The Environmental Liability Directive: Practical Impact and Implementation

Conference of 12-13 May 2005, Brussels, organized by the Academy of European Law in Trier (ERA)

On 12-13 May, the Academy of European Law in Trier (ERA) organized a Conference on the implementation and the practical effects of Directive 2004/35/EC, the Environmental Liability Directive (ELD), organized by Jens Hamer (Head of European Business Law at ERA). The event was hosted by the Bavarian Representation in Brussels. It addressed the practical implications and general problems raised by this legislation and assessed the constraints on implementation in the light of the experience of three Member States: Belgium, Sweden and the United Kingdom.

The text of the ELD was approved on 31 March 2004 after more than a decade of deliberations. From the 1993 Green Paper on Remediating Environmental Damage to the adoption of the current provisions, there has been a great deal of discussion. The decision making procedure itself took as long as 13 months as it was necessary to go through the conciliation process. The final outcome, Directive 2004/35/EC, aims to create a common minimum framework for the prevention and remedying of environmental damage, giving practical shape to the "polluter pays"-principle envisaged in Article 174(2) EC. The Directive is due to be implemented by 30 April 2007. Its provisions will lead to numerous changes in the national legal systems not only in respect of environmental damage. The Member States are already now experiencing general and specific difficulties.

Over the two days, more than sixty participants and speakers from over twenty different countries, representing diverse legal backgrounds, had the opportunity to discuss their concerns and share their experiences in this field.

I. Introduction

1. Core issues covered by the Directive

Professor Kurt Deketelaere (Chair of Environmental, Energy, Construction, Health & Safety Law at the Faculty of Law of the University of Leuven) chaired the first part of the conference, which was devoted to the main characteristics of the Directive as well as implementation constraints.

The opening speech was given by Charles Pirotte (DG Environment). In his speech Mr. Pirotte gave an overview of the Directive's provisions, pointing at several important issues. First he referred to the personal and material scope of the provisions. He mentioned the concept of "operator" as envisaged in Article 1(6) and then continued with an overview of what should be understood as "environmental damage". The Directive covers damage to soil, water, species and natural habitats as defined in Community legislation. According to Mr. Pirotte, land damage is understood as soil contamination which results directly or indirectly from the introduction of substances that cause a significant risk to human health. Water damage is defined by reference to the Water Framework Directive. As to species and natural habitats, the idea of using the concepts of the Convention on Biological Diversity was rejected, since their scope would have been too broad to include them in the text of the Directive. The actual provisions contained in the latter refer to Natura 2000. It is not clear whether protection goes beyond these sites and Mr. Pirotte addressed this issue by saying that the protection of areas outside the scope of Natura 2000 is left up to the Member States.

His speech then made a reference to liability. The Directive establishes a two tier system, one of strict liability with respect to environmental damage as such and a second tier of fault or negligence based liability, where damage or threat occurs to protected species or natural habitats.

His last remark was about the fact that Member States have to report on implementation by 2013 and he expressed his doubts about the viability of this, as Member States are behind schedule.

2. Implementation from an EU perspective

Professor Lucas Bergkamp (Partner at Hunton & Williams, Brussels) took a closer look at implemen-
tation problems from an EU perspective and commenced his speech by stating that he intended to point out some issues that he hoped would be answered in the course of the seminar.

The Directive was necessary because national liability regimes insufficiently address biodiversity damage and damage to public or unowned land, but different regimes may create a "race to the bottom", and therefore the EU needs a level playing field. Mr. Bergkamp first questioned the effects of the Directive in relation to other laws and policies. As an example he mentioned the Texaco case, where depending on the national implementation of EC waste law, the producer of the product or the producer of the waste can be liable for the costs of its disposal. He then went on to argue that the EU should look at the US experience and try to analyse and understand it before their solutions are imported into the European system.

Another characteristic of the Directive to which Mr. Bergkamp paid attention was its general vagueness. The Member States can go further, since it only provides for minimum harmonization, and according to him, this may create many different regimes at the level of transposition and enforcement. Concepts like the material and personal scope of application may be extended, but other important questions are the EC's position on insurability, multiparty cases, NGOs' action rights, definition of operator, prevention orders and the treatment of orphan sites. Nevertheless, there is a feeling that none of them is going to gold plate the Directive.

II. Scope and defences under the ELD: Who is liable for what?

After the introductory speeches, the sessions were divided according to the core issues of the Directive. Country reports for each of these matters were preceded by a general review.

First, Professor Gerrit Betlem (School of Law, University of Southampton) reviewed the concept of the operator and the defences that can be raised. In his opinion, the introduction of the operator's liability is a great contribution in order to prevent and remediate environmental damage. However, the term is uncertain and it opens up several questions. The definition has two parts: one related to the control over the activities damaging the environment and a second one, related to the holder of the economic power. The latter only applies if national legislation provides for it. This is somewhat confusing, as it does not provide a fixed definition. Moreover, as Prof. Betlem stated, the parent/subsidiary relationship in terms of liability is not clear. Comparing this definition with the Lugano Convention, one sees that the basic element is the operator's control over the activity. The US Supreme Court, on the other hand, considers that the concept goes beyond the legal person in control, and that parent companies can be made liable. Prof. Betlem also argued that the concept could be compared to other definitions at EC level, but in the end these questions remain unresolved.

With respect to the permit defences, it will be up to the Member States to decide how to implement them. In any case, they do not apply to preventive action. Prof. Betlem concluded by saying that the allocation of liability may result in no obligation to take remediation measures, which can jeopardize the objectives of the Directive.

The implementation of the Directive under Belgian law, as Mr. Hannes Descamps (Flemish Ministry for the Environment) described, is difficult, since it is dependent on the individual regions. Flanders is still studying the impact of the Directive. Mr. Deschamps stated that there is a conceptual confusion with respect to its activities and it is claimed that several competent authorities will be needed. In particular, with respect to the concept of "operator", the Flemish region is planning to adapt the exact wording of the Directive. Multiple party and third party liability have not yet been addressed, and they are considered problematic for the region. Defences seem to be the main issue, and Mr. Deschamps concluded his speech by acknowledging the lack of perspective on how to implement them.

Sweden is in a similar position, as Ms. Susanne Allgårdh Calderón explained (Ministry of Sustainable Development, Stockholm) that implementation is still being analysed and stakeholders are currently being consulted. Nevertheless, with respect to the definition of "operator", the Swedish regime is planning to adopt the exact wording of the Directive. Multiple party and third party liability have not yet been addressed, and they are considered problematic for the region. Defences seem to be the main issue, and Mr. Deschamps concluded his speech by acknowledging the lack of perspective on how to implement them.