IMPLEMENTATION OF THE ENVIRONMENTAL LIABILITY DIRECTIVE IN GERMANY

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1. Introduction

In March 2007, the German Parliament adopted the new Act on the Prevention and Remediation of Environmental Damages\(^1\) as well as amendments of the Federal Protection of Nature Act and the Water Resources Management Act. The legislative package is designed to implement the environmental liability directive. The Environmental Damages Act will enter into force on 15 October 2007. However, when in force, it will apply retroactively to all activities and omissions that occurred as from 30 April 2007, the date on which the deadline for transposing the directive into national law has lapsed. This somewhat odd legislative technique aims for ensuring that the requirements of the directive are complied with at least with respect to the remediation obligations. As regards preventive action, retroactive application is ruled out by the very nature of such action. The legislature was of the opinion that in this field existing German law is more or less already in compliance so that the formal gap of applicability does not count much.

The Environmental Liability Directive introduces obligations of operators of particular professional activities to prevent immediately threatening ecological damage and remediate such damage that has already occurred. It covers certain categories of pure ecological damage, namely damage to protected species and habitats ("biodiversity damage), damage to waters and – narrowly defined by reference to health risks – soil damage. The liability is in principle strict. It is limited to certain professional activities covered by Community regulation as listed in Annex III. This strict liability is supplemented by fault-based liability as regards biodiversity damage.

In assessing the implementation by the directive under the new German law, it has to be taken into account that Germany, like the other member states, already possesses quite comprehensive legislation both with respect to prevention and remediation of environmental harm. Preventive obligations exist in the many – at least nine – environmental laws that cover the activities listed in the annex III of the directive. Remediation obligations are in particular set forth in media-related laws. The most important piece of legislation is the Federal Soil Protection Act. Although focusing on historic contamination which is

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not covered by the directive, it also contains preventive and remediation obligations with respect to soil damage – and this notion is defined more broadly than under the directive comprising not only risks presented to human health but also to groundwater. Moreover, the state protection of nature acts and water acts (which implement the relevant federal framework acts on nature conservation and water resources management)\(^2\) empower the competent authorities to require preventive and remediation action in case of (threatening) ecological or water damage, although they are much less specific than the Federal Soil Protection Act. The result of this state of national law is that the environmental liability directive, although certainly innovative in many respects, has not occupied “virgin ground” in Germany. Therefore, it has been one of the more difficult and hence controversial tasks in the legislative process to devise a mode of transposition that both complies with the directive’s requirements and fits the directive into the existing body of environmental law.

2. Systematic structure

The transposition of the directive has been split into two legislative blocks: the Environmental Damages Act and amendments of the Federal Protection of Nature Act and the Federal Water Resources Management Act. The Environmental Damages Act contains all the general, i.e. not media-specific, provisions of the directive, mostly transposed literally without adding more extensive regulation (“1 by 1” implementation). The two acts on protection of nature and water resources acts set forth media-specific definitions of environmental damage and specify the remediation obligations. By contrast, the Federal Soil Protection Act has not been amended because the legislature was of the opinion that besides the general rules contained in the Environmental Damages Act additional regulation was not required. The only controversy in this field was the question as to whether the definition of soil damage by the directive based on the notion of significant risk to human health (article 2 (1) (c) of the Directive) was correctly implemented by the Environmental Damage Act which refers to the German notion of “danger” meaning a sufficient probability that harm to human health will occur. It was argued that the directive’s notion of significant risk also covers the scope of application of the precautionary principle (article 174 (2) EC Treaty). However, it is submitted that this

\(^2\) The reason for this kind of fragmentation is the federal structure of Germany. Under article 75 of the old Constitution the Federal Government only had framework competences in the fields of water resources and nature conservation. It should be noted that this type of competences has been abolished in the recent constitutional reform in 2006 and hence the Federal Government now has full concurrent competences, although to a certain extent subject to the right of the states to deviate from federal law.
assertion is not correct. The precautionary principle is related to merely possible or potential risks, as can be derived from the Community practice.³

As already pointed out, the transposition of the directive was confronted with the task of fitting it into the existing body of law. The legislature has chosen the solution of creating a “stem law” which unites all the general provisions of the directive and superimposes itself on the existing laws. It is only with respect to definitions and specific remediation obligations that one has opted for a sectoral approach. There had been proposals to integrate the preventive obligations of the directive into existing laws that govern the relevant professional activities and all remediation obligations into sector-specific laws.⁴ The advantage of this systematic approach would have been an improved degree of legal certainty and information about the duties of the addressees of the law. However, these proposals were rejected by the Parliament, the major reason being that transaction costs would have been high, a major degree of duplication would have ensued and it would have been difficult to prove to the Commission that Germany had complied with the Directive. However, considering the problem of creating two layers of laws for one and the same issue, section 1 of the Act contains a subsidiarity clause. The Act is only applicable to the extent to which existing federal and state laws are not more specific or do not correspond to this law. Legal rules that contain more extensive requirements are not pre-empted. This provision is by no means an example of clarity. It leaves the task of ascertaining the source and contents of applicable legal requirements to the addressees and their lawyers.

3. Scope of application

The Environmental Damages Act applies to all natural habitats classified by the Habitats Directive (section 2 No. 1 lit.a Environmental Damages Act, section 21a (3) Federal Protection of Nature Act). It is not required that the typical natural habitats classified in the Habitats Directive be actually protected or at least required to be protected. Proposals to limits the Act’s scope of application to such habitats and thereby arrive at parallel regulation with the Natura 2000 network have been rejected by Parliament. The German text of the directive, as all other texts in Germanic languages, simply refers to protected species and natural habitats. This could be taken as an argument mitigating for a broad scope of application. However, in the Romanic languages,
the word “protected” refers both to species and natural habitats. In one provision of the annex II, even the German text refers to “protected natural habitats” (No. 1.1.3). Moreover, there is a strong systematic argument in favour of a narrow scope of application of the directive. The directive excludes from the definition of damage to natural habitats all interventions that have been expressly authorized under article 6 (3) and (4) of the Habitats Directive. If “unprotected” natural habitats were included, the scope of application of the directive would be artificially enlarged. Unless they are protected under national law, there does not exist an authorisation regime for such habitats that could exempt them, in an individual case, from the coverage of the definition of environmental damage. This result appears odd. On the other hand, it appears from the legislative history of the environmental liability directive that the European Parliament had tried to insert specific language into the text of the directive that would have clarified that it only applies to habitats actually protected or to be protected. This proposal was withdrawn because it was not considered to be weighty enough at a stage of the legislative negotiations between Council and Parliament where a compromise on the directive had to be found. So the question remains open. In any case, in view of the doubts as to the conformity of a narrow determination of the Act’s scope of application with the directive, the German Parliament opted for a definition that leaves the question to judicial interpretation.

One the other hand, the option under article 2 (1) (a) of the directive to include in the definition of biodiversity damage areas protected under national law has not been used in Germany. This seems to be a kind of compensation for the broad interpretation of the notion of “natural habitat”.

4. Exercise of options granted to member states

Article 8 (4) of the directive empowers the member state to exempt operators from the responsibility to bear the costs of remediation action where the operator has used the necessary care to avoid the damage and the damage was caused under two different circumstances (which the operator has to prove). The first possibility is that the damage was caused by an emission or other occurrence that was expressly permitted under an authorisation accorded under national law implementing the relevant EC directives and was fully in conformity with the conditions of the authorisation (article 8 (4) (a) of the directive). This is called the “permit” defence. As a matter of policy, the permit defence has been highly controversial. While industry is in favour of it on

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5 In French: espèces et habitats protégés. The plural masculin is a clear indication that the habitats need to be “protected” habitats.
the grounds of legal security and competitiveness, legal authors⁶ as well as environmental organisations in Germany have generally denounced the permit defence as a violation of the very spirit of a strict liability for environmental harm. The other defence is the so called "development risk" or "state of the art" defence. Operators may be exempted from the responsibility to bear the costs of remediation where an emission or an activity or any kind of use of a product in the course of an activity was not considered to be the probable cause of environmental damage according to the state of scientific or technical knowledge at the time when the emission occurred or the activity was performed (article 8 (4) (b) of the directive). Although by and large acceptable as a matter of policy and not uncommon in strict liability causes of action under private law, it has to be underlined that this defence to a certain degree approaches the strict liability established under the directive to fault-based liability.

The German legislature decided not to make use of these options. Rather, their exercise has been delegated to the states (section 9 (1) of the Act). This was motivated by the budgetary implications of exemptions from the cost burdens for the states that under the German system of execution of federal laws are responsible for the execution of the Environmental Damage Act. The idea seems to be that in view of the fact that in Germany there are wealthy and less wealthy or even poor states, it should be up to the states to decide whether they can afford to exempt operators from the cost burden for remediation and eventually bear the costs themselves or not. However, the budgetary implications of using the options accorded by article 8 (4) of the directive only are one side of the coin. The other side is the impact on competitiveness of industry and agriculture as such and a possible distortion of competitive conditions in Germany due to different approaches taken in the states. As regards agriculture, the legislature finally has recognised this problem by mandating the states, when deciding on the grant of an exemption from the cost burden, to consider the particular situation of agriculture in the application of plant protection products. Whether the law is really helpful in this regard, appears doubtful because the application of pesticides and herbicides is not performed by farmers under an authorisation granted to them. Rather, the marketing and use of the preparation is authorised as such and the farmers simply act lawfully when they use an authorised product. In any case it shows that the legislature has at least finally grasped at the other side of the coin.

5. Obligations of authorities

Under articles 5 (1) and 6 (1) of the directive, the responsible operator is obliged to take preventive and remediation action when environmental

⁶ See the authors cited supra note 1.
damage is immediately threatening or has already occurred. The role of the competent authorities especially in the field of remediation was very controversial during the legislative negotiations. This is especially true of the Commission’s proposal to provide for subsidiary state liability in case of failure of the operator to effectuate remediation. The compromise formula that has emerged from the negotiations is not an example of clarity. Articles 5 (3) and 6 (2) of the directive contain language that one could either describe as a mere determination of the tasks of the authorities with respect to preventive or remediation action to be taken by the operator, or as an empowerment to take a discretionary decision in this respect. On the other hand, articles 5 (4) and 6 (3) of the directive can be interpreted to the extent that the competent authority must order the operator to take action although enforcement of this order in discretionary. In any case, the subsidiary state liability has been discarded. The two provisions cited now only say that the competent authority may take itself the measures in question.

Against this backdrop, the German implementation appears even more regressive than the final version of articles 5 and 6 of the directive. Section 7 (1) of the Act provides very ambiguous language as to the obligations of the competent agency. The text can either be understood as to mean that the authority merely supervises preventive and remediation action to be taken by the operator. Or one could argue that the authority must see to it that such action be taken. What is clear, though, is that the competent authority is not under an obligation to order the operator to perform preventive or remediation action. Section 7 (2) of the Act expressly provides that the competent authority “may” make such orders. In German legal terminology this means that its decision is discretionary. Moreover, section 7 does not address either the problem of enforcement. Although a certain measure of control may be provided by the intervention of environmental associations provided by articles 12 and 13 of the directive, the German implementation is not easy to defend. Its conformity with the directive is open to serious doubts.

6. Rights of affected persons and environmental organisations

Article 12 of the directive accords certain persons the right to comment on, and request the competent authority to go against, environmental damage according to the directive. The extension of this right to threatening environmental damage is optional. The comments and request must be accompanied by supporting information and data. When the comments and the request appear plausible, the competent authority investigates the matter and informs the applicant about its decision and the reasons for taking the decision. Under article 13, the applicant has the right to challenge the procedural and substantive legality of the decision as well as inaction of the authority before a court
or tribunal. Standing is accorded to persons that are or are likely to be affected by an environmental damage as well as persons, in particular environmental organisations, who either have a sufficient interest or alternatively, where the administrative court procedure law of the relevant member state requires that, invoke the violation of a right. This latter alternative for the grant of standing is patterned on Directive 2004/35 that implements the third pillar of the Aarhus Convention. It is designed to afford countries such as Germany who adhere to the subjective system of judicial review of administrative action the possibility to fit environmental standing into their administrative court procedure law.

Germany has implemented these provisions in a very restrictive manner. In the first place, it has used the option to exempt threatening environmental damage. Secondly, it has put major limitations on standing to make requests for action and institute court action for review of the relevant decisions. The directive grants standing to natural and legal persons who are affected or either have a sufficient interest or invoke the violation of a right. By contrast, section 10 of the German Environmental Damage Act seems to equate, with respect to natural persons, the quality of being affected and to be able to invoke a right. Since the directive clearly distinguishes between these two bases of standing, it must be concluded that the test for determining whether a person is affected by an environmental damage cannot be the violation of a right but rather some sort of injury in fact.

However, what is more important is the way in which the Act implements the association rights. In this regard, the Act refers to the new Environmental Remedies Act of 2006. Under this Act, standing is limited to environmental associations who are recognised in an administrative procedure and invoke, in their own name, the violation of a norm that confers rights on individuals (section 2 (1) of the Act). This wording mirrors the German “protective norm theory” and means that the legal norm allegedly violated must be designed to protect individual interests. Whether or not this linkage of association standing with the potential violation of individual rights by the Environmental Remedies Act complies with the mandate of Directive 2004/35 is quite controversial. Consequently these doubts extend to the Environmental Damage Act. A weighty argument that militates against the German solution is that article 12 (1) subparagraph 3 specifically addresses the standing of non-governmental organisations by using a fiction whereby these associations are deemed to have a sufficient interest or are holders of a subjective right that can be violated. It is submitted that what the directive has in mind here is a collective right rather than the right of individuals.

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It should be noted that the directive does not give much guidance as to the depth of judicial review of the administrative decision or omission to make such a decision in case of requests under article 12. The directive speaks of review of the procedural and substantive legality of the decision or omission (article 13). However, the details of judicial review are regulated by national law. As the competent authority is granted a large degree of discretion in deciding whether and how to act, the normal limitations of judicial review of discretionary decisions would seem to apply, although, as stated, the delimitation of agency obligations and discretion is not entirely clear under the directive. If one takes this state of affairs into account, it is safe to conclude that the judicial control of administrative decisions and omissions in the field of remediation of environmental damage is not very extensive.

7. Relationship to environmental liability under private law

The Environmental Liability Directive establishes a state-oriented system of public law responsibility for pure ecological damage. In contrast to the original plans, environmental harm suffered by individuals is entirely left to regulation by the member states. However, many natural resources such as habitats, soil and even watercourses are or may be in private property, including private property of public bodies in countries that do not recognise the concept of public domain. Particular environmental damages may also be encompassed by the protective scope of property in land. Consequently there almost invariably is a certain overlap between public and private law liability for environmental harm. The directive provides that the member states may regulate the relationship between public and private law liability for environmental harm, especially with a view to avoid a double cost burden of the operator (article 16 (2) of the directive).

Germany possesses an Environmental Liability Act\(^9\) which provides for strict liability of the operators of certain activities (contained in a list) for personal and property damage caused on the "environmental path", namely by emissions from, or accidents occurring at, a facility listed in the Act. This liability also covers ecological damage insofar as it is encompassed by the protective scope of property in land, for example damage to the vegetation or to the soil. In this respect, the Act contains particular provisions that link compensation to the restoration of the affected good (section 16 Environmental Liability Act). Therefore, there is a potential overlap between the public law responsibility established by the Environmental Damage Act and the private law liability set forth in the older Environmental Liability Act. In spite of this,

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the Environmental Damage Act does not contain any provision relating to this overlap. The problems will have to be solved by interpretation, arguably in the sense that restoration measures already undertaken under one of the laws must be given credit in the framework of applying the other law.

8. Financial security

Article 14 of the directive addresses the problem of financial security for covering the cost risk incurred by operators who are responsible for prevention or remediation and hence have to bear the costs of action taken or to be taken by them. However, the directive does not go so far as to require the member state to enact binding regulation for a mandatory insurance or other financial security against the cost risk arising under the directive.

The German implementation of this provision is characterised by a high degree of scepticism about the availability of mandatory insurance of environmental damage on the market. This is based on experience with section 19 of the Environmental Liability Act which empowers the Government to introduce, by regulation, mandatory insurance for particularly risky activities covered by the Act. This empowerment has never been used because it was felt that the insurance market for environmental liability was not well developed enough to permit the introduction of any system of mandatory insurance. Consequently, the Environmental Damage Act leaves the field to the private market. It should be noted that at present voluntary insurance for environmental damage is limited to liability arising under private law.

9. Overall assessment

The German implementation of the Environmental Liability Directive is characterised by a very restrictive attitude. Germany has used the concept of a “one by one” transposition which contents itself to transpose the provisions of the directive almost literally into national law without making use of the powers set forth in article 16 (1) of the directive to adopt more stringent regulation. Where Germany has deviated from “one by one” transposition, the conformity of the relevant provisions with the directive is doubtful. However, to do justice to Germany’s implementation of the directive it must also be underlined that the directive is the product of compromise between Council and Parliament and therefore often contains language the interpretation of which is open to question.