




EEB Seminar on
**Transposition of the Environmental
 Liability Directive (2004/35/EC)**
 Brussels May 29, 2006

**The Environmental Liability Directive and the
 transposition process in Germany**
 Prof. Dr. Gerhard Roller




Structure

- Liability under the new Directive
- Transposition process in Germany






Liability under the new Directive

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DIRECTIVE 2004/35/CE DU PARLEMENT EUROPÉEN ET DU CONSEIL
du 21 avril 2004
sur la responsabilité environnementale en ce qui concerne la prévention et la réparation des dommages environnementaux

LE PARLEMENT EUROPÉEN ET LE CONSEIL DE L'UNION EUROPÉENNE,
vu le traité instituant la Communauté européenne, et notamment son article 175, paragraphe 1,
vu la proposition de la Commission (1),
vu l'avis du Comité économique et social européen (2),
après consultation du Comité des régions,
statuant conformément à la procédure prévue à l'article 251 du traité, en vertu duquel le présent acte a été adopté par le conseil de

quel dommage soit tenu pour financièrement responsable, afin d'inciter les exploitants à adopter des mesures et à développer des pratiques propres à minimiser les risques de dommages environnementaux, de façon à réduire leur exposition aux risques financiers associés.
(1) Étant donné que l'objectif de la présente directive, à savoir l'établissement d'un cadre commun pour la prévention et la réparation des dommages environnementaux, à un coût raisonnable pour la société, ne peut pas être réalisé de manière suffisante par les États membres et peut donc, en raison de l'ampleur de la présente directive et des implications liées à d'autres dispositions législatives communautaires, à savoir la directive 79/409/CEE du Conseil du 2 avril 1979 concernant la conservation des oiseaux sauvages (3), la directive 92/43/CEE du Conseil du 21 mai 1992 concernant la conservation des habitats naturels ainsi que de la faune

General remarks

- History of the Directive
- Civil vs. Public liability
- Polluter pays principle




1989/91	↓	Liability for waste
1993	↓	Green Paper
2000	↓	White Paper
2004	↓	Liability Directive




Types of damage covered

water

land

species and habitats

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Types of damage covered

Art. 2
al. 2

'damage': means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

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Types of damage covered

Art. 2
al. 1b)

water

« is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;»

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Types of damage covered

Art. 2
al. 1c)

land

« is 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; »

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Types of damage covered

Art. 2
al. 1a)

species and habitats

« is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I; »

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Types of damage covered

Art. 2
al. 1a)

species and habitats

« is any damage that has **significant** adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I; »

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Criteria of «significance»

- the number of individuals, their density or the area covered,
- the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation, the rarity of the species or habitat (assessed at local, regional and higher level including at Community level),
- the species' capacity for propagation (according to the dynamics specific to that species or to that population), its viability or the habitat's capacity for natural regeneration (according to the dynamics specific to its characteristic species or to their populations),
- the species' or habitat's capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

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Who is liable?

Art. 3
al. 1

Strict liability

Fault based liability

a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities;

b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

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Obligations of the polluter

- Information
- Prevent further damage
- Remedial measures
- Costs

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Remediation of damage

a) 'Primary' remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition;

b) 'Complementary' remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services;

c) 'Compensatory' remediation is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect;

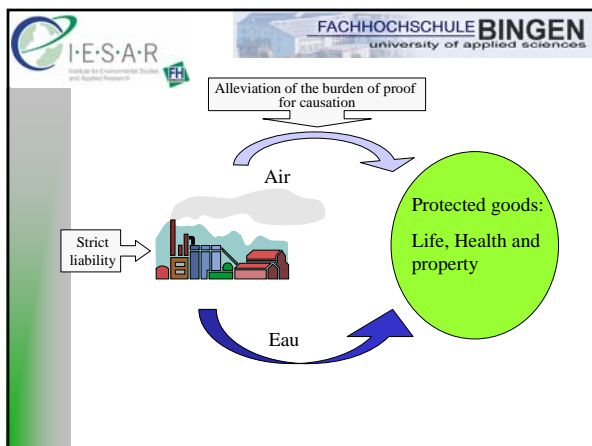
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Civil Liability in Environmental Law

German „Umwelthaftungsgesetz“ of 1-1-1990
(Environmental Liability Act)

- The Law covers installations that are listed on the Annex
- Damage has to be caused by an „immission“, type of damage covered: only „classical“ damage (health and property)



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Practical experience with the Environmental Liability Act

- Few cases
- Increase in insurance policies
- No reduction of accidents

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State of the transposition process in Germany

- Internal draft of the Ministry of Environment, March 4, 2005 (Umweltschadensgesetz-Entwurf)
- Linked to draft concerning transposition of Dir. 2003/35/EC

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Structure of the Law

```

    graph TD
      A[UmweltschadensG] --> B[Nature protection law]
      A --> C[Water management law]
      B -.- D[-----]
      C -.- D
      subgraph Dashed_Line [ ]
        D
      end
      D -.- E[Länder]
      E --- F[Coats of Arms]
  
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- Land damage → Bundes-Bodenschutzgesetz
- Water damage → Wasserhaushaltsgesetz

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Opportunities

- Burden of proof
- State of the Art, permit defence
- Option of Art. 2 (3) c (further habitats)
- Financial security
- NGO-actions, Option Art. 12 (5)
- Stricter national legislation

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Opportunities

Burden of proof

- No alleviation is foreseen in the german draft

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Opportunities

State of the Art, permit defence

- The draft does not use the option of Art. 8 IV of the Directive
- It leaves it up to the Länder to do so

Exemptions (facultative):

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    graph TD
      A[Exemptions (facultative):] --> B["Permit Defence"]
      A --> C["State of the Art Defence"]
  
```

"Permit Defence"

"[...] an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III [...] (Art. 8 (4) (a) of Directive 2004/35/EC)

"State of the Art Defence"

"[...] an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge [...] (Art. 8 (4) (b) of Directive 2004/35/EC)

Opportunities

Option of Art. 2 (3) c (further habitats not listed in the annexes)

- The draft does not use this option but leaves it up to the Länder to do so

Opportunities

Financial security

- No compulsory insurance is provided
- The draft provides for a legal basis for a ministry regulation („in case of“)

Opportunities

NGO-actions

- The rights under the directive are limited („request for action“, Art. 12, no direct action against polluter)
- Further rights under the Directive 2003/35/EC
- Situation in Germany