁰⁵ E.g. see for Italy M. Alberton: "Saint George and the dragon: transposing the Environmental Liability Directive in Italy", pp. 235 ff.; for Portugal see A. Aragao: "Environmental Liability Directive in Portugal"; for Hungary see G. Bándi: "Environmental Liability Directive – Hungary"; for Finland see A. Ekroos: "Environmental Liability Directive – Finland"; for England see V. Fogleman: "Environmental Liability Directive", p. 114; for Romania see M. Józson: "Directive 2004/35/EC and Romania", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>; for Spain see A.-M. Moreno and A. García Ureta: "Implementation of the Environmental Liability Directive in Spain"; for Germany see E. Rehbinder: "Implementation of the Environmental Liability Directive in Germany", pp. 199 ff.; for the Flanders region in Belgium see R. Slabbinck, H. Descamps and H. Bocken: "Implementation of the Environmental Damage Directive in Belgium (Flanders)", pp. 3 ff.; for Estonia see H. Veinla: "Implementation of Environmental Liability Directive in Estonia".

⁴⁰⁶ E.K. Czech: "Liability for Environmental Damage according to Directive 2004/35/EC, pp. 321 ff.

⁴⁰⁷ P. Pagh: "Environmental Liability Directive – Danish Report", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>, p. 5.

⁴⁰⁸ For Portugal see A. Aragao: "Environmental Liability Directive in Portugal", pp. 8-9.; for Hungary see G. Bándi: "Environmental Liability Directive – Hungary", p. 1; for Germany see B. Becker: "Das neue Umweltschadensgesetz und das Artikelgesetz zur Umsetzung der Richtlinie über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden", p. 1106; for Finland see A. Ekroos: "Environmental Liability Directive – Finland", p. 1; for United Kingdom see M. Lee and R. Macrory: "Environmental Liability Directive – UK (England and Wales)"; for Italy see M. Montini: "Environmental Liability Directive – Report for Italy"; for Spain see A.-M. Moreno and A. García Ureta: "Implementation of the Environmental Liability Directive in Spain", pp. 1 ff.; for Denmark see P. Pagh: "Environmental Liability Directive – Danish Report", p. 1; for Estonia see H. Veinla: "Implementation of Environmental Liability Directive in Estonia", p. 2.

conclusion that the type of liability established by the Liability Directive was probably not the reason for the cumbersome implementation process.

Hence, the wide discretion that the Directive leaves to the Member States with regard to crucial points, vague and unclear formulations, the general problems of translation into the different languages of the Member States and the problem of implementation into an existing legal environment are likely to have made the implementation process even more difficult. The uncertainties concerning the type of liability established by the Directive, on the contrary, did not seem to play a major part in the problems of implementation.

4.2.2 An implementation that weakens the effectiveness of the Liability Directive

A general look at the implementation acts of the 23 Member States that have already implemented the Liability Directive shows that the weakest form of implementation has been chosen by the majority of the Member States. Moreover, the discretion given to the Member States by the Directive might have led to significant differences among the liability schemes in the Member States.

As already mentioned above, the Member States were given discretion concerning crucial points of the Directive such as the scope of the liability regime, the permit and state of the art defence and the compulsory financial security. These three elements are decisive for the effectiveness of the Liability Directive as a mechanism to prevent and remedy environmental damage. The very narrow scope of the Directive could be enlarged by the Member States by determining more species and habitats protected under national law than under Wild Birds and the Habitats Directive. However, so far only a few Member States have chosen to do so,⁴⁰⁹ and often they match with the habitats protected under the Habitats Directive anyhow.⁴¹⁰ Moreover, most of the Member States made use of the optional permit and the state of the art defence.⁴¹¹ As seen above, this in particular weakens the regime of the

⁴⁰⁹ Only Cyprus, Estonia, Hungary, Ireland, Poland, Spain, Sweden and United Kingdom extended the scope, Czech Republic delegated the power to enlarge the scope to the Ministry of the Environment, see K. De Smedt. "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 7;

⁴¹⁰ 45 per cent overlap, *CSI 008 – Designated areas – Assessment published Mar 2009*, European Environmental Agency, available at http://themes.eea.europa.eu/IMS/IMS/ISpecs/ISpecification20041007131611/IAssessment1216803252161/view_content; P. Beyer: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", p. 259.

⁴¹¹ For Belgium, Cyprus, Czech Republic, Denmark (only state of the art defence), Estonia, France, Ireland, Italy, Latvia, Malta, Romania, Slovakia, Spain, Sweden (implemented as mitigating factors), United Kingdom (except for genetically modified organisms in Wales) see table of implementation by K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", pp. 14 ff.; for Luxemburg see Article 9(3), (4) Loi du 20 avril 2009 relative à la responsabilité environnementale en ce qui concerne la prévention et la réparation des dommages environnementaux, *Memorial Journal Officiel du Grand-*

Directive as an effective mechanism to prevent and remedy environmental damage. It further narrows down the potential liability of an operator. Eventually, none of the Member States has introduced a compulsory insurance for operators yet and only very few already committed to establish one in the nearer future.⁴¹² This exercise of discretion might, however, change with more advanced knowledge on how to estimate such insurance and after the Commission has delivered its report, due by April 30, 2010.⁴¹³ The report will deal among other things with conditions of insurance and other types of financial security. Nevertheless, the fact that most Member States did not enlarge the scope of the Liability Directive but inserted all the possible defences for the operator pictures a weak form of implementation of the Liability Directive in the national laws of the Member States.

Finally, the differences between the implementations in the Member States particularly relating to the three crucial points previously mentioned, is partly seen to undermine the objective of harmonisation as aimed at by the Directive.⁴¹⁴ Since the points have a decisive influence on the effectiveness of the regime as a mechanism to prevent and restore environmental damage their application or non-application makes the systems in the Member States differ significantly. However, this evaluation can be questioned. The Directive's aim is only to establish a framework of environmental liability in form of a minimum harmonisation. Thus, the differences that remain in the Member States even after the implementation of the Directive are the logical consequence of its legal character.

Hence, the discretion given by the Liability Directive on the scope of the liability system, on the permit and state of art defence and on compulsory financial security was used by the Member States in a way weakening the effectiveness of the liability regime as a mechanism to prevent and remedy environmental damage. However, the Member States' differing exercise of discretion goes hand in hand with the legal nature of the Liability Directive as a framework and minimally harmonising piece of legislation.

Duché de Luxembourg, Recueil de Legislation, 27 April 2009, A – No. 82, pp. 968 ff.; for Ireland implementing the permit defence only see Regulation 17(4)(b) of the European Communities (Environmental Liability) Regulations 2008, S.I. No. 547 of 2008.

⁴¹² In the Czech Republic a compulsory insurance shall be established from 2013, Hungary has made a draft legislation on compulsory insurance, in Poland the decision was delegated to the competent authority and the Minister of Environment, Slovakia has established a compulsory system which will enter into force in 2012, Spain established a compulsory system from 2010 on and Sweden is reviewing to extend its compulsory insurance system to damage to biodiversity, see table of implementation by K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", pp. 14 ff.

⁴¹³ See duty of the Commission to file a report Article 14(2) of the Liability Directive.

⁴¹⁴ K. De Smedt: "Is Harmonisation always Effective? The Implementation of the Environmental Liability Directive", p. 12; A. Epiney: *Umweltrecht in der Europäischen Union*, p. 253.

4.2.3 Conclusion

In conclusion, the problems concerning the implementation of the Liability Directive are diverse. On the one hand, the discretion left to the Member States concerning crucial points, vague and unclear formulations in the Directive and the general problems of translation into the different languages of the Member States and the need to implement into existing law are likely to have made the implementation process cumbersome. The uncertainties concerning the type of liability established by the Directive, on the contrary, did not seem to play a major part in the problems of implementation. On the other hand, the Member States have chosen the weakest form of implementation undermining the effectiveness of the liability regime as a mechanism to protect the environment. However, the differences in the exercise of the Member States' discretion does not undermine the harmonisation envisaged by the Directive but is in accordance with its character as a minimum harmonising scheme.

4.3 Implementation in Germany – improvement of the national environmental liability system?

In this section, the implementation of the Liability Directive into Germany will be given attention. Germany provides a good example of implementation for several reasons. Germany had a well developed legislation for the prevention and remediation of environmental harm in place already before the implementation of the Liability Directive.⁴¹⁵ It is the biggest state of the European Union in terms of population⁴¹⁶ with a civil law tradition.⁴¹⁷ The section will analyse if the implementation of the Liability Directive in German law improves the national liability system for environmental damage that already existed. In order to do so, the liability schemes concerning environmental damage that already existed before the implementation shall be described briefly. This description will be confined to the liability for damage to protected species and habitats, land and water. Then, the content of the implementation act shall be set out and evaluated against the background of the already existing liability schemes.

4.3.1 Existing environmental liability law

⁴¹⁵ For Germany see B. Becker: "Das neue Umweltschadensgesetz und das Artikelgesetz zur Umsetzung der Richtlinie über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden", p. 1105; E. Rehinder: "Implementation of the Environmental Liability Directive in Germany", p. 199; G. Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", p. 8.

⁴¹⁶ Germany is the biggest country with 82,5 million inhabitants, ed. Statistisches Bundesamt: *Deutschland in der EU 2006*, Wiesbaden 2006, p. 12.

⁴¹⁷ H.P. Glenn: *Legal Traditions of the World*, 3rd edition, Oxford/New York 2007, pp. 125 ff., 224 ff.

German environmental law consists mainly of regulatory measures, planning laws and indirect regulation of conduct.⁴¹⁸ These are instruments as, for instance, taxes and also liability for environmental damage.⁴¹⁹ Before the implementation of the Liability Directive, German law already was familiar with liability schemes for damage to species and natural habitats, water and land. These schemes could be found in forms of civil liability and as a liability under administrative mechanisms.

Not surprisingly considering the definition given in chapter one of this thesis, all civil liability for environmental damage in Germany always required and requires the injury of a personal interest such as life, health or property.⁴²⁰ Civil liability exists in specific and general laws.⁴²¹ The specific laws concern the impact on elements of the environment that result in damage to a personal interest. They establish a strict liability not requiring fault as a condition for liability.⁴²² Such civil liability has already existed for impact to land, air and water under the Environmental Liability Act of 1990⁴²³ and for damage caused by the impact on the constitution of waters under the Federal Water Resource Management Act of 2002.⁴²⁴ Civil liability for damage to any of these environmental elements could and can still further be found in the general civil liability provisions of tort law⁴²⁵ and the law of neighbours⁴²⁶ if a personal interest is infringed at the same time. The provisions establish mainly a fault based liability. Thus, civil liability for damage to land and water that causes damage to private interests existed in specific German laws and could come under the general rules of tort and neighbour law. Damage to species and natural habitats that caused damage to private interests could only give rise to civil liability under the general norms of tort and neighbour law.

⁴¹⁸ M. Rodi: "Public Environmental Law in Germany", in: *Public Environmental Law in the European Union and the United States – A Comparative Analysis*, eds. R.J.G.H. Seerden, M.A. Heldeweg and K.R. Deketelaere, The Hague 2002, pp. 199-245 at p. 212.

⁴¹⁹ M. Rodi: "Public Environmental Law in Germany", p. 217.

⁴²⁰ B. Becker: "Das neue Umweltschadensgesetz und das Artikelgesetz zur Umsetzung der Richtlinie über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden", p. 1106; E. Rehlinger: "Implementation of the Environmental Liability Directive in Germany", p. 203; M. Rodi: "Public Environmental Law in Germany", p. 218; W. Pfennigstorf: "How to deal with Damage to Natural Resources: Solutions in the German Environmental Liability Act of 1990", in: *Harm to the Environment – the Right to Compensation and Assessment of Damages*, ed. P. Wetterstein, New York 1997, pp. 131-142 at p. 132.

⁴²¹ K.A. Pape and K. Schillhorn: "Environmental Law in the Federal Republic of Germany", in: *Environmental Law in Europe*, ed. N.S.J. Koeman, London 1999, pp. 273-293 at p. 277; eds. H. Schlemminger and C.-P. Martens: *Environmental Law for Practitioners*, 2nd edition, The Hague 2004, p. 180.

⁴²² For the Environmental Liability Act, M. Rodi: "Public Environmental Law in Germany", p. 218.

⁴²³ § 1 Umwelthaftungsgesetz of 10 December 1990, BGBl I, 1990, pp. 2634, as amended by Article 9(5) of the law of 23 November 2007, BGBl I, 2007, pp. 2631.

⁴²⁴ § 22 Gesetz zur Ordnung des Wasserhaushalts of 19 August 2002, BGBl I, 2002, pp. 3245 ff., as amended by Article 8 of the law of 22 December 2008, BGBl I, 2008, pp. 2986 ff.

⁴²⁵ § 823(1) BGB of 18 August 1896 (German Civil Code) in the form as of 2 January 2002, BGBl. I, 2002, pp. 42 ff., as amended by Article 2(1) of the law of 25 June 2009, BGBl. I, 2009, pp. 1574 ff.

⁴²⁶ §§ 905 ff., 1004 BGB.

German law was also already familiar with the liability of private parties under administrative law for damage to some environmental elements. Under federal nature preservation laws private parties were under the obligation to remedy environmental damage.⁴²⁷ The liability did not require any fault in order to arise. Such liability already existed for the contamination of land under the Soil Protection Act of 1998⁴²⁸ and the negative interference with land and groundwater under the Federal Nature Protection Act of 2002.⁴²⁹ Hence, it did not yet exist for damage to species and natural habitats.

Furthermore, obligations of individuals to remedy an environmental damage exist in the law of the federal states of Germany (*Länder*) concerning the prevention of dangers. Under these laws, individuals could be ordered by the public authorities to remedy damage to protected species and habitats, land and water if it poses a threat *inter alia* to important individual interests.⁴³⁰ The person that can be ordered to take action is the person whose action or property caused the threat. The laws do not provide for a specific responsibility to remedy environmental damage. However, when the threat to central individual interests results from an environmental damage caused by an individual that individual could be obliged to remedy the environmental damage under these general laws.⁴³¹

In conclusion, under German law, liability for damage to protected species and habitats, land and water existed before the implementation of the Liability Directive into German law in 2007. There existed civil liability for all these environmental damages under special and general laws. Liability of private parties under administrative law existed for damage to land and water but not for species and natural habitats. Lastly, individuals could be asked to prevent environmental damage under the *Länder*'s laws.

4.3.2 Improvement of the national liability system for environmental damage

⁴²⁷ W. Pfennigstorf: "How to deal with Damage to Natural Resources: Solutions in the German Environmental Liability Act of 1990", p. 133.

⁴²⁸ § 4 Gesetz zum Schutz vor schädlichen Bodenveränderungen und zur Sanierung von Altlasten (Bundes-Bodenschutzgesetz - BBodSchG) of 17 March 1998, BGBl. I, 1998, pp. 502 ff., as amended by Article 3 of the law of 9 December 2004, BGBl. I, 2004, pp. 3214 ff.

⁴²⁹ §§ 18 f. Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz - BNatSchG) of 25 March 2002, BGBl. I, 2002, pp. 1193 ff., as amended by Art. 3 of the law of 22 December 2008, BGBl. I, 2008, pp. 2986 ff.

⁴³⁰ E.g. § 8(1) Police Act North Rhine-Westphalia (Polizeigesetz des Landes Nordrhein-Westfalen (PolG NRW)) of 25 July 2003, GV. NRW, 2003, pp. 441 ff., as amended by Article 1 of the law of 10 June 2008, GV. NRW, 2008, pp. 473 ff.; §§ 6(1), 7(1) Public Safety Law of Lower Saxony (Niedersächsisches Gefahrenabwehrsgesetz (NGefAG)) of 20 February 1998, GVBl., 1998, pp. 101 ff., as amended by law of 20 November 2001, Nds. GVBl., 2001, pp. 701 ff.

⁴³¹ W. Pfennigstorf: "How to deal with Damage to Natural Resources: Solutions in the German Environmental Liability Act of 1990", p. 133.

Against the background of the above described existing liability schemes for damage to protected species and natural habitats, land and water it will now be evaluated in how far the implementation of the Liability Directive into German law has improved the existing liability schemes. First, some general remarks on the implementation shall be made. Then, the improvement shall be assessed.

4.3.2.1 General remarks on the implementation in Germany

The Liability Directive was implemented into German law in two legislative ways. The main legislative way of implementation of the Directive constitutes the creation of a new law, namely Article 1 of the Act on the Prevention and Remediation of Environmental Damages which entered into force on 14 November 2007 (Environmental Damages Act).⁴³² The Act only applies if other German laws do not require the prevention and remediation of environmental damages more precisely and if they do not establish a standard equal to the Act.⁴³³ The second legislative way of implementation was an amendment of the Federal Nature Protection Act of 2002 and the Federal Water Resource Management Act of 2002. The Environmental Damages Act contains all the general provisions of the Liability Directive. The concrete liability to prevent and restore environmental damage and bear the costs thereof for the respective environmental elements protected species and natural habitats, land and water was implemented by the amendment of the specific laws for the respective element.⁴³⁴

In general, the Environmental Damages Act transposes almost the exact text of the Liability Directive. That is why it is referred to in Germany literature as a *one to one* implementation.⁴³⁵ The German legislator did not introduce a compulsory insurance. Moreover, the Environmental Damages Act as a federal law did not extend the scope of the liability regime nor did it introduce the permit and the state of the art defences. However, the introduction of the defences was left to the competence of the *Länder* when implementing the

⁴³² Gesetz über die Vermeidung und Sanierung von Umweltschäden (Umweltschadensgesetz) vom 10 Mai 2007, BGBl I, Nr. 19, 2007, pp. 666 ff.

⁴³³ § 1 of the Environmental Damages Act; on the relationship of in particular the Environmental Damages Act on the one hand and the Soil Protection Act and the Federal Water Resource Management Act see Müggendorf: "Das Verhältnis des Umweltschadensgesetzes zum Boden- und Gewässerschutzrecht", pp. 16 ff.

⁴³⁴ On this J. Duikers: "EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung", p. 630.

⁴³⁵ E.g. B. Becker: "Das neue Umweltschadensgesetz und das Artikelgesetz zur Umsetzung der Richtlinie über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden", p. 1106; E. Rehlinger: "Implementation of the Environmental Liability Directive in Germany", p. 199.

liability scheme in their law.⁴³⁶ They did not make use of this competence so far and also probably will not.⁴³⁷ The main disadvantage of this *one to one* implementation is that it also took over the uncertainties from the text of the Liability Directive. An example for this is the implementation of the competences of the competent authority from Articles 5 and 6 of the Liability Directive. As seen in chapter 3, it is not clear if the competent authority is under an obligation to request from the operator the preventive or remedial action or if this request is discretionary. The implementation in the German law does not clarify this entirely either. Therefore, some hold that the competent authority is under an obligation to act⁴³⁸ while others state that it is not clear and do not take a stand.⁴³⁹ The explanatory statement of the government concerning this implementation in German law does not help to solve this uncertainty. It states that the competent authority is under an obligation to make sure that the operator is acting in accordance with its duties, but that it is within the discretion of the competent authority to enforce the preventive or remedial action from the operator.⁴⁴⁰ Moreover, it is also not clear if the action by the competent authority is subsidiary or not.⁴⁴¹

Thus, Germany implemented the Liability Directive by establishing the Environmental Damages Act, inserting two amendments to existing laws, using a *one to one* approach and therewith taking over uncertainties from the text of the Liability Directive.

4.3.2.2 Assessment of the improvement

For the assessment if the implementation of the Liability Directive in Germany improved the already existing environmental liability schemes, a closer look shall be taken into the two

⁴³⁶ § 9(1) of the Environmental Damages Act, requesting them to take into account the situation of agriculture with regard to pesticides of which the use is subject to authorisation, on the latter see A. Scheidler: "Umweltschutz durch Umweltverantwortung – Das neue Umweltschadensgesetz", p. 118.

⁴³⁷ For the *Land* Saxony (Sachsen) e-mail from F.-J. Kunert, Head of Division 15, General Legal Affairs at the State Ministry of Environmental Affairs in Saxony, of 31 July 2009; for the *Land* Saxony-Anhalt (Sachsen-Anhalt) e-mail from B. Hartmann, Ministry for Agriculture and Environment of Sachsen-Anhalt, of 5 August 2009; for the *Land* Schleswig-Holstein e-mail from H. Herre, Ministry of the Environment of Schleswig-Holstein, of 31 July 2009 with the remark that he is not aware of any *Land* that made use of the discretion given by Article 9 of the Environmental Damages Act.

⁴³⁸ G. Winter, J.H. Jans, R. Macrory and L. Krämer: "Weighing up the Liability Directive", p. 8; H.-J. Muggenborg: "Das Verhältnis des Umweltschadensgesetzes zum Boden- und Gewässerschutzrecht", pp. 15-16.

⁴³⁹ B. Becker: "Das neue Umweltschadensgesetz und das Artikelgesetz zur Umsetzung der Richtlinie über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden", p. 1111; E. Rehbinder: "Implementation of the Environmental Liability Directive in Germany", p. 201.

⁴⁴⁰ Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden of 13 December 2006, Drucksache 16/3806, p. 24.

⁴⁴¹ Suggesting that it is not A. Scheidler: "Umweltschutz durch Umweltverantwortung – Das neue Umweltschadensgesetz", p. 117 and the explanatory statement of the government, Entwurf eines Gesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden, p. 25.

amendments of the Federal Nature Protection Act and the Federal Water Resource Management Act and into the provisions of the Environmental Damages Act.

For the liability established by the Liability Directive for protected species and natural habitats, § 21a was inserted into the Federal Nature Protection Act. This provision contains in its paragraph four the liability for damage to protected species and natural habitats as protected by the Wild Birds and Habitats Directive. Therewith it establishes a liability for private parties under administrative law for pure damage to species and habitats which before only existed under civil law for damage to private interests.

For the liability established by the Liability Directive for damage to water, § 22a was inserted into the Federal Water Resource Management Act. In its paragraph two, the provisions provides for the obligation of the polluter to take the remedial action foreseen in the Liability Directive. Even though liability under administrative law for certain pure change in the constitution of waters existed already under the Federal Nature Protection Act, this liability was extended to all the waters protected under the Water Framework Directive. As seen above, so far only a civil liability for damage to such waters existed under the Federal Water Resource Management Act. On the contrary to these newly inserted provisions, no provision was inserted in the Soil Protection Act for the liability for land damage as established under the Liability Directive. The German legislator was of the opinion that the already existing liability for land damage under § 4 of the Soil Protection Act was consistent with the liability established by the Liability Directive.⁴⁴² Thus, the implementation of the Liability Directive into German law finally closed the existing gaps for liability of private persons under administrative law for damage purely to protected species and natural habitats, land and water. Considering the limited value civil liability has for the prevention and remediation of environmental damages the introduction of liability under administrative law for all three types of damages improved the German environmental liability schemes.

Besides this addition of the forms of liability available for these environmental damages, the Environmental Damages Act introduced some further innovation into the German environmental liability systems. The innovation brought about is the possibility for public interest groups to make requests to the competent authority. This right of public interests groups did not exist concerning environmental damage in German law before.⁴⁴³

⁴⁴² E. Reh binder: "Implementation of the Environmental Liability Directive in Germany", p. 200.

⁴⁴³ L. Diederichsen: "Grundfragen zum Umweltschadensgesetz", *NJW*, iss. 47, 2007, pp. 3377-3382 at p. 3381; L. Knopp and K. Kwasnicka: "Die Umsetzung der europäischen Haftungsrichtlinie in Deutschland und Polen", p. 356; for soil contamination E. Reh binder: "A German Source of Inspiration? *Locus Standi* and Remediation Duties under the Soil Protection Act , the Environmental Liability Act and the Draft Environmental Code", in:

Hence, the implementation of the Liability Directive into German law also provided public interest groups with a new role concerning the prevention and remediation of the environmental damages.

Thus, the *one to one* implementation of the Liability Directive into German law brought about a liability of private parties under administrative law for all three sets of environmental elements, protected species and natural habitats, water and land, and introduced a new role for public interest groups concerning the prevention and remediation of the environmental damages. Even though German environment law was already well developed before, the implementation of the Liability Directive completed and therewith improved the existing liability schemes for environmental damage.

4.3.3 Conclusion

Liability for damage to protected species and habitats, land and water had been introduced into the German legal system before the Liability Directive was implemented in 2007. Civil liability for all these environmental damages existed under both general laws as well as special ones. Liability of private parties under administrative law existed for damage to land and water but not for species and natural habitats. This gap was closed by the implementation of the Liability Directive. Moreover, public interest groups were given a role concerning the prevention and remediation of these environmental damages. Thus, the implementation of the Liability Directive in Germany improved the already existing liability schemes for environmental damage.

4.4 Final conclusion

In conclusion, various problems existed concerning the implementation of the Liability Directive. One set of problems was identified to be the problems that probably led to the implementation process being so cumbersome. This was the discretion left to the Member States concerning crucial points, vague and unclear formulations in the Directive and the general problems of translation into the different languages of the Member States and the need to implement into existing law. The uncertainties concerning the type of liability established by the Directive, on the contrary, did not seem to play a part in the problems of implementation. The other set of problems was identified to be the way the 23 Member States finally implemented the Liability Directive. The majority of Member States chose the weakest

Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law, eds. G. Betlem and E.H.P. Brans, London 2006, pp. 103-127 at p. 108.

form of implementation and therewith undermined the effectiveness of the liability scheme as an environmental protection. The constraint on the harmonisation of the Member State's laws is not worth criticising for this is the logical consequence of the legal character of the Directive as an instrument of minimum harmonisation. The implementation of the Liability Directive into German law is an example on how the Liability Directive improved the already existing liability schemes for damage to protected species and natural habitats, water and land. It did so by establishing the liability finally for all such damages under administrative mechanisms and introducing a new role for public interest groups concerning the prevention and remediation of the environmental damages. The improvement brought about by a *one to one* implementation of the Liability Directive into the state's law environment liability law which was already well developed, permits the assumption that the Directive already did and will improve the environmental liability systems in most of the Member States' laws.

Final conclusion and evaluation

As stipulated in the introduction, the “role of liability depends however on the detailed design of the scheme”. This thesis endeavoured to analyse both the detailed design of the regime of the Liability Directive as well as its more general role. In the very beginning of this thesis, the general role of environmental liability schemes as a mechanism to protect the environment was mentioned. The uncertainty of whether the Liability Directive really constitutes a *liability* directive was highlighted as well as its controversial nature. At the same time, it put forth the proposal that the Liability Directive does not only comprise the term *liability* in its title but even constitutes one of the most environmentally beneficial liability systems available in European Community law and Member States’ national law. Both statements were confirmed by the analysis of the underlying notions *liability* and *environment* to the present topic, the historical evolution of the Liability Directive, its content and the implementation process in the Member States.

From the title of the Environmental Liability Directive, its underlying notions are *liability* and *environment*. In order to serve as a background for the evaluation of the Directive, these terms were given meaning by relying on a general European context. In this context, *liability* is mainly associated with *civil liability*. In turn, mainly *tort law liability* as a form of civil liability is relevant in the context of the environmental liability regime. Liability under tort law can arise when private interests, such as property, person or assets, are damaged. It is the private party whose interests are infringed that can bring a claim directly against the private party that caused the damage. The notion *environment* found in the European context can be divided into wide and narrow definitions. Wide definitions comprise natural resources and human beings or man-made things or both, while the narrow ones only comprise natural resources. However, wide definitions of the environment seem to be more common. *Environmental liability* describes the relationship of the two notions as liability for environmental damage without taking a stand on the type of liability involved. Traditional liability under tort law though has major shortcomings as a form of liability for environmental damage. It is confined to damage of environmental elements that are subject to individual property rights, that causes also damage to a person or causes an economic loss to a person. Thus, the environmental benefits of a tort law liability for environmental damage are merely incidental.

It took the Commission almost a decade to present its final Proposal for a Directive on Environmental Liability. The history of the Liability Directive pictures the controversial

nature of the topic. It is coined by a shift from traditional tort law liability to a public law regime and by a shift from a very wide environmental liability scheme to quite a narrow one. This process already foreboded the liability regime the Liability Directive would establish. The shift away from establishing a tort law liability under the Directive was mainly motivated by the fact that national laws were already containing comprehensive rules on tort law and that it would have been difficult to harmonise them in the view of the differences existing between the Member States' national laws.

An analysis of the content of the Liability Directive set out its main aspects and proved some of its criticism right and some of them wrong. The Directive is an instrument implementing the polluter pays and the preventive principle. It can be rightly criticised for being complex and sometimes ambiguous. Also the various exceptions from liability the Directive offers can be seen to weaken the Directive in its effectiveness as a mechanism to protect the environment. Furthermore, the Directive is in itself of narrow scope for its application is limited to damage to wild birds and habitats, water and land caused by an operator of an occupational activity. In addition, Member States are granted a large amount of discretion concerning crucial points of the Directive which might undermine a uniform implementation into their national laws. The latter two points deserve, however, no criticism. The Liability Directive constitutes a framework directive with the approach of a minimum harmonisation, thus, leaving it up to the Member States to enlarge the scope of application and it is not aiming at regulating all aspects in itself conclusively. At the same time and despite the shortcomings worth criticising, the Liability Directive has great features that establish an environmental liability scheme which complements existing environmental liability regimes and has more environmental benefits than them. Since it does not comprise traditional tort law liability, its title is perceived to be *misleading*. However, it establishes the liability of operators of occupational activities for pure environmental damage caused based on classical administrative mechanisms. The operator is liable irrespective if it is a private or public, natural or legal person. The liability is enforced by the state who acts as a *trustee* for the environment in the interest of the general public. These administrative mechanisms are not new but their usage under the heading *liability* is. Even though some aspects of civil liability, such as the fault based liability system and the defences available for the operator, are present, the administrative mechanisms have to be located under public law only. The Directive further serves as a tool to contribute to the principle of intergenerational equity. It implements this principle by bringing the protection of the environment as a public interest into focus, regardless of the infringement of private interests and therewith preserving it for future

generations. Hence the Liability Directive is not only really a *liability* directive but even an important legal regime with great environmental value.

As pointed out in chapter 4, the implementation of the Liability Directive has created problems in most of the Member States. The Member States were given discretion concerning crucial questions such as the permit and state of the art defence, which were not solved during the drafting process for almost a decade. Moreover, uncertainties in the text of the Directive such as the competences of the competent authority made the implementation process cumbersome. Also the manner in which the 23 Member States have by now implemented the Directive is not free of problems. Most states seem to have chosen the weakest form of implementation, for instance, by opting for the permit and the state of the art defence. Even though the implementation process reveals various problems, the Liability Directive probably improved existing national environmental liability systems. Before the implementation of the Liability Directive into the German legal system, German law had already developed a sophisticated environmental liability scheme. Nevertheless, only the implementation of the Directive in November 2007 completed the existing environmental liability scheme. Hence, if the Directive improved the national environmental liability law in a state where it was already very developed, it can be concluded that the implementation of the Liability Directive into other Member States' national laws brought and will bring about an improvement of the existing liability schemes for environmental damage.

In conclusion, starting from the drafting process to its implementation by the Member States, the Liability Directive can be found to be a complicated piece of legislation which does not escape criticism. Nevertheless, it must be kept in mind that the Liability Directive constitutes a framework directive with the approach of a minimum harmonisation, thus, not aiming at regulating all aspects in itself conclusively. Moreover, the criticism is outweighed by the environmental benefits the Directive brings about. Without inventing a new mechanism or types of liability, the Liability Directive constitutes an innovation on the level of the European Community. It establishes a liability for pure environmental damage by relying upon classical administrative procedures. It, furthermore, implements and serves fundamental environmental principles and improves and completes the national environmental liability systems of the Member States. Hence, the Liability Directive is not only a complicated piece of legislation but an important one for the strengthening of the European Community's environmental policy as well as that of its Member States.

Bibliography

1. Treaties

Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960. 956 UNTS, pp. 251 ff.

Brussels Supplementary Convention of 31 January 1963. 2 ILM 1963, pp. 685 ff.

Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963. 1063 UNTS, pp. 266 ff.

Brussels Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971. 974 UNTS, pp. 255 ff.

Convention on Limitation of Liability for Maritime Claims of 19 November 1976. 1456 UNTS, pp. 222 ff.

Convention on Long-range Transboundary Air Pollution of 13 November 1979. 18 ILM 1979, pp. 1442 ff.

Single European Act of 17 February 1986. OJ 1987, L 169/1 ff.

Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention 21 September 1988. 1672 UNTS, pp. 293 ff.

Strasbourg Convention on Limitation of Liability in Inland Navigation of 4 November 1988. Reprinted in Descamps, Hannes, Slabbinck, Robin and Bocken, Hubert (eds.): *International Documents on Environmental Liability*, Berlin 2008, pp. 241 ff.

Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels 10 October 1989. UN Doc. ECE/TRANS/79.

Convention on Biological Diversity of 5 June 1992. 1760 UNTS, pp. 79 ff.

Protocol to the 1969 Convention on Civil Liability for Oil Pollution Damage of 27 November 1992. 973 UNTS, pp. 3 ff.

Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 27 November 1992. 1110 UNTS, pp. 57 ff.

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 21 June 1993. ETS 150.

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 3 May 1996. 35 ILM 1996, pp. 1415 ff.

Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997. 36 ILM 1997, pp. 1473 ff.

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of 25 June 1998. 38 ILM 1999, pp. 517 ff.

International Convention on Civil Liability for Bunker Oil Pollution Damage of 23 March 2001. LEG/CONF 12/19 of 27 March 2001.

Consolidated Version of the Treaty Establishing the European Community of 29 December 2006. OJ 2006, C-321 E/39 ff.

2. Documents of the European Community

2.1. Secondary legislation

2.1.1 Regulations

Council Regulation (EEC) No 259/93 of 1 February 1993 on the Supervision and Control of Shipments of Waste within, into and out of the European Community OJ 1993, L 30/1 ff.

Council Regulation (EC) No 2027/97 of 9 October 1997 on Air Carrier Liability in the Event of Accidents. OJ 1997, L 285/1 ff.

Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 Laying Down General Provisions Establishing a European Neighbourhood and Partnership Instrument. OJ 2006, L 310/1 ff.

Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 Establishing a Financing Instrument for Development Cooperation. OJ 2006, L 378/41 ff.

Commission Regulation (EC) No 889/2008 of 5 September 2008 Laying Down Detailed Rules for the Implementation of Council Regulation (EC) No 834/2007 on Organic production and Labelling of Organic Products with regard to Organic Production, Labelling and Control. OJ 2008, L 250/1 ff.

Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 On the Liability of Carriers of Passengers by Sea in the Event of Accidents. OJ 2009, L 131/24 ff.

2.1.2 Directives

Council Directive 67/548/EEC of 27 June 1967 on the Approximation of Laws, Regulations and Administrative Provisions Relating to the Classification, Packaging and Labelling of Dangerous Substances. OJ 1967, L 196/1 ff.

Council Directive 72/166/EEC of 24 April 1972 on the Approximation of the Laws of Member States Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, and to the Enforcement of the Obligation to Insure Against Such Liability. OJ 1972, L 103/1 ff.

Council Directive 75/442/EEC of 15 July 1975 on Waste. OJ 1975, L 194/39 ff.

Council Directive 76/464/EEC of 4 May 1976 on Pollution Caused by Certain Dangerous Substances, Discharged into the Aquatic Environment of the Community. OJ 1976, L 129/23 ff.

Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds. OJ 1979, L 103/1 ff.

Council Directive 80/68/EEC of 17 December 1979 on the Protection of Groundwater Against Pollution Caused by Certain Dangerous Substances. OJ 1980, L 20/43 ff.

Council Directive 84/360/EEC of 28 June 1984 on the Combating of Air Pollution from Industrial Plants. OJ 1984, L 188/20 ff.

Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment. OJ 1985, L 175/40 ff.

Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products. OJ 1985, L 210/29 ff.

Council Directive 90/219/EEC of 23 April 1990 on the Contained Use of Genetically Modified Micro-organisms. OJ 1990, L 117/1 ff.

Council Directive 91/414/EEC of 15 July 1991 Concerning the Placing of Plant Protection Products on the Market. OJ 1991, L 230/1 ff.

Council Directive 91/689/EEC of 12 December 1991 on Hazardous Waste. OJ 1991, L 377/20 ff.

Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora. OJ 1992, L 206/7 ff.

Council Directive 93/75/EEC of 13 September 1993 Concerning Minimum Requirements for Vessels Bound for or Leaving Community Ports and Carrying Dangerous or Polluting Goods. OJ 1993, L 247/19 ff.

Council Directive 94/55/EC of 21 November 1994 on the Approximation of the Laws of the Member States with Regard to the Transport of Dangerous Goods by Road. OJ 1994, L 319/7 ff.

Council Directive 96/49/EC of 23 July 1996 on the Approximation of the Laws of the Member States with Regard to the Transport of Dangerous Goods by Rail. OJ 1996, L 235/25 ff.

Council Directive 96/61/EC of 24 September 1996 Concerning Integrated Pollution Prevention and Control. OJ 1996, L 257/26 ff.

Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 Concerning the Placing of Biocidal Products on the Market. OJ 1998, L 123/1 ff.

Council Directive 1999/13/EC of 11 March 1999 on the Limitation of Emissions of Volatile Organic Compounds Due to the Use of Organic Solvents in Certain Activities and Installations. OJ 1999, L 85/1 ff.

Council Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste. OJ 1999, L 182/1 ff.

Council Directive 1999/32/EC of 26 April 1999 Relating to a Reduction in the Sulphur Content of Certain Liquid Fuels and Amending Directive 93/12/EEC. OJ 1999, L 121/13 ff.

Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 Concerning the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Classification, Packaging and Labelling of Dangerous Preparations. OJ 1999, L 200/1 ff.

Directive 2000/16/EC of the European Parliament and the Council of 10 April 2000 amending Council Directive 79/373/EEC on the Marketing of Compound Feedingstuffs and Council Directive 96/25/EC on the Circulation of Feed Materials. OJ 2000, L 105/36 ff.

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy. OJ 2000, L 327/1 ff.

Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the Incineration of Waste. OJ 2000, L 332/91 ff.

Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC. OJ 2001, L 106/1 ff.

Commission Directive 2001/59/EC of 6 August 2001 Adapting to Technical Progress for the 28th time Council Directive 67/548/EEC on the Approximation of the Laws, Regulations and Administrative Provisions Relating to the Classification, Packaging and Labelling of Dangerous Substances. OJ 2001, L 225/1 ff.

Directive 2002/32/EC of the European Parliament and of the Council of 7 May 2002 on Undesirable Substances in Animal Feed. OJ 2002, L 140/10 ff.

Council Directive 2002/55/EC of 13 June 2002 on the Marketing of Vegetable Seed. OJ 2002, L 193/33 ff.

Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the Energy Performance of Buildings. OJ 2003, L 1/65 ff.

Directive 2003/4/EC of the European Parliament And Of The Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC. OJ 2003, L 41/26 ff.

Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the Promotion of the use of Biofuels or other Renewable Fuels for Transport. OJ 2003, L 123/42 ff.

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability With Regard to the Prevention and Remedying of Environmental Damage, OJ 2004, L 143/56 ff., as amended by Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the Management of Waste From Extractive Industries and Amending Directive 2004/35/EC, OJ 2006, L 102/15 ff., and by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 On the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ 2009, L 140/114 ff.

Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on Waste. OJ 2006, L 114/9 ff.

Council Directive 2006/88/EC of 24 October 2006 On Animal Health Requirements for Aquaculture Animals and Products Thereof, and On The Prevention and Control of Certain Diseases in Aquatic Animals. OJ 2006, L 328/14 ff.

Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control. OJ 2008, L 24/8 ff.

Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on Ambient Air Quality and Cleaner Air for Europe. OJ 2008, L 152/1 ff.

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives. OJ 2008, L 312/3 ff.

Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control. OJ 2009, L 131/57 ff.

Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of Clean and Energy-Efficient Road Transport Vehicles. OJ 2009, L 120/5 ff.

Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the Contained Use of Genetically Modified Micro-Organisms. OJ 2009, L 125/75 ff.

2.2 Cases of the European Court of Justice and the Court of First Instance

2.2.1 Cases of the Court of First Instance

Case T-4/01, *Renco SpA v Council of the European Union*, Judgement of 25 February 2003. ECR [II-171].

2.2.2 Cases of the European Court of Justice

Joined cases 63-9/72, *Wilhelm Werhahn Hansamühle and others v Council of the European Communities*, Judgement of 13 November 1973. ECR [1229].

Case C-343/95, *Diego Calì & Figli v. Servizi ecologici porto di Genova SpA (SEPG)*, Judgement of 18 March 1997. ECR [I-01574].

Case C-234/02 P, *European Ombudsman supported by European Parliament v. Frank Lamberts*, Opinion of Advocate General Geelhoed delivered on 3 July 2003. ECR [I-2803].

Case C-328/08, *Commission of the European Communities v. Republic of Finland*, Action brought on 17 July 2008. OJ 2008, C 236/12.

Case C-328/08, *Commission of the European Communities v. Republic of Finland*, Judgement of 22 December 2008. OJ 2009, C 44/22.

Case C-329/08, *Commission of the European Communities v Kingdom of Belgium*, Action brought on 18 July 2008. OJ 2008, C 272/8.

Case C-329/08, *Commission of the European Communities v Kingdom of Belgium*, Order of the President of the Court of 6 March 2009. OJ 2009, C 113/29.

Case C-330/08, *Commission of the European Communities v. French Republic*, Action brought on 18 July 2008. OJ 2008, C 272/9.

Case C-330/08, *Commission of the European Communities v. French Republic*, Judgement of 11 December 2008. OJ 2009, C 32/11

Case C-331/08, *Commission of the European Communities v. Luxemburg*, Action brought on 18 July 2008. OJ 2008, C 272/9.

Case C-331/08, *Commission of the European Communities v. Luxemburg*, Judgement of 24 March 2008. OJ 2009, C 113/13.

Case C-368/08, *Commission of the European Communities v. Greece*, Action brought on 8 August 2008. OJ 2008, C 247/11.

Case C-368/08, *Commission of the European Communities v. Greece*, Judgement of 19 Mai 2009. OJ 2009, C 153/16.

Case C-402/08, *Commission of the European Communities v Republic of Slovenia*, Action brought on 18 September 2008. OJ 2008, C 285/30.

Case C-402/08, *Commission of the European Communities v Republic of Slovenia*, Judgement of 12 March 2009. OJ 2009, C 113/13 f.

Case C-417/08, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Action brought on 22 September 2008. OJ 2008, C 301/25 f.

Case C-417/08, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Judgement of 18 June 2009. available at http://curia.europa.eu/jcms/jcms/j_6/.

Case C-418/08, *Commission of the European Communities v. Ireland*, Action brought on 22 September 2008. OJ 2008, C 301/26.

Case C-418/08, *Commission of the European Communities v. Ireland*, Order of the President of the Court of 27 March 2009. available at http://curia.europa.eu/jcms/jcms/j_6/.

Case C-422/08, *Commission of the European Communities v Republic of Austria*, Action brought on 24 September 2008. OJ 2008, C 301/26.

Case C-422/08, *Commission of the European Communities v Republic of Austria*, Judgement of 18 June 2009. available at http://curia.europa.eu/jcms/jcms/j_6/.

2.3 Communications and Proposals of the Commission

Proposal on Environmental Liability in the Waste Sector of 22 May 1991, COM(1991) 102 final – SYN 335.

Amendment of the Proposal on Environmental Liability in the Waste Sector of 23 July 1991, COM(1991) 219 final.

The Green Paper on the Restoration of Environmental Damage of 14 May 1993, COM(1993) 47 final.

White Paper on Environmental Liability of 9 February 2000, COM(2000) 66 final.

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 of 23 January 2002, COM(2002) 17 final.

Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage of 19 September 2003, 2002/0021 (COD).

Questions and Answers Environmental Liability, Commission Memorandum of 27 April 2007, MEMO/07/157.

2.3. Resolutions of the Parliament

Parliament Resolution of 20 April 1993, OJ 1993, C 128/165.

2.4. Other

First Environmental Action Programme of the European Communities of 1973, OJ 1973, C 112/I ff.

Second Environmental Action Programme of the European Community of 1977, OJ 1977, C 139/I ff.

Third Environmental Action Programme of the European Community of 1983, OJ 1983, C 46/I ff.

"Towards Sustainability", the Fifth European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, OJ 1993, C 138/I ff.

Economic and Social Committee, Opinion of 23 February 1994 (CES 226/94).

Natura 2000, European Commission DG Env Nature Newsletter, no. 26, July 2009, available at http://ec.europa.eu/environment/nature/info/pubs/docs/nat2000news/nat26_en.pdf.

3. Declarations, reports, recommendations, papers

OECD Guiding Principles Concerning International Economic Aspects of Environmental Policies of 26 May 1972, OECD Doc. C 72/128 ff.

Conference on Security and Co-Operation in Europe Final Act of 1 August 1975, 14 ILM 1992, pp. 1292 ff.

Recommendation No. R (84) 15 of the Committee of Ministers to Member States of 18 September 1984 Relating to Public Liability, Council of Europe, Available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=603877&SecMode=1&DocId=683180&Usage=2>.

Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) of 1987, UN Doc. A/42/427.

OECD Draft Recommendation on Compensation for Victims of Accidental Pollution, C(91) 53, August 1991 (OECD).

C'M'S: Cameron McKenna, *Study of Civil Liability Systems for Remedying Environmental Damage*, Final Report of 31 December 1995, available at http://ec.europa.eu/environment/legal/liability/pdf/civiliability_finalreport.pdf

Brans, Edward H.P. and Uilhoorn, Mark, *Liability for Damage to Natural Resources*, Background Paper for EU White Paper on Environmental Liability of 17 September 1997, available at <http://ec.europa.eu/environment/legal/liability/pdf/ecodamage.pdf>.

Deloddere, Sophie and Ryckbost, Donatienne, *Liability for Contaminated Sites*, Background Document to the EU White Paper on Environmental Liability of 26. September 1997, available at <http://ec.europa.eu/environment/legal/liability/pdf/soilcont.pdf>.

Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability) of July 2001, available at http://ec.europa.eu/environment/legal/liability/pdf/consultation_en.pdf.

New Delhi Declaration of Principle of International Law Relating to Sustainable Development of 2002 by the International Law Association, available at www.cisdl.org/pdf/new_delhi_declaration.pdf.

CSI 008 – Designated areas – Assessment published Mar 2009, European Environmental Agency, available at http://themes.eea.europa.eu/IMS/IMS/ISpecs/ISpecification20041007131611/IAssessment1216803252161/view_content.

4. National legislation

4.1 Austria

Bundesgesetz, womit die Haftung des Bundes, der Länder, der Bezirke, der Gemeinden und der sonstigen Körperschaften und Anstalten des öffentlichen Rechts für den in Vollziehung der Gesetze zugefügten Schaden geregelt wird (Amtshaftungsgesetz) of 18. Dezember 1948, Bundesgesetzblatt Nr. 20/1949.

4.2 Germany

Bürgerliches Gesetzbuch of 18 August 1896 (German Civil Code) in the form as of 2 January 2002, Bundesgesetzblatt I, 2002, pp. 42 ff., as amended by Art. 2 (1) of the law of 25 June 2009, Bundesgesetzblatt I, 2009, pp. 1574 ff.

Grundgesetz für die Bundesrepublik Deutschland) of 23 May 1949, Bundesgesetzblatt 1949, pp. 1 ff., as amended by law of 19 May 2009, Bundesgesetzblatt 2009, pp. 606 ff.

Umwelthaftungsgesetz of 10 December 1990, Bundesgesetzblatt I, 1990, pp. 2634, as amended by Art. 9 (5) of the law of 23 November 2007, Bundesgesetzblatt I, 2007, pp. 2631.

Public Safety Law of Lower Saxony (Niedersächsisches Gefahrenabwehrgesetz (NGefAG)) of 20 February 1998, GVBl., 1998, pp. 101 ff., as amended by law of 20 November 2001, Nds. GVBl., 2001, pp. 701 ff.

Gesetz zum Schutz vor schädlichen Bodenveränderungen und zur Sanierung von Altlasten (Bundes-Bodenschutzgesetz - BBodSchG) of 17 March 1998, Bundesgesetzblatt I, 1998, pp. 502 ff., as amended by Art. 3 of the law of 9 December 2004, Bundesgesetzblatt I, 2004, pp. 3214 ff.

Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz - BNatSchG) of 25 March 2002, Bundesgesetzblatt I, 2002, pp. 1193 ff., as amended by Art. 3 of the law of 22 December 2008, Bundesgesetzblatt I, 2008, pp. 2986 ff.

Gesetz zur Ordnung des Wasserhaushalts of 19 August 2002, Bundesgesetzblatt I, 2002, pp. 3245 ff., as amended by Art. 8 of the law of 22 December 2008, Bundesgesetzblatt I, 2008, pp. 2986 ff.

Police Act North Rhine-Westphalia (Polizeigesetz des Landes Nordrhein-Westfalen (PolG NRW)) of 25 July 2003, GV. NRW, pp. 441 ff., as amended by Art. 1 of the law of 10 June 2008, GV. NRW, pp. 473 ff.

Gesetz über die Vermeidung und Sanierung von Umweltschäden (Umweltschadensgesetz) vom 10 Mai 2007, Bundesgesetzblatt I, Nr. 19, 2007, pp. 666 ff.

4.3 Ireland

European Communities (Environmental Liability) Regulations 2008. Statutory Instruments No. 547 of 2008.

4.4 Italy

Decree 152/2006 of the President of the Republic of 3 April 2006. Supplement OJ of the Italian Republic, 14 April 2006, no. 88.

4.5 Luxemburg

Loi du 20 avril 2009 relative à la responsabilité environnementale en ce qui concerne la prévention et la réparation des dommages environnementaux. Memorial Journal Officiel du Grand-Duché de Luxembourg, Recueil de Legislation, 27 April 2009, A – No. 82, pp. 968 ff.

4.6 Poland

Law of 13 April 2007, o zapobieganiu szkodom w środowisku i ich naprawie. Dziennik Ustaw z 2007 r. Nr 75 poz. 493.

4.7 United States of America

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 11 December 1980. 42 United States Code 103.

5. Books

Allen, Robert (ed.): *The New Penguin English Dictionary*, Harmondsworth 2000.

Basse, Ellen Margrethe: *Environmental Law in Denmark*, The Hague 2000.

Bell, Stuart and McGillvray, Donald: *Environmental Law – The Law and Policy Relating to the Protection of the Environment*, 5th edition, New York 2000.

Bergkamp, Lucas: *Liability and Environment – Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, The Hague 2001.

Berry, Elspeth and Hargreaves, Sylvia: *European Union Law*, 2nd edition, Oxford/New York 2007.

Cano, G.J.: *A Legal and Institutional Framework for Natural Resources Management*, FAO Legislative Studies No. 9, Rome 1975.

Chalmers, Damian and Tomkins, Adam: *European Union Law – Texts and Materials*, New York 2007.

Craig, Paul and De Búrca, Gráinne: *EU Law – Texts, Cases, And Materials*, 4th edition, New York 2008.

De Sadeeler, Nico: *Environmental Principles – From Political Slogans to Legal Rules*, New York 2002.

Epiney, Astrid: *Umweltrecht in der Europäischen Union*, 2nd edition, Cologne *iner alia* 2005.

Fergusson, Rosalind, Manser, Martin and Pickering, David (eds.): *The New Penguin Thesaurus*, Harmondsworth 2000.

Glenn, H. Patrick: *Legal Traditions of the World*, 3rd edition, Oxford/New York 2007.

Hartley, T.C.: *The Foundations of European Community Law*, 5th edition, New York 2003.

Hinteregger, Monika (ed.): *Environmental Liability and Ecological Damage in European Law*, New York 2008.

Jans, Jan. H. and Vedder, Hans H.B.: *European Environmental Law*, 3rd edition, Groningen 2008.

Kiss, Alexandre and Shelton, Dinah: *Manual of European Environmental Law*, Oxford 1993.

Krämer, Ludwig: *EC Environmental Law*, 6th edition, London 2007.

Larsson, Mourie-Luise: *The Law of Environmental Damage – Liability and Reparation*, Cambridge *inter alia* 1999.

Lee, Maria: *EU Environmental Law: Challenges, Change and Decision-Making*, Portland 2005.

Louka, Elli: *Conflicting Integration – Environmental Law of the European Union*, Oxford 2004.

Sands, Philippe: *Principles of International Environmental Law*, 2nd edition, Cambridge 2003.

Schlemminger, Horst and Martens, Claus-Peter (eds.): *Environmental Law for Practitioners*, 2nd edition, The Hague 2004.

Schrijver, Nico: *Sovereignty Over Natural Resources – Balancing Rights and Duties in an Independent World*, Groningen 1995.

Schwarze, Jürgen: *European Administrative Law*, 1st revised edition, London 2006.

Skinner, J.B.: *Earth Resources*, 3rd edition, Englewood Cliffs (New Jersey) 1986.

Statistisches Bundesamt (ed.): *Deutschland in der EU 2006*, Wiesbaden 2006.

Thornton, Justine and Beckwith, Silas: *Environmental Law*, 2nd edition, London 2004.

Von Bar, Christian: *The Common European Law of Torts – The Core Areas of Tort Law, its Approximation in Europe, and its Accommodation in the Legal System*, vol. 1, New York 1998.

Wenk, Michael S.: *The European Union's Eco-Management and Audit Scheme (EMAS)*, Dordrecht 2005.

Wetterstein, Peter (ed.): *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, Oxford 1997.

Wilde, Mark: *Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy Europe and the United States*, The Hague/New York 2002.

6. Articles

Alberton, Mariachiara: “Saint George and the dragon: transposing the Environmental Liability Directive in Italy”, *Environmental Liability*, iss. 6, 2007, pp. 235-241.

Aragao, Alexandra: “Environmental Liability Directive in Portugal”, Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Bándi, Gyula: “Environmental Liability Directive – Hungary”, Paper for the Avosetta Group Meeting 1-2 June

2007, available at <http://www.avosetta.org/>.

Becker, Bernd: "Das neue Umweltschadengesetz und das Artikelgesetz zur Umsetzung der Richtlinie über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden", *Neue Zeitschrift für Verwaltungsrecht*, iss. 10, 2007, pp. 1105-1113.

Becker, Bernd: "Einführung in die Richtlinie über Umwelthaftung und Sanierung von Umweltschäden", *Neue Zeitschrift für Verwaltungsrecht*, 2005, pp. 371-376.

Betlem, Gerrit and Brans, Edward H.P.: "Environmental Liability in the EU: An Introduction", in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. Betlem, Gerrit and Brans, Edward H.P., London 2006, pp. 17-27.

Betlem, Gerrit and Brans, Edward H.P.: "The Future Role of Civil liability for Environmental Damage in the EU", *The Yearbook of European Environmental Law*, vol. 2, 2002, pp. 183-221.

Betlem, Gerrit: "Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws", *The Yearbook of European Environmental Law*, vol. 4, 2005, pp. 117-148.

Betlem, Gerrit: "Transnational Operator Liability", in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. Betlem, Gerrit and Brans, Edward H.P., London 2006, pp. 149-188.

Betlem, Gerrit: "Trial Smelter II: Transnational Applications of CERCLA", *Journal of Environmental Law*, vol. 19, 2007, pp. 389-397.

Beyer, Peter: "Eine neue Dimension der Umwelthaftung in Europa? Eine Analyse der europäischen Richtlinie zur Umwelthaftung", *Zeitschrift für Umweltrecht*, vol. 5, 2004, pp. 257-320.

Brans, Edward H.P.: "Liability for Damage to Public Natural Resources Under the 2004 EC Environmental Liability Directive: Standing and Assessment of Damages", *Environmental Law Review*, vol. 7(2), 2005, pp. 90-109 (pages cited in the text of this thesis refer to the word print out as given by Westlaw).

Brans, Edward H.P.: "The EC White Paper on Environmental Liability and the Recovery of Damages for Injury to Public Natural Resources" in: *Environmental Damage in International Comparative Law*, ed. Bowman, Michael and Boyle, Alan, New York 2002, pp. 323-337.

Clarke, Chris: "The Proposed EC Liability Directive: Half-Way Through Co-Decision", *Review of European Community & International Environmental Law*, vol. 12(3), 2003, pp. 254-268.

Cordonier Segger, Marie-Claire: "Significant Developments in Sustainable Developments Law and Governance: A Proposal", *Natural Resources Forum*, vol. 28, 2004, pp. 61-74.

Coroner, Florence: "Environmental Liability Directive: how well are Member States handling transposition?", *Environmental Liability*, iss. 6, 2006, pp. 226-229.

Czech, E.K.: "Liability for Environmental Damage according to Directive 2004/35/EC", *Polish Journal of Environmental Studies*, vol. 16 (2), 2007, pp. 321-324.

De La Fayette, Louise: "The Concept of Environmental Damage in International Liability Regimes", in: *Environmental Damage in International and Comparative Law – Problems of Definition and Valuation*, eds. Bowman, Michael and Boyle, Alan, New York 2002, pp. 149-189.

De Sadeleer, Nico: "The Birds, Habitats, and Environmental Liability Directives to the Rescue of the Wildlife Under Threat", *The Yearbook of European Environmental Law*, vol. 7, 2007, pp. 36-75.

De Smedt, Kristel: "Is Harmonisation always Effective? The Implementation of the Environmental liability Directive", *European Energy and Environmental Law Review*, February 2009, pp. 2-18.

Diederichsen, Lars and Jerxsen, Markus: “Haftungsrisiken für Unternehmen durch verzögerte Umsetzung der Umwelthaftungsrichtlinie”, *Umwelt und Planungsrecht*, 2007, pp. 17-20.

Diederichsen, Lars: “Grundfragen zum Umweltschadensgesetz”, *Neue Juristische Wochenschrift*, iss. 47, 2007, pp. 3377-3382.

Doolittle, Ian: “A Guide to EC Regulation: Environmental Liability”, *International Financial Law Review*, Suppl. June 1992, pp. 20-25.

Duikers, Jan: “EG-Umwelthaftungsrichtlinie und deutsches Recht – Struktur der Richtlinie und Hinweise für die Umsetzung”, *NR*, 2006, pp. 623-631.

Ekroos, Ari: “Environmental Liability Directive – Finland”, Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Fogleman, Valerie: “Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions”, *Environmental Liability*, iss. 4, 2006, pp. 127-146.

Fogleman, Valerie: “Environmental Liability Directive”, *Environmental Liability*, iss. 3, 2004, pp. 101-115.

Fogleman, Valerie: “The Environmental Liability Directive and its Impacts on English Environmental Law”, *Journal of Planning & Environment Law*, 2006, pp. 1443-1456.

Grossmann, Margaret Rosso: “Agriculture and the Polluter Pays Principle: An Introduction”, *Oklahoma Law Review*, vol. 59, 2006, pp.1-51.

Hinteregger, Monika: “International and Supranational Systems of Environmental Liability in Europe”, in: *Environmental Liability and Ecological Damage in European Law*, ed. Hinteregger, Monika, New York 2008, pp. 3-32.

Jendroska, Jerzy and Bar, Magdalena: “Transposition of Directive 2004/35/EC (ELD) in Poland: issues of concern”, Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Jóhannsdóttir, Adalheidur: “Considerations on the Development of Environmental Law in the Light of the Concept of Sustainable Development”, *Ympäristöjuridiikka*, iss.2, 2005, pp. 27-48.

Jones, Brian: “Deterring, Compensating, and Remedying Environmental Damage: The Contribution of Tort Liability”, in: *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, ed. Wetterstein, Peter, Oxford 1997, pp. 11-27.

Józson, Mónika: “Directive 2004/35/EC and Romania”, Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Knopp, Lothar and Kwasnicka, Kamila: “Die Umsetzung der europäischen Haftungsrichtlinie in Deutschland und Polen”, *Wirtschaft und Recht in Osteuropa*, 2008, pp. 353-358.

Krämer, Ludwig: “Directive 2004/35/EC on Environmental Liability”, in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. Betlem, Gerrit and Brans, Edward H.P., London 2006, pp. 29-47.

Layard, Antonia: “The Europeanisation of Contaminated Land”, in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. Betlem, Gerrit and Brans, Edward, H.P., London 2006, pp. 129-147.

Lee, Maria and Macrory, Richard: “Environmental Liability Directive – UK (England and Wales)”, Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Lee, Maria: “From Private to Public: The Multiple Faces of Environmental Liability”, *European Public Law*, vol. 7(3), 2001, pp. 375-397.

Lee, Maria: “The Changing Aims of Environmental Liability”, *Environmental Law and Management*, vol. 14, 2002, pp. 189-196.

Loibl, Gerhard: “The Evolving Regime on Climate Change and Sustainable Development”, in: *International Law and Sustainable Development, Principles and Practice*, eds. Schrijver, Nico and Weiss, Friedl Leiden 2004, pp. 97-118.

Lopatta, Hans: “Perspectives from the European Commission – Overview and State of Play of the ELD”, 3rd CEA Environmental Liability Workshop of 27 April 2009, available at http://www.cea.eu/uploads/DocumentsLibrary/documents/1240821878_eld-overview-and-state-of-play-hans-lopatta.pdf.

Ludwig, Rasso and Petersen, Malte: “Aktuelle Fragen und Entwicklungen des europäischen Bodenschutzrechts”, *Natur und Recht*, 2007, pp. 446-423.

Montini, Massimiliano: “Environmental Liability Directive – Report for Italy” Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Moreno, Angel-Manuel and García Ureta, Agustín: “Implementation of the Environmental Liability Directive in Spain”, Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Müggenborg, Hans-Jürgen: “Das Verhältnis des Umweltschadensgesetzes zum Boden- und Gewässerschutzrecht”, *Neue Zeitschrift für Verwaltungsrecht*, iss. 1, 2009, pp. 12-18.

Mullerat, Bernat: “European Environmental Liability: One Step Forward”, *International Company and Commercial Law Review*, vol. 16(6), 2005, pp. 263-268.

Pagh, Peter: “Environmental Liability Directive – Danish Report”, Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Pape, Kay Artur and Schillhorn, Kerrin: “Environmental Law in the Federal Republic of Germany”, in: *Environmental Law in Europe*, ed. Koeman, Niels S.J., London 1999, pp. 273-293.

Pfennigstorf, Werner: “How to deal with Damage to Natural Resources: Solutions in the German Environmental Liability Act of 1990”, in: *Harm to the Environment – the Right to Compensation and Assessment of Damages*, ed. Wetterstein, Peter, New York 1997, pp. 131-142.

Pirotte, Charles: “A Brief Overview of Directive 2004/35/EC on Environmental Liability”, Paper of to be presented at the time of the conference organized in Brussels on October 22, 2004 by Eagle International on the theme of environmental liability, http://www.eagle-law.com/papers/brussels2004_en-06.pdf (pages cited in the text of this thesis refer to the pdf print out).

Rehbinder, Eckard: “A German Source of Inspiration? *Locus Standi* and Remediation Duties under the Soil Protection Act, the Environmental Liability Act and the Draft Environmental Code”, in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. Betlem, Gerrit and Brans, Edward H.P., London 2006, pp. 103-127.

Rehbinder, Eckard: “Implementation of the Environmental Liability Directive in Germany”, *Environmental Liability*, iss. 5, 2007, pp. 199-203.

Rodi, Michael: “Public Environmental Law in Germany”, in: *Public Environmental Law in the European Union and the United States – A Comparative Analysis*, eds. Seerden, René J.G.H, Heldeweg, Michiel A. and Deketelaere, Kurt R., The Hague 2002, pp. 199-245.

Roller, Gerhard: “Liability”, in: *Reflection on 30 Years of EU Environmental Law – A High Level of Protection*, ed. Macrory, Richard, Groningen 2006, pp. 127-139.

Rosenne, Shabtai: “Exploitation and Protection of the Exclusive Economic Zone and the Continental Shelf”, *Yearbook of the Association of Attenders and Alumni*, 1986, pp. 63-74.

Scheidler, Alfred: "Umweltschutz durch Umweltverantwortung – Das neue Umweltschadensgesetz", *Neue Zeitschrift für Verwaltungsrecht*, iss. 10, 2007, pp. 1113-1119.

Slabbinck, Robin, Descamps, Hannes and Bocken, Hubert: "Implementation of the Environmental Damage Directive in Belgium (Flanders)", *Environmental Liability*, iss. 1, 2006, pp. 3-12.

Vakrou, Alexandra: "The Environmental Liability Directive ('ELD'), Implementation Process in EU & Current State of Play", European Commission, DG Environment, Conference on ELD, Culturgest, Lisbon, 04.April.2007, available at [http://www.evalue.pt/30/app_alexandra_vakrou_\(ce\).pdf](http://www.evalue.pt/30/app_alexandra_vakrou_(ce).pdf).

Veinla, Hannes: "Implementation of Environmental Liability Directive in Estonia", Paper for the Avosetta Group Meeting 1-2 June 2007, available at <http://www.avosetta.org/>.

Waite, Andrew: "The Quest for Environmental Law Equilibrium", in: *Environmental Liability in the EU – The 2004 Directive compared with US and Member States Law*, eds. Betlem, Gerrit and Brans, Edward H.P. London 2006, pp. 49-87.

Wälde, Thomas W.: "Natural Resources and Sustainable Development: From "Good Intentions" of "Good Consequences"", in: *International Law and Sustainable Development, Principles and Practice*, eds. Schrijver, Nico and Weiss, Friedl, Leiden 2004, pp. 119-150.

Wansink, John H.: "Environmental liability Insurance: Tour d'Horizon in Europe" in: *Transnational Environmental Liability Insurance*, ed. Kröner, Ralph P., London 1993, pp. 1-21.

Wennerås, Pål: "Permit Defences in Environmental Liability Regimes – Subsidizing Environmental Damage in the EC?", *The Yearbook of European Environmental Law*, vol. 4, 2005, pp. 149-180.

Wetterstein, Peter: "A Proprietary or Possessory Interest: A Condition Sine Qua Non for Claiming Damages for Environmental Impairment", in: *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, ed. Wetterstein, Peter, Oxford 1997, pp. 29-54.

Wilde, Mark L.: "The EC Commission's White Paper on Environmental Liability: Issues and Implications", *Journal of Environmental Law*, vol. 13(1), 2001, pp. 21-37.

Winter, Gerd, Jans, Jan. H., Macrory, Richard and Krämer, Ludwig: "Weighing up the Liability Directive", *Journal of Environmental Law*, vol. 20, 2008, pp. 163-186 (pages cited in the text of this thesis refer to the word print out as given by Westlaw).

7. Miscellaneous

Comments of the interested groups on the White Paper of 2000,
available at http://ec.europa.eu/environment/legal/liability/pdf/wel_export.pdf.

Comments on Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability)
http://ec.europa.eu/environment/legal/liability/pdf/wrkdoc_comments.pdf.

Alphabetical list of the commentators to the Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability)
http://ec.europa.eu/environment/legal/liability/pdf/wrkdoc_commentators.pdf.

Press Release Environmental liability: Commission welcomes agreement on new Directive, IP/04/246 of 20 February 2004.

Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden of 13 December 2006, Drucksache 16/3806.

Press Release Environment: Liability Directive ensures polluters pay, IP/07/581 of 27 April 2007.

Environmental Liability Directive enters into force, Editorial Comment, *European Focus*, vol. 209, 2007, pp. 2-4.

E-mail from Hans Lopatta, legal and policy officer of the European Commission, Directorate General for Environment, Infringements Unit A.2, of 16 July 2009.

E-mail from Hans Herre, Ministry of the Environment of Schleswig Holstein, of 31 July 2009.

E-mail from Franz-Josef Kunert, Head of Division 15, General Legal Affairs at the State Ministry of Environmental Affairs in Saxony, of 31 July 2009.

E-mail from B. Hartmann, Ministry for Agriculture and Environment of Sachsen-Anhalt, of 5 August 2009.