The Judge in Europe and Community Environment Law

October 9-10 2008, Centre de conférences internationales, 5 avenue des Portugais, 75016 Paris

CONSEIL D'ÉTAT

Association of the Councils of State and Supreme Administrative jurisdictions of the E.U. i.n.p.a

EU Forum of Judges for Environnement

Association européenne des juges administratifs

les avocats et l'Europe

Société Française pour le Droit de l'Environnement

European Commission

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NB : because of environmental concerns, no printed version of this document will be available at the conference.

I. THE JUDGE IN EUROPE AND COMMUNITY ENVIRONMENT LAW

1/ Presentation of the conference

Context of the conference

The European Commission has recently highlighted the role of national courts in the implementation of Community law by adopting its communication of the 5th of September 2007 (COM 2007-502 final). The Commission is working on a communication specific to the role of national courts in the implementation of Community environment law.

The Environment Directorate-General (DG Env) is concerned by the implantation of Community law in the Member States, particularly in the new ones. Indeed, it is in the environmental field that the Commission has the most open infringement cases.

The Commission would like to develop a cooperation program with national courts in 2008. This program should result, in 2009, in training seminars for judges and workshops between judges from different countries in order to deepen the mutual knowledge of work habits.

The National Council of Bars (CNB) wanted to organize a seminar for lawyers concerning Community environment law. It hence joined the Commission project. The French Council of State and the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union showed their interest in the conference "The Judge in Europe and Community Environment Law" that deepens translational judicial dialogue.

Key questions

The environment issue concerns several actors: states, local authorities, industrial firms, lawyers specialized in environment law, environmental NGOs… How do national courts implement and enforce Community environment law in a European landscape marked by strong law traditions? How can the implementation of Community environment law be improved?

The conference theme covers several issues:

- the implementation of the Aarhus Convention on access to justice in environmental matters

- protection of nature and remedying of environmental damage with the implementation of the environmental liability directive
- the courts' power on environmental decisions, in particular within the scope of the Natura 2000 directive
- judges' training needs and dialogue with all interested parties.

Objectives of the conference

The conference "The Judge in Europe and Community Environment Law" offers the occasion to gather judges, lawyers, civil servants and individuals so that they can share their experiences and understand how Community environment law is interpreted and implemented in the different Member States.

The conference will also highlight the key role of the administrative judge and the diversity of its missions concerning environment. For instance, the French Council of State is judge, legal advisor of the Government, carries out studies and follows enforcement of courts' decisions.

The debates will show the judge's concern over dialogue with other actors of environment law, notably the European Parliament concerning the production of rules, local authorities, real estate professionals or environment law professional concerning the implementation of the rule.

Finally, the conference aims at identifying important themes for the training program in Community environment law and for transnational courts dialogue. The conference's content could be used as a basis to develop trainings as from 2009.

2/ Conference organizers and partners

Organizers:

CONSEIL D'ÉTAT

The Council of State: legal advisor of the government and supreme administrative judge.

The Council of State has two main function: an advisory function and a judicial one.

The Council of State is the legal advisor of the government. It studies all *projets de loi* (government's bills), *ordonnances* (Government's orders) and *décrets en Conseil d'Etat* (decree of the Council of State) before they are sent to the Council of Ministers. The Council of State expresses its opinion regarding the legal regularity and the form of the text and whether or not there is a reason to advise against it. The Government can ask any legal or administrative question to the Council of State. The Council of State tells the Government which European text proposals deal with legislative matters and must hence be transmitted to Parliament.

Each year the Council of State submits to the President of the Repulic a public report that suggests to the Government reforms in the legislative, regulatory or administrative fields.

The Council of State is the highest administrative court. It judges in particular litigation between administration and individuals. The Council of State is the *cassation* court for lower administrative courts and specialized

administrative courts. The Council of State is the first and last instance judge for recourses against decrees and decisions by some committees, and for regional and european elections. It is the appeal judge for litigation concerning local and district elections.

Concerning environment, the Litigation Section of the Council of State registered 102 new cases in 2007 and judges 100 cases. The *Public Works* section advises the Government on text dealing with environment. The *Public Works* Section reviewed 258 texts in 2007, a great deal of them concerned watter, sea, reservations, protected sites…

European Commission

DG Environment (DG ENV) : a key actor of Community environment law

Environment law includes roughly 200 directives about a great number of realms, from the very local level with waste treatment for instance, to the most global level with climate change.

Environment law, relatively new, raises specific issues from the judges' point of view. They face the difficulty of balancing opposing interests (environmental protection and socio-economic interests), the complexity of some mechanisms (Stock exchange of CO2 quotas

DG Env's mission statement is "protecting, preserving and improving the environment for present and future generations, and promoting sustainable development". DG Env has defined four main objectives:

- to ensure a **high level of environmental protection**, taking into account the diversity of situations in the various regions of the Community
- to contribute to **a high level of quality of life and well-being** for citizens
- to strengthen **measures at international leve**l to deal with regional, international or global environmental problems
- to promote and support the **implementation of environment legislation** and the **integration** of environmental protection requirements into all other European policies and activities.

To carry out its mission, DG Env has roughly **740 agents**. Almost half of them are working on implementation of environment policy and legislation. DG Env's budget comes to **346 million** euros in 2008. The number of open infringement cases or complaints has been recently reduced (687 open cases of infringement of environmental legislation at the end of 2006).

les avocats et l'Europe

Lawyers and Europe is an *ad hoc* organism created for the French Presidency of the European Union. This informal structure gathers the National Council of Bars (CNB), the Conference of the Bar Chairpersons and the Paris Bar. Lawyers and Europe organizes ten conferences, notably with the ministries of Justice, of Defence or the National School of Administration (ENA).

The National Council of Bars (CNB) represents the lawyers towards the French authorities, international organisations and other lawyers associations abroad. It also contributes to the harmonization of professional standards.

The CNB is also in charge of collecting and dividing up the financing of education and training for the profession. The CNB harmonizes training programs, coordinates training centres and sets up the conditions under which specialization degrees can be obtained.

Partners:

Association of the Councils of State and Supreme Administrative jurisdictions of the E.U. i.n.p.a

The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union is composed of the ECJ and the Councils of State or the Supreme administrative jurisdiction of each of the members of the European Union. The administrative court of Croatia and the Council of State of Turkey, take part in this forum as observers. The association promotes exchanges of views and experience on matters concerning the jurisprudence, organisation and functioning of its members in the performance, particularly with regard to EU law.
Besides studies and colloquia, the associate is in charge of the publishing of a newsletter and of a databank.

EU Forum of Judges for the Environnement

The European Union forum of judges for the environment, created in 2004, seeks to promote the enforcement of national, European and international environmental law by contributing to a better knowledge by judges of environmental law, by exchanging judicial decisions and by sharing experience in the area of training in environmental law.
In the wake of the United Nations Program for the Environment, the Forum, by organizing conferences, intends to foster the knowledge of environmental law and the sharing of experience on judicial training in Community environmental law. The 2005 conference dealt with "European Waste Law, Theory and Practise", the 2006 one with "Impact of Natura 2000 on environment licensing" and the 2007 conference was entitled "Criminal Enforcement of Environment Law".

Fédération européenne des juges administratifs

The Association of European Administrative Judges (AEAJ) seeks to advance legal redress of individuals vis-à-vis public authority in Europe and to promote the legality of administrative acts. Besides promoting the professional interests of administrative judges, the AEAJ intends to broaden the knowledge of legal redress in administrative matters among administrative judges in Europe (both the EU and the Council of Europe) by organizing meetings and seminars.
The Beaulieu-sur-mer 2006 seminar for instance dealt with "Primacy of EU Law for Administraive Judge" and the Würzburg 2007 seminar with "Independence and Efficiency of Administraive Justice". The AEAJ has also a working group on environment.

Société Française pour le Droit de l'Environnement

The French Society of Environment Law (SFDE), created in 1974, gathers the french community of environment lawyers in an association of a scientific nature. By organizing conferences and seminars, the SFDE fosters research and develops information concerning environment law.
In collaboration with NGOs and national, international and EU institutions, the SFDE studies positive law and reform projects planned by either the Parliament of the Government.
The SFDE also publishes five times a year the *Revue juridique de l'environnement* which is the oldest French environmental law review. The *RJE* is published with the support of the National centre for scientific research (CNRS) and the Environmental Law Centre of the Robert Schuman University of Strasbourg.

NB: The Revue juridique de l'environnement *will publish a special issue including the speeches and debates of the conference*. A subscription form is available at the entrance.

3/ Conference program

Thursday, 9th October 2008

10 : 30 – Opening session

Mr. Jean Marc Sauvé, Vice-president of the Council of State (France)
Mrs. Claire-Françoise Durand, Director-general of the Legal Service - European Commission
Mr. Christian Charrière-Bournazel, Chairman of the Paris Bar Association (France)

11 : 15 – Access to justice in environmental matters

Presidency : **Mrs Corinne Lepage**, Lawyer at the Paris Bar Association, former French Environment Minister
Speakers :
Mr. Charles Pirotte, European Commission, DG Environment
Mr. Jerzy Jendroska, Professeur of public law (Poland)
Mr. Werner Heermann, Vice-president of the administrative court of Würzburg (Germany)
Mr. Arnaud Gossement, Lawyer at the Paris Bar Association (France)

13 : 00 – Lunch

14 : 30 – The new system of prevention and remedying by the court of environmental damage

Presidency : **Prof. Maria Lee**, Professor of Law at University College London (United-Kingdom)
Speakers :
Mr. Julio Garcia Burgues, Head of unit, European Commission, DG Environment
Mr. Jan Passer, Judge at the supreme administrative court (Czech Republic)
Mr. Jean-Nicolas Clément, Lawyer at the Paris Bar Association (France)
Mr. Thomas Alge, Head of the « environment law » unit, Coordination office of Austrian Environmental organizations (Austria)

16 : 15 – Synthesis of the day

Mme Dominique Guihal, Judge at the Council of State (France)

Friday, 10th October 2008

9 : 00 – Extent of courts' review powers in the Member States

Presidency : **Mr. Georges Ravarani**, President of the administrative court of Luxembourg (Luxembourg)
Speakers :
Mr. Joseph Micallef, Judge at the appeal court of Malta (Malta)
Mr. Jan Eklund, Judge at the administrative court of Vasaa (Finland)
Mr. Ryszard Mikosz, Professor of public law (Poland)
Mr. Yann Aguila, State councillor (France)

10 : 45 – A court's review power in action : project carried out on a Natura 2000 site (comparative study)

Presidency : Mr. Luc Lavrysen, Judge at the Belgian constitutional court, President of the EU Forum of judges for the environment (UEFJE), Professor of Law at Ghent University (Belgium)

Speakers :

Mrs Renate Philipp, Judge at the Federal Administrative court of Germany (Germany)
Mrs Marie-Claude Blin, Deputy head of unit, European Commission, DG Environment
Mr. Jean-Claude Bonichot, State councillor, judge at the European court of justice (France)
Mr. Carlos de Miguel Perales, Lawyer at Uria & Menéndez, Professor of Law (Spain)

12 : 30 – Lunch

14 : 00 – Conclusion on cooperation between courts in Europe and training requirements

Presidency : Mrs Pia Bucella, Director of communication, governance and civil protection at the European Commission, DG Environment

Speakers :

Mr. Xavier Delcros, Director of continuing education at the Paris law school (France)
Mr. Wolfgang Heusel, Director of the Academy of European Law-ERA (Germany)
Mrs Mary Sancy, Professor of environment law in Geneva (Switzerland)

15 : 30 – Closing session

M. Hubert Haenel, President of the Senate's delegation for the European Union
Mr. Vassilios Skouris, President of the European Court of Justice (Greece)

II. THE DEBATES : ASSESSMENT, COMPARISONS AND PROSPECTS

Opening session : Jean-Marc Sauvé, Claire-Françoise Durand and Christian Charrière-Bournazel

Jean-Marc SAUVE

Vice-president of the Council of State (France)

Jean-Marc Sauvé graduated from the Political Science Institute in Paris (Sciences-Po) and attended the National School of Administration (ENA). He started his career at the French Council of State in 1977. He worked as legal advisor for Maurice Faure and Robert Badinter, ministers of Justice, from 1981 to 1983.

He was director of the administration and equipment at the ministry of Justice from 1983 to 1988, then director of legal affairs at the ministry of Interior from 1988 to 1994 before becoming prefect of the Aisne département.

Jean-Marc Sauvé became Counsellor of State and Secretary General of the Government.

Since the 3rd of October 2006, he is the vice-president of the Council of State.

Claire-Françoise DURAND

Director-General of the Legal Service at the European Commission

After graduating from Sciences-Po (Public service, 1968), Claire-Françoise Durant obtained a Master of Law (LLM) at Yale in 1970 and became doctor in law in 1978.

Claire-Françoise Durand joined the Commission in 1973 as administrator in the DG "Competition". In 1982, she joined the Legal service. She was successively assistant to the Director-General, Director for institutional affairs, Director for the internal market and the environment, then Deputy Director-General of the Legal service.

Since 2008, Claire-Françoise Durand is Director-General of the Legal Service of the Commission.

Christian CHARRIERE-BOURNAZEL

Chairman of the Paris Bar Association

Christian Charrière-Bournazel is the holder of a postgraduate diploma specializing in literary, artistic and industrial property as well as of a master's degree in classical literature at the Sorbonne. He is lawyer at the Paris Bar since 1973 and Chairman of the Paris Bar Association since the 1st of January 2008. He was first secretary of the "young lawyers Conference" in 1975.

Currently working at August & Debouzy, Christian Charrière-Bournazel focuses on literary and artistic property, media and press law, leases, business criminal law and enterprise law.

He was member of the French Competition Council from 2001 to 2008.

Christian Charrière-Bournazel is also member, since 1987, of the steering committee of the LICRA (International league against racism and anti-semitism) and head of its legal committee.

PRESENTATION OF THE ROUND TABLES

1/ ROUND TABLE N° 1 :

Access to justice in environmental matters

1/ Theme of the first round table

The Aarhus Convention, signed on the 25h of June 1998, made access to justice on environmental matters a key element of good governance. Access to justice, in particular in environmental matters, differs widely from one Member State to another, depending on whether or not said individuals and associations are considered to have *locus standi*. Moreover, the cost factor can often, in practice, be a significant barrier.

This first round table will address several issues: access to justice, cost of proceedings and the Commission's draft directive on access to justice in environmental matters.

2/ Presentation of the speakers

Presidency:

Corinne LEPAGE

Lawyer at the Paris and Brussels Bars Associations, former French Environment Minister, doctor of law

Lawyer since 1975, Corinne Lepage, associated with Christian Huglo, founded Huglo Lepage & associés in 1991. Member of the Paris and Brussels Bars, she developed a judicial and advisory activity for firms, associations and jurisdiction.

Minister of Environment from 1995 to 1997, Corinne Lepage tried to put environment at the heart of public policies. She teaches in several schools and university and, notably, lectures at the Political Science Institute in Paris (Sciences-Po) on sustainable development.

President of CAP 21, of the CRII-GEN, of the Law Circle, of the National Association of Doctors of Law, Corinne Lepage is also vice-president of "Environment without Borders". Among her publications: *On ne peut rien faire, Madame le ministre* (1997), *Bien gérer l'environnement, une chance pour l'entreprise* (1999), *La Politique de Précaution* (2001), *De l'écologie hors de l'imposture et de l'opportunisme* (2003), *Santé et Environnement l'Abécédaire* (2005) et *Et si c'était elle ?* (2006).

Speakers :

Charles PIROTTE

Jurist at the European Commission, DG Environment

Charles Pirotte graduated from the University of Liège and from the College of Europe in Bruges, where he focuses on Community law. He worked from 1992 to 1994 in the service in charge of the free movement of goods.

Charles Pirotte joined the DG Environment in 1995. He worked until 2001 on the control of the implementation of Community environment law. From 2001 to 2007, he was in charge of the "environmental liability" realm. He is now coordinating the work of the "Environmental Governance" team at the DG Env.

Jerzy JENDROSKA

Professor of public Law (Poland)

Jerzy Jendrośka, PhD, holds the Chair of European and Public International Law at Opole University, Poland. He is also the Managing Partner at Jendrośka Jerzmański Bar & Partners, Environmental Lawyers; and the Director of the Environmental Law Center, Wrocław, Poland.

Jerzy Jendroska has been involved in drafting most of environmental legislation in Poland since 1990. He is member of the National Environmental Impact Assessment Commission since 1994, permanent legal expert of the Parliamentary Environment Commission since 1996, Vice -chair of the governmental GMO Commission (2002 - 2006) and a Member of the Committee „Man and the Environment" of Polish Academy of Sciences (2003-2007).

Jerzy Jendroska worked at United Nations Economic Commission for Europe (UNECE) as a Secretary to the Aarhus Convention (1998-1999) after having represented the Government of Poland in the Aarhus Convention negotiations. He is arbitrator at the Permanent Court of Arbitrage in the Hague since 2002, member of the Compliance Committee of the Aarhus Convention since 2006 and member of the Implementation Committee of the UNECE Espoo Convention.

Mr. Jendrośka is author and/or editor of 28 books and about 200 articles (in Polish, English, Russian, Italian and German) dealing with environmental law in international, domestic and comparative perspectives.

Mr. Jendroska is a member of the International Council of Environmental Law (ICEL) and a member of IUCN Environmental Law Commission.

Werner Heermann

Vice-president of the administrative court of Würzburg

Holder of doctorate in civil and canon law (*doctor iuris utriusque*) at the university of Würzburg, Werner Heermann is administrative judge since 1975. From 1977 to 1983, he worked as legal advisor in the public service, then as judicial trainer. From 1990 to 1992, he helped to establish an administrative jurisdiction in Thüringen (ex-GDR).

Currently vice-president of the Administrative court of Würzburg (Bavaria), Werner Heermann is also responsible for the training of young lawyers. Moreover, he vice-president of the Association of European Administrative Judges (AEAJ) and head of its working group on environment law.

Arnaud Gossement

Lawyer at the Paris Bar Association

Arnaud Gossement is partner at Huglo-Lepage & Associés Conseil. Doctor in law, he worked on the "*principe de precaution*" (precautionary principle) for his thesis. He mainly works on environmental law.

Arnaud Gossement teaches as well environment law in the university Paris I Sorbonne, at Cergy-Pontoise university and at Sciences-Po.

He has notably published the article « Avant-projet de loi sur la responsabilité environnementale : vers le principe pollué-payeur » *? »*, *Droit de l'environnement*, n°145, janvier – février 2007, p.24

3/ Documentation

- ***ECJ's case law***

Commune de Mesquer v/ Total France SA et Total Internatioanl Ltd
24 june 2008
in Case C-188/07

By the its decision of the 24th of June 2008, the European Court of Justice (ECJ) answered a preliminary reference from the Cour de Cassation (France) in the case, between the French municipality of Mesquer and two Total oil companies, following the sinking of the oil tanker Erika.

The ECJ rules that a heavy fuel oil sold as a combustible fuel does not constitute waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste.

However, hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Directive 75/442.

National court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a *producer of that waste* within the meaning of Directive 75/442. Thereby, the "seller-charterer", if he contributed to the risk that pollution caused by the ship wreck would occur, can be regarded as a "previous holder" in the meaning of the Directive.

Under special conditions, the national law of a Member State, in order to ensure that Directive 75/442 is correctly transposed, has to make provision for the cost of pollution to be borne by the *producer* of the product that from which the waste thus spread came

In accordance with the "polluter pays" principle, however, such a producer cannot be liable to bear that cost unless he *has contributed by his conduct to the risk* that the pollution caused by the shipwreck will occur.

- ***Executive Summary Report on access to justice in environmental matters Milieu* Inventory of Member-States' measures on ace s to justice in environmental matters /19 September 2007**

Conclusions of the Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters

(extracts)

Within the 25 Member States of the European Union, environmental law has mainly developed over the last fifty years, though there existed, of course, earlier provisions in all States, in particular in urban agglomerations. All Member States have charged the administrations to take care of the environment, to issue permits, control private and public environmental-related activities, balance the need for infrastructure against the preservation of the environment and, generally, monitor the state of the environment. With the number of environmental regulations, the tasks of the administrations were constantly increased. It was thus only normal that also the questions how and by whom the administrative acts or omissions with regard to the environment could be challenged in courts became of greater concern. While it was normal that an economic operator who felt aggrieved by an administrative act or omission could address courts, the new phenomenon of environmental law was that individuals and groups or associations addressed the courts, seeking protection of the environment against administrative measures or omissions.

Where such an action is motivated by an "interest" or – as some legal systems in Member States put it – a

subjective right of the applicant, the judicial systems have had no problems in dealing with it, as such cases are not really different from other cases where individuals or groups may have asked for redress against administrative actions or inactions. Such environmental cases where the applicant has himself an interest or a right often concern neighbourhood issues, though they are not limited to them. Member States' approaches differ as to the question of when a person is close enough to the place of impairment to seek redress. Several Member States have left this decision to the courts themselves; others have taken such a decision by way of substantive law provisions. On rare occasions, the legislator expressly excluded judicial redress.

The real challenge for the judicial system appeared where the problem of protecting the environment against acts or omissions of the administration was raised by a person or a group that did not have in the traditional sense a personal interest or right in the result of the litigation, in other words, where the action was altruistic.

No Member State has gone so far as to allow the environment itself to raise issues in court and to appear as the applicant. The famous question "Should trees have standing?", formulated in the early 1970s by a United States lawyer, has not found a positive echo in the legal systems of any of the 25 Member States. The closest to such an approach is the system in the Austrian Länder, where the institution of environmental attorney (*Landesumweltanwalt)* was created for nature protection matters. These attorneys are charged with the protection of the environment; they participate in particular in nature protection and environmental impact assessment procedures and have the power to appeal against administrative decisions to either the Land Governments or to the administrative courts.

As regards individuals who introduced altruistic actions to protect the environment, Member States reacted in different ways. Some countries gave the possibility to everybody to act in favour of the environment (*actio popularis*). This possibility was expressly introduced by Portugal, a country that also recognises an individual constitutional right to a clean environment. In the United Kingdom, Ireland and Latvia, the applicant must have an interest in order to have legal standing in court; however, the very liberal interpretation given to the notion of "interest" leads to a situation which is close to that of an *actio popularis*. The same result is reached in Spain, which introduced an *actio popularis* in specific areas of environmental law.

The majority of Member States continue to require an "interest" of an applicant for seeking judicial redress. The interpretation of this notion and hence the degree of flexibility varies. Some Member States allow individuals to a larger extent to participate in administrative decision-making and they link this procedural position with the interest of a person to seek judicial redress. Others remain strict in the interpretation of "interest" and thus make the individual application for judicial redress difficult or even impossible.

The appearance of environmental groups has complicated the issue of standing. While in legal theory natural and legal persons have corresponding rights to seek judicial review, most of the 25 Member States recognise in one way or the other that environmental organisations have a specific function in the protection of the environment. This has led to a considerable number of different ways to organise access to justice by environmental organisations; for most of these criteria have been laid down in specific legislation. Examples of criteria include the existence of statutes where the organisation's objective to protect the environment is laid down, a democratic character of the organisation, a certain duration of existence of the organisation, a geographical proximity to the effect of the administrative act or omission or even (in Sweden) a minimum number of members.

These criteria and others not mentioned here vary from one Member State to the other. In some Member States, environmental groups which comply with the established criteria are considered to have an "interest" in the environment and thus legal standing; in other Member States, the "interest" has to be established in addition to fulfilling the criteria.

Some Member States require legal personality of the organisation, which excludes *ad hoc* organisations. Others also allow *ad hoc* groups to act.

Some Member States limit the possibility of altruistic court actions by environmental organisations to specific sectors of policy, in particular nature protection; others allow actions with regard to all aspects of the environment. Many Member States require that, before application is made for judicial review, the administration has the possibility to review and eventually revise its acts or omissions; in Denmark an administrative appeal board may be addressed which can challenge the administrative

decision. This correction of acts – or omissions – by the administration itself may help to avoid unnecessary litigation and rationalise court procedures.

The *raison d'être* of other criteria is not always easy to understand. In most cases, the criteria appear aimed at making sure that only organisations which are well known in public (registered, several years of existence etc.) seek judicial remedy in court, and that not too many actions are brought. The criteria do not aim primarily at optimising the protection of the environment.

This leads to the question of the efficiency of the system on access to justice in environmental matters. Before some comments in this regard are given, some further remarks on the judicial system, the costs of litigation, and the remedial measures should be made. The organising of the system for judicial review in environmental matters has not yet come to an end, which is undoubtedly also due to the short period that elapsed since the appearance of environmental law. Some Member States set up specialised environmental courts to deal with environmental litigation. As this has happened rather recently, it is too early to draw conclusions on the efficiency of such organisational measures. They are also inherently linked to the organisation of the judiciary in each Member State. Generally, though, it appears as if only some, but not all environmental issues are submitted to such specialised courts, and in particular not cases which are at the borderline with other sectoral policies (agriculture, energy, fishery, transport).

Other Member States have activated or instituted public interest bodies – ombudsman, public prosecutor – to assume functions in the area of environmental impairment and, where necessary, also to act *vis-á-vis* the administrations. However, in most cases, these environmental tasks were given to the judiciary in supplement to already existing tasks which has limited the number and the efficiency of interventions in the highly differentiated environmental sector.

Almost no Member State has adopted specific measures with regard to the costs of litigation, in order to take account of the altruistic character of environmental action[1]. It may be that this is due to the difficulty of differentiating between such public interest cases and cases in the interest of the applicant, though a registered, non-profit making environmental organisation may normally be presumed to act in the general interest of the environment, not in its own interest.

The rules on court costs vary considerably. Expert fees and the cost of legal representation are generally considered to be high and influence decisions to take judicial actions. Most environmental organisations indicate that the cost risk is a deterrent factor, in particular because environmental organisations are not profit-making and have limited revenues. Legal aid – which again shows no specificity with regard to environmental actions, with the exception of Portugal and Spain – does not play an important role in practice.

In no Member State is any reward attributed to individuals or environmental organisations for bringing a successful action to the court. The US system of punitive damages – where the applicant receives an amount of money for having brought the action and thus prevents further disadvantage – is unknown in the Member States; it is true, though, that this system principally applies against private polluters. Nevertheless, EC Member States do not provide for any incentive to bring environmental cases to the judiciary, though it is, of course, in the general interest to avoid environmentally damaging administrative acts or omissions.

Another deterrent to bring court action is the fact that such action has, in most Member States, no suspensive effect. Often, the courts may decide to suspend the execution of an administrative decision, but seem to be cautious to do so, in view of the costs which delays may cause and in view of the length of the judicial procedure.

Overall, the combined effects of the requirements in particular on legal standing, the cost risk, the length of procedure and the limited availability of measures with suspensive effect do not favour the bringing of a judicial action in cases where the applicant is of the opinion that the administration has not respected the law on the protection of the environment. Member States are quite willing to allow individual persons or associations to draw the attention of the administration to any errors, mistakes, wrongful acts or omissions which contradict the laws on environmental protection. However, they are less willing to grant similar access to the courts in order to have the administrative acts or omissions checked.

The very great power of the administration – through permits, controls, monitoring measures, data

[1] Portugal and Spain have specific provisions to ensure that NGOs benefit from legal aid in environmental litigation.

availability, planning and executive functions - with regard to measures that affect the environment demonstrates the need in a democratic society to establish checks and balances in order to contain this power. Whether the checks and balances are to be laid in the hands of another administrative body – we think of the ombudsman or prosecutor-type system – or whether the possibility to check and thus to balance the power of the administration is put into the hands of civil society – in concrete terms: individuals and environmental organisations – is to be answered according to the tradition of each Member State. However, there can be no doubt that the Aarhus Convention has in mind that civil society should have the possibility to act.

Indeed, Article 9 (3) of the Convention expressly mentions "members of the public" of which environmental organisations are part (see in this regard also Article 1(5) of the Aarhus Convention).

It appears necessary to mention in this context the roots of the Aarhus Convention. In the 1970s, there were discussions under the auspices of the Council of Europe to complete the European Convention on Human Rights by a Protocol on the right to a clean environment. These efforts failed, as no agreement could be reached on the drafting of such a right, though there was a consensus that such a right existed. Subsequently, efforts at national and international level concentrated on procedural rights of individuals with regard to the environment, based on the following reflection: the administration has great powers to positively or negatively influence the environment, by acting or omitting to act. However, the administration is not the owner of the environment. Rather, the environment is everybody's. For this reasons, there must be a possibility for individuals and environmental organisations to participate in the administrative making of decisions that affect the environment. And in order to allow individuals to effectively participate in this process, they must have the same amount of information on the environment as has the administration. Finally, there might be controversies between individuals and the administration on the degree of protection which the environment needs, or the administration might not act where, in the opinion of individuals, it should take action. In such cases, the courts as arbiters between the administration and the individuals should decide on the controversy.

Seen from this perspective, an *administrative* review of the administrative acts or omissions is an important and useful step to allow relatively quick, inexpensive and efficient corrections of decisions. However, such administrative review mechanisms cannot substitute the *judicial* review as the ultimate recourse. Indeed, administrations which are, under democratic theory, obliged to pursue the general interest have over the last fifty years been exposed to more and more influence from policy, political parties or vested interests. Courts are perceived to be more neutral, to ensure the balance of diverging interests and to ascertain that the law is applied. Access to the courts is widely and rightly seen as a possibility of access to justice which means access to a system where also due consideration is given to the weaker positions and diffused interests in a society, to minorities and to those who – as the environment – cannot express and defend themselves.

The Aarhus Convention intends to give broad access to the courts in environmental matters. It should be remembered that over the last twenty years, all Member States, in line with international developments, have granted much broader access to environmental information than in the past, moving largely away from the principle of administrative secrecy. They have accepted that environmental issues are of concern to everybody and that an open discussion and shared information is beneficial to all. In the same way, participation issues in environmental decision-making procedures have gained importance in the last decades. More and more is the civil society associated with and integrated into the decision-making process on environmentally relevant decisions, with the result of citizens feeling more in agreement with such decisions and with the process that has led to them. And neither has the administration nor the decision-making process been negatively affected by the greater openness, transparency and accountability of local, regional or national administrations.

Until now, the issue of access to courts has not seen similar significant changes. The existing systems tried to accommodate the appearance of environmental litigation, by changing the institutions and the procedures as little as possible. There was and there is a fear that greater accessibility of the courts in environmental cases would lead to an avalanche of court procedures and thus paralyse economic development and administrative decision-making. But data, even of those Member States where *de iure* or *de facto* an *actio popularis* exists, shows that these apprehensions are not founded. The number of court cases in environmental matters is very small in all Member States. However, the possibility of individuals and environmental organisations to have, as a last resort, access to the courts increases the relevance of environmental protection in day-to-day discussions and policy, ensures the acceptance of

administrative decisions and gives individuals the feeling that their commitment to environmental protection is being respected.

Also, it is very likely that a better access to the courts in environmental issues will incite the administration to better prepare its decisions, to more carefully consider its omissions to act, and to better associate individuals and environmental organisations in this process. Indeed, for a number of reasons – length of procedure, cost, complexity of cases, and others – access to the courts will always remain the last resort for the settlement of disputes. On environmental issues, perhaps one out of thousand, if not of ten thousand cases goes to court, and this is not likely to change in future. Thus, the decisive elements are and will remain the decisions by the administrations to take action or not to act, already because of the number of decisions which need to be taken every day. In view of this, a concept of checks and balances, also with regard to the administrative power, is capable of positively influencing deliberations and decisionmaking processes in environmental matters.

The more Member States accept that citizens have legitimate interest to see the quality of the environment preserved, protected and improved, the more they maintain contradictions, if they do not allow citizens to defend this legitimate interest in courts. It is not by chance that the Member State with the most liberal access to the courts - Portugal – is also a Member State which has recognised, in its constitution, a right of each individual to a clean environment. Asking citizens to help stop the loss of biodiversity, to save water, energy and other natural resources and to behave environmentally responsible, but restricting the possibility of citizens to have access to the courts, is, in the long term, an inconsistent policy.

This study has not had to look into possibilities to change the present situation on access to the courts in Member States. It had to describe the status quo in 25 Member States. Whether and how the present situation on access to justice will be changed in future is also a political question. It is hoped that this study contributes to a decision on environmental justice within the European Community and its Member States.

A full version of the Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters can be found on the DG Env's website at the following address:
http://ec.europa.eu/environment/aarhus/study_access.htm

- ***AEAJ comments on the milieu study***

Association of European Administrative Judges (AEAJ)

Statement on Access to Administrative Justice in Environmental Matters
– A Comment on the Milieu Study issued by the European Commission –

following the workshop of the Working Group on Environmental Law
held in Brussels on the 14th of March 2008

Updated 31th of May

During the workshop the AEAJ Working Group discussed the transposition of the third pillar of the *Aarhus Convention* into national law and ventured to assess the so-called "Milieu Study" issued by the European Commission. The following Member States had sent delegates: Austria, Finland, France, Germany, Greece, Hungary, Italy and Poland.

Each delegate presented a case on environmental law from his/her home jurisdiction. The presentation was followed by a discussion whereby the other members commented on the case and offered a solution according to their national laws[2]. It turned out that, although all the Member States have so far transformed the *Aarhus Convention* into national law a considerable amount of actions were deemed inadmissible under national law.

[2] The cases and solutions are published on the AEAJ's website www.aeaj.org

Each delegate then issued a statement on his/her national report and the conclusions arrived at by the authors of the Milieu Study. According to the Working Group the national reports in Milieu Study more or less accurately describe the general structures of administrative jurisdiction in the Member States. The Working Group agreed with the findings by the Milieu Study that national rules indeed widely differ from Member State to Member State. Some of the Member States, Austria and Germany in particular, have set up restrictions to access to administrative justice in environmental matters which in turn create problems without parallel in other Member States. The Working Group criticised the state of affairs as to the scope of judicial review in some Member States. According to the Working Group access to justice is not worth its name if, for example, the court is limited to a control of procedural aspects only. The Working Group raised concerns as to the effectiveness of judicial remedies. Article 9 para. 4 of the *Aarhus Convention* demands (…) timely and not prohibitively expensive procedures. According to the Working Group effectiveness depends on other factors too. The Working Group regards the different deep-rooted judicial traditions as the crucial problem on the way to common standards for the application of the third pillar of the *Aarhus Convention*. The Working Group stressed the need for more interaction between the representatives of the different legal systems. According to the Working Group it is essential for the judges within the administrative judiciary to have a certain knowledge of the functioning of other legal systems in order to be able to critically evaluate the situation at home. The Working Group concluded that the access to administrative justice in environmental matters granted so far does not always correspond to spirit of the *Aarhus Convention* and that the respective Codes of Judicial Procedure in the respective Member States are in need of amendment.

II. Proposal for a Directive of the European Parliament and the Council on Access to Justice in Environmental Matters COM (2003) 624 final

The Aarhus Convention is not regarded as self-executing. The Aarhus Convention allows for more detailed regulation. The Working Group therefore principally supports the Proposal in order to establish common European standards. However, it is questionable if the Proposal goes any further than the Aarhus Convention itself The Proposal could simply be seen as a binding variation of Article 9 of the Aarhus Convention. It does not seem necessary to differentiate between "members of the public" and "qualified entities" (see Article 4 and 5 of the Proposal). The Preamble of the Aarhus Convention demands that effective judicial remedies be accessible to the public, "*including organisations*". The term "qualified entities" could lead to a restrictive interpretation of the Aarhus Convention in the sense that only approved associations must have access to justice. The Working Group is of the opinion that Article 6 of the Proposal should foresee exceptions, if the initial administrative procedure includes a thorough investigation, participation of stakeholders and a public hearing like e.g. the German "Planfeststellungsverfahren". In these cases a request for internal review would lengthen the procedure and present an obstacle for judicial remedies.

III. Recommendation on Best Practice

The AEAJ Working Group like judges' organisations in general does not feel constricted to evaluate existing rules. The Working Group does not solely focus on the compliance of national law with European Law or International Public Law. The following recommendations on best practice shall be more than correct interpretation of higher range law and more than the lowest common denominator. But of course judicial traditions must be respected as much as possible.

1. Notion of "Environmental Matters"
For reasons of legal certainty it is recommended to make use of the enumerative method. The law on urbanism should be included in the catalogue of environmental matters.

2. Legal standing of NGOs
It is regarded as indispensable for the enforcement of environmental law that NGOs have legal standing before the courts. However, it seems not advisable to grant access to associations which have not been approved since these groups tend to defend individual interests of their members only.

3. Legal standing of public self government bodies
In some Member States legal standing is granted to self government bodies. However, it does not seem vitally essential for the enforcement of environmental law.

4. Public attorney in Environmental Matters
The institution of an "ombudsman" is not a necessary feature where the rules on legal standing are liberal. The opposite holds true if the rules on legal standing are restricted. If the ombudsman is truly independent he/she can contribute to the enforcement of environmental law.

5. Suspensive Effect and Interim Relief
In some Member States the suspensive effect must be granted by the public authority or the court. In other

Member States suspensive effect of an action is a general rule, subject to exceptions.

In any case, an effective system of interim relief must be installed. The procedure has to be easily available. It must be speedy, protect against irreversible damage. The courts should be prepared to order supensive effect in so-called *in-dubio-situations*.

6. Two judicial instances?
In the most Member States the judiciary comprises courts of first instance and courts of appeal. Although this is not regarded as essential, the Working Group recommends a second instance which may be limited to a review on the grounds of law, not facts, in order to assert the unity of the legal order.

7. Investigation in the Judicial Procedure
According to the legal tradition in some Member States (e.g. Hungary, Poland) the courts do not engage themselves in the investigation of the facts so that they will not quash a decision where the public authority has wrongly investigated the facts. These Member States rely on a request for internal review (see Article 6 of the Proposal). By majority of votes the Working Group is of the opinion that such a limitation of the grounds on the basis of which a decision can be quashed is not desirable in environmental matters since the investigation of the facts - at least in the first instance – may be more important than the interpretation of law.

8. Representation by a Lawyer
The issue of representation by a lawyer is connected with the burden of costs. In most of the member States the representation by a lawyer is obligatory before courts of second instance. This is regarded as a good practice.

9. Privilege for NGOs concerning Legal Aid?
The general rules seem to be sufficient.

10. Low Costs or Dispensation for NGOs?
In many Member States court fees are already quite low and therefore have no prohibitive effect on access to administrative justice. But if the fees are high and the "loser pays it all" principle is in place the financial risk can be a serious obstacle. The Working Group recommends a dispensation of court fees including costs of evidence for NGOs if they exceed a small lump sum.

- ***Aarhus convention, 25th June 1998***

CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (extracts)

done at Aarhus, Denmark,on 25 June 1998

The Parties to this Convention,

Recalling principle l of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-todate environmental information,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the "Environment for Europe" process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:

Article 1
OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 2
DEFINITIONS

For the purposes of this Convention,
1. “Party” means, unless the text otherwise indicates, a Contracting Party to this Convention;

2. “Public authority” means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.
This definition does not include bodies or institutions acting in a
judicial or legislative capacity;

3. “Environmental information” means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

4. “The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 3
GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.

6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters

without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Article 4
ACCESS TO ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:
(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species. The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

Article 5
COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:
(i) Publicly accessible lists, registers or files;
(ii) Requiring officials to support the public in seeking access to information under this Convention; and
(iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

(b) Texts of legislation on or relating to the environment;

(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention, provided that such information is already available in electronic form.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;

(b) International treaties, conventions and agreements on environmental issues; and

(c) Other significant international documents on environmental issues, as appropriate.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

7. Each Party shall:

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and

(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and offsite treatment and disposal sites.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

Article 6
PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) The proposed activity and the application on which a decision will be taken;

(b) The nature of possible decisions or the draft decision;

(c) The public authority responsible for making the decision;

(d) The envisaged procedure, including, as and when this information can be provided:
(i) The commencement of the procedure;
(ii) The opportunities for the public to participate;
(iii) The time and venue of any envisaged public hearing;
(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) A description of the significant effects of the proposed activity on the environment;

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

Article 7
PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Article 8
PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible.

Article 9
ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as

a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Article 10
MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

(d) Establish any subsidiary bodies as they deem necessary;

(e) Prepare, where appropriate, protocols to this Convention;

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument

concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

Article 11
RIGHT TO VOTE

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 12
SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

(c) Such other functions as may be determined by the Parties.

Article 13
ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

Article 14
AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that

not more than one third of the Parties have submitted such a notification.

7. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

Article 15
REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

Article 16
SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in annex II.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Article 17
SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Article 18
DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

Article 19
RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization’s member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

Article 20
ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration

organization shall not be counted as additional to those deposited by States members of such an organization.

3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

Article 21
WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

Article 22
AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

Annex I
LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

1. Energy sector:
(…)

2. Production and processing of metals:
(…)

3. Mineral industry:
(…)

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):
(…)

5. Waste management:
(…)

6. Waste-water treatment plants with a capacity exceeding 150 000 population equivalent.

7. Industrial plants for the:

(a) Production of pulp from timber or similar fibrous materials;
(b) Production of paper and board with a production capacity exceeding 20 tons per day.

8. (a) Construction of lines for long-distance railway traffic and of airports 2/ with a basic runway length of 2 100 m or more;
(b) Construction of motorways and express roads; 3/
(c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tons;
(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5% of this flow. In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:
(a) 40 000 places for poultry;
(b) 2 000 places for production pigs (over 30 kg); or

(c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tons or more.

19. Other activities:
- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;
- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;
- (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;
(b) Treatment and processing intended for the production of food products from:
(i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;
(ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day
(average value on a quarterly basis);
(c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);
- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;
- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
- Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

Notes
1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

2/ For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

3/ For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

Annex II
ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the

request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so
inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:
(a) Provide it with all relevant documents, facilities and information;
(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

2/ ROUND TABLE N° 2 :

The new system of prevention and remedying by the court of environmental damage

1/ Theme of the second round table

Directive 2004/35/CE on environmental liability and environmental damage is a key new component in the framework of environmental law. It should have been transposed by the end of April 2007. Under its term, in the event of environmental damage, Member States are required to establish special proceedings base on the "polluter-pays" principle. The directive also sets out a specific system for appeals against decisions taken by the authorities in this realm.

The round table will briefly describe the progress of the transposition process of the environmental liability directive. After highlighting the outline of the directive, the round table address the problems linked to the implementation of the directive and the questions of jurisdictional competence and proceedings.

2/ Presentation of the speakers

Presidency :

Prof. Maria LEE

Professor of Law at University College London

Maria Lee is professor of law at University College London. Her main teaching and research interests lie in the law and policy of environmental protection and the borderlines between civil liability and environment regulation.

Her recent publications include *EU Environmental Law: Challenges, Change and Decision-Making* (2005, Hart Publishing); "Regulatory Solutions for GMOs in Europe: The Problem of Liability" 2003 *Journal of Environmental Law and Practice* 311-340; "The Changing Aims of Environmental Liability" 2002 *Environmental Law and Management* 185 192; *Environmental Protection, Law and Policy: Text and Materials* (2007, Cambridge University Press – co-authored with Jane Holder).

Speakers :

Julio GARCIA-BURGUES

Head of Unit at the European Commission, DG ENV

Julio Garcia Burgués joined the European Commission in 1986. As Head of the Infringements Unit in DG ENV, he is in charge of legal enforcement as well as of other legal files, including environmental liability and environmental crime.

In previous assignments in DG ENV he was in charge of international affairs, trade and environment and international environmental agreements.

Jan PASSER

Judge at the supreme administrative Court (Czech Republic)

Jan Passer graduated in law from Charles university in Prague in 1997 and in European law from Stockholm university in 2000. Since 2007, he is doctor in law and in philosophy.

From 2001 to 2004, Jan Passer was judge at the District Court for Prague 2. In the meantime, he did an internship at the Court of First Instance of the European communities and one at the ECJ.

Since 2004, Jan Passer is judge at the Supreme Administrative Court. Member of the tax and financial division, he deals with tax and financial law and with general administrative law (including environmental law). Besides, he is member of the panel of the Supreme Administrative Court that decides electoral matters.

Jan Passer also lectures at the Czech Judicial Academy and at Masaryk University in Brno. He is member of the board of the Czech Society for European and Comparative Law and member of the European Forum of Judges for the Environment.

Jean-Nicolas CLEMENT

Lawyer at the Paris Bar Association

Jean-Nicolas Clément graduated in law and sociology. He also graduated from Sciences-Po (Public service section, 1985) and obtained an advanced studies degree (DEA) in environment law at Paris II Panthéon-Assas university.

Jean-Nicolas Clément worked from 1986 to 1989 at the legal division of the Equipment Board of EDF (French electricity supplier). He was then admitted to the Paris Bar in 1990 with certificates of specialization in public and environmental law. He joined for one year Lemaître Monod, attorney-at-law Conseil d'Etat and Cour de cassation. He worked at Lafarge Flécheux as associate then partner from 1990 to 2002.

Since 2002, Jean-Nicolas Clément is partner at UGGC & Associés. His areas of practice are Environment law, ICPE law, mining law and quarries law, nuclear law and energy law.

Jean-Nicolas Clément is also member of the editing committee of *Bulletin du Droit de l'Environnement Industriel (BDEI)*, of The French Society of Environment Law 5SFDE), of the Society of Comparative Law and of the International Association of Nuclear law.

Thomas ALGE

Legal expert at « Justice and Environment » and at the Ökobüro (Coordination office for environmental organizations)

Thomas Alge holds a master's degree in law at Vienna University (Faculty of Law) since 2001 and is pursuing a Ph. D. degree in the Economics and Business Administration department. Thomas Alge worked as trainee in three Austrian courts and as legal assistant in the law firm Fiebinger Polak Leon & Partner.

Since 2002, he heads the environmental law service facility for NGOs and grassroots initiatives at the Ökobüro, an organization that gathers 14 Austrian environmental associations (Greenpeace Austria, WWF Austria, Global 2000…). His areas of expertise include Austrian, European and international environmental law and policy and environmental impact assessment. He focuses in particular on activities and projects in central and southeastern Europe.

Thomas Alge is also treasurer and member of the executive committee of the NGO "Justice and Environment", a European network of Environmental law organizations. He thus works as project manager and coordinator. He also works as trainer in legal issues.

Among his publications: *Strategic environmental impact assessment in infrastructure projects: case studies and legal analysis of transposition in five EU member states* (Justice and Environment, 2007), *Umweltstrafrecht: der neue Richtlinienvorschlag der Europäischen Kommission* (Europa: Magazin zur EU-Umweltpolitik, 2007).

3/ Documentation

- **Press release and summary of the White Paper on Environmental Liability (extracts)**

Brussels, 9 February 2000

The European Commission has today adopted a White Paper on Environmental Liability. The objective of the Paper is to explore how the polluter pays principle one of the key environmental principles in the EC Treaty can best be applied to serve the aims of Community environmental policy. Avoiding environmental damage is the main aim of this policy. The White Paper explores how a Community regime on environmental liability can best be shaped. Having explored different options for Community action, the Commission concludes that the most appropriate option is a Community framework directive on Environmental Liability. The White Paper responds to a request from the European Parliament for proposals for legislation in this field.

These days, we are confronted with cases of severe damage to the environment resulting from human acts. The recent accident with the Erika oil tanker and the incident, a few years ago, near the Doñana nature reserve in the South of Spain, are only two examples of cases where human activities have resulted in substantial damage to the environment, involving the suffering and death of hundreds of thousands of birds and other animals.

So far, the Member States of the European Union have established national environmental liability regimes that cover damage to persons and goods, and they have introduced laws to deal with liability for, and clean up of, contaminated sites. However, until now, these national regimes have not really addressed the issue of liability for damage to nature. This is one reason why economic actors have focused on their responsibilities to other people's health or property, but have not tended to consider their responsibilities for damage to the wider environment. This has traditionally been seen as a 'public good' for which society as a whole should be responsible, rather than something the individual actor who actually caused the damage should bear. The introduction of liability for damage to nature as proposed in the White Paper, is expected to bring about a change of attitude that should result in an increased level of prevention and precaution.

On adoption of the White Paper by the Commission Environment Commissioner Margot Wallström stated: "We have now laid the foundations for an environmental liability regime for Europe. Legislation in this field will provide common rules to ensure that

polluters will effectively be held responsible for environmental damage they cause. This will improve protection of the health of Europeans and our natural environment".

Possible main features of an EC environmental liability regime

The White Paper sets out the structure for a future EC environmental liability regime that aims at implementing the polluter pays principle. It describes the key elements needed for making such a regime effective and practicable.

Since the protection of health is also an important environmental objective, and for reasons of coherence, an EC regime should cover both 'traditional damage' (damage to persons and goods) and environmental damage. The latter type of damage should include both contamination of sites and damage to nature and biological diversity in the Community. Therefore, it is proposed that the liability regime should apply to areas and species covered by the Natura 2000 Network. These protected areas are or have to be designated by the Member States under the Wild Birds Directive of 1979 and the Habitats Directive of 1992. Since many habitats and waterways straddle frontiers between Member States, an EC regime can also provide solutions for transboundary damage.

Like nearly all national environmental liability regimes, the EC regime should be based on strict liability (this means that no fault by the polluter is required), when damage is caused by a hazardous activity. Damage to biodiversity in the protected Natura 2000 areas should also be covered if it is caused by a non-hazardous activity. In this case, however, the liability should be fault-based. The liable party should be the operator in control of the activity that caused the damage.

In case of environmental damage, the compensation to be paid by the polluter should be spent on the effective restoration of the damage. Furthermore, for cases concerning environmental damage, public interest groups should have a right to step into the shoes of public authorities, where these are responsible for tackling environmental damage, but have not acted. Such groups may also be allowed to take action in urgent cases if there is a need to prevent damage. This is in line with the 1998 Århus Convention on access to information, public participation in decision-making and access to justice, a UN/ECE Convention that has been signed by the Community and all the EU Member States, as well as by other states.

Expected effects on competitiveness

Most OECD countries which are the main trade partners of the EU already have environmental liability legislation of some kind. An EC environmental liability regime will not amount to the adoption by the EU of a unilateral standard of environmental protection. Available evidence on existing environmental liability regimes suggests that industry competitiveness has not been disproportionately affected. Nor have the environmental liability regimes existing in some Member States been associated with significant competitiveness problems.

WHITE PAPER ON ENVIRONMENTAL LIABILITY

SUMMARY

1. After giving some background information and explaining what the aim of environmental liability is (sections 1 and 2), the case for an EC regime and its expected effects are set out in section 3. The main reasons for introducing an EC regime are: improved implementation of key environmental principles (polluter pays, prevention and precaution) and of existing EC environmental laws, the need to ensure decontamination and restoration of the environment, and better integration of environment into other policy areas. Moreover, an EC regime may contribute to a level playing field in the internal market.

2. Better prevention and ensuring restoration of environmental damage will result in an increased internalisation of environmental costs, which means that the costs of preventing and restoring environmental damage will be paid by the parties responsible for the damage rather than being financed by society in general (or: the tax payer).

3. Section 4 contains possible main features of an EC environmental liability regime, namely: no retroactive application, coverage of both environmental damage (site contamination and damage to biological diversity, also called biodiversity) and traditional damage (harm to health and property). The scope of application should be a 'closed' one, to be linked with EC environment related legislation. Contaminated sites and traditional damage should only be covered if caused by an EC regulated (potentially) hazardous activity; damage to biodiversity only if protected under the Natura 2000 network, which is based on the Wild Birds Directive and the Habitats Directive.

4. Examples of EC legislation dealing with hazardous or potentially hazardous activities are legislation containing discharge or emission limits for hazardous substances into water or air; legislation with the objective to prevent and control risks of accidents and pollution; legislation dealing with dangerous substances and preparations with a view (among others) of protection of the environment; legislation in the field of

waste management; legislation in the field of genetically modified organisms (as far as not covered by the Product Liability Directive); and legislation in the field of transport of dangerous goods.

5. Liability should be strict for damage caused by dangerous activities and fault-based for biodiversity damage caused by a non-dangerous activity. There should be commonly accepted defences and some equitable relief for defendants. The liable party should be the operator in control of the activity that caused the damage.

6. Criteria should be set for dealing with and restoring environmental damage, and for assessing damage to biodiversity. There should be an obligation to spend compensation paid by the polluter on environmental restoration.

Access to justice in environmental damage cases should be enhanced, in line with the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters. Finally, there should be focus on financial security for potentially liable parties.

7. Section 5 considers different options for Community action, namely Community accession to the Lugano Convention, a regime for transboundary damage only, Member States action guided by an EC recommendation, and a Community directive, both in a horizontal way and sector-wise. Arguments for and against each option are given, with a horizontal Community directive considered as the most appropriate option.

8. In terms of subsidiarity and proportionality, section 6 considers an EC initiative justified because of the insufficiency of separate Member State regimes to address all aspects of environmental damage, the integrating effect of common enforcement through EC law and the flexibility of an EC framework regime which fixes objectives and results but leaves ways and instruments to achieve these to Member States.

9. Section 7 deals with the overall economic impact of environmental liability at EC level along the lines of the White Paper, including the impact on external competitiveness. However, since most OECD countries have already environmental liability legislation of some kind, an EC environmental liability regime will not amount to the adoption by the EU of a unilateral standard of environmental protection. This section concludes that past experience is insufficient to support any strong views with respect to the economic effects of a regime as proposed in the paper. The Commission will continue its research in this area and launch further studies on the economic and environmental impact of environmental liability. The findings of these studies together with all the other available evidence will be used to assess future initiatives in this area.

10.Section 8 concludes that the Commission considers a Community framework directive on environmental liability as the appropriate option, in order to provide the most effective means of implementing the environmental principles of the EC Treaty, in particular the polluter pays principle. Interested parties can send comments on the White Paper to the Commission until 1 July 2000.

The full text of the White paper on environmental liability is available on the Commission's website at :
http://ec.europa.eu/environment/liability/pdf/el_full.pdf

▪ Directive 2004/35/CE on environmental liability, 21st April 2004

DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON ENVIRONMENTAL LIABILITY WITH REGARD TO THE PREVENTION AND REMEDYING OF ENVIRONMENTAL DAMAGE

(extracts)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the Opinion of the European Economic and Social Committee(2),

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3), in the light of the joint text

approved by the Conciliation Committee on 10 March 2004,

Whereas:

(1) There are currently many contaminated sites in the Community, posing significant health risks, and the loss of biodiversity has dramatically accelerated over the last decades. Failure to act could result in increased site contamination and greater loss of biodiversity in the future. Preventing and remedying, insofar as is possible, environmental damage contributes to implementing the objectives and principles of the Community's environment policy as set out in the Treaty. Local conditions should be taken into account when deciding how to remedy damage.

(2) The prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter pays" principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.

(3) Since the objective of this Directive, namely to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level by reason of the scale of this Directive and its implications in respect of other Community legislation, namely Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds(4), Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora(5), and 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(6), the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(4) Environmental damage also includes damage caused by airborne elements as far as they cause damage to water, land or protected species or natural habitats.

(5) Concepts instrumental for the correct interpretation and application of the scheme provided for by this Directive should be defined especially as regards the definition of environmental damage. When the concept in question derives from other relevant Community legislation, the same definition should be used so that common criteria can be used and uniform application promoted.

(6) Protected species and natural habitats might also be defined by reference to species and habitats protected in pursuance of national legislation on nature conservation. Account should nevertheless be taken of specific situations where Community, or equivalent national, legislation allows for certain derogations from the level of protection afforded to the environment.

(7) For the purposes of assessing damage to land as defined in this Directive the use of risk assessment procedures to determine to what extent human health is likely to be adversely affected is desirable.

(8) This Directive should apply, as far as environmental damage is concerned, to occupational activities which present a risk for human health or the environment. Those activities should be identified, in principle, by reference to the relevant Community legislation which provides for regulatory requirements in relation to certain activities or practices considered as posing a potential or actual risk for human health or the environment.

(9) This Directive should also apply, as regards damage to protected species and natural habitats, to any occupational activities other than those already directly or indirectly identified by reference to Community legislation as posing an actual or potential risk for human health or the environment. In such cases the operator should only be liable under this Directive whenever he is at fault or negligent.

(10) Express account should be taken of the Euratom Treaty and relevant international conventions and of Community legislation regulating more comprehensively and more stringently the operation of any of the activities falling under the scope of this Directive. This Directive, which does not provide for additional rules of conflict of laws when it specifies the powers of the competent authorities, is without prejudice to the rules on international jurisdiction of courts as provided, inter alia, in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(7). This Directive should not apply to activities the main purpose of which is to serve national defence or international security.

(11) This Directive aims at preventing and remedying environmental damage, and does not affect rights of compensation for traditional damage granted under any relevant international agreement regulating civil liability.

(12) Many Member States are party to international agreements dealing with civil liability in relation to

specific fields. These Member States should be able to remain so after the entry into force of this Directive, whereas other Member States should not lose their freedom to become parties to these agreements.

(13) Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.

(14) This Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages.

(15) Since the prevention and remedying of environmental damage is a task directly contributing to the pursuit of the Community's environment policy, public authorities should ensure the proper implementation and enforcement of the scheme provided for by this Directive.

(16) Restoration of the environment should take place in an effective manner ensuring that the relevant restoration objectives are achieved. A common framework should be defined to that end, the proper application of which should be supervised by the competent authority.

(17) Appropriate provision should be made for those situations where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that all the necessary remedial measures are taken at the same time. In such a case, the competent authority should be entitled to decide which instance of environmental damage is to be remedied first.

(18) According to the "polluter-pays" principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures. In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator. It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring.

(19) Member States may provide for flat-rate calculation of administrative, legal, enforcement and other general costs to be recovered.

(20) An operator should not be required to bear the costs of preventive or remedial actions taken pursuant to this Directive in situations where the damage in question or imminent threat thereof is the result of certain events beyond the operator's control. Member States may allow that operators who are not at fault or negligent shall not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place.

(21) Operators should bear the costs relating to preventive measures when those measures should have been taken as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities or the terms of any permit or authorisation.

(22) Member States may establish national rules covering cost allocation in cases of multiple party causation. Member States may take into account, in particular, the specific situation of users of products who might not be held responsible for environmental damage in the same conditions as those producing such products. In this case, apportionment of liability should be determined in accordance with national law.

(23) Competent authorities should be entitled to recover the cost of preventive or remedial measures from an operator within a reasonable period of time from the date on which those measures were completed.

(24) It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which remedial measures should be taken.

(25) Persons adversely affected or likely to be adversely affected by environmental damage should be entitled to ask the competent authority to take action. Environmental protection is, however, a diffuse interest on behalf of which individuals will not always act or will not be in a position to act. Non-governmental organisations promoting environmental protection should therefore also be given the opportunity to properly contribute to the effective implementation of this Directive.

(26) The relevant natural or legal persons concerned should have access to procedures for the review of the competent authority's decisions, acts or failure to act.

(27) Member States should take measures to encourage the use by operators of any appropriate insurance or other

forms of financial security and the development of financial security instruments and markets in order to provide effective cover for financial obligations under this Directive.

(28) Where environmental damage affects or is likely to affect several Member States, those Member States should cooperate with a view to ensuring proper and effective preventive or remedial action in respect of any environmental damage. Member States may seek to recover the costs for preventive or remedial actions.

(29) This Directive should not prevent Member States from maintaining or enacting more stringent provisions in relation to the prevention and remedying of environmental damage; nor should it prevent the adoption by Member States of appropriate measures in relation to situations where double recovery of costs could occur as a result of concurrent action by a competent authority under this Directive and by a person whose property is affected by the environmental damage.

(30) Damage caused before the expiry of the deadline for implementation of this Directive should not be covered by its provisions.

(31) Member States should report to the Commission on the experience gained in the application of this Directive so as to enable the Commission to consider, taking into account the impact on sustainable development and future risks to the environment, whether any review of this Directive is appropriate,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

The purpose of this Directive is to establish a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage.

Article 2

Definitions

For the purpose of this Directive the following definitions shall apply:

1. "environmental damage" means: (a) damage to protected species and natural habitats, which 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;

Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

(b) water damage, which 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;

(c) land damage, which 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;

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;

3. " protected species and natural habitats" means: (a) the species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annexes II and IV to Directive 92/43/EEC;

(b) the habitats of species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annex II to Directive 92/43/EEC, and the natural habitats listed in Annex I to Directive 92/43/EEC and the breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC; and

(c) where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives;

4. "conservation status" means: (a) in respect of a natural habitat, the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat;

The conservation status of a natural habitat will be taken as "favourable" when:

- its natural range and areas it covers within that range are stable or increasing,

- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

- the conservation status of its typical species is favourable, as defined in (b);

(b) in respect of a species, the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that species;

The conservation status of a species will be taken as "favourable" when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats,

- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

5. "waters" mean all waters covered by Directive 2000/60/EC;

6. "operator" means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity;

7. "occupational activity" means any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character;

8. "emission" means the release in the environment, as a result of human activities, of substances, preparations, organisms or micro-organisms;

9. "imminent threat of damage" means a sufficient likelihood that environmental damage will occur in the near future;

10. "preventive measures" means any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage;

11. "remedial measures" means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II;

12. "natural resource" means protected species and natural habitats, water and land;

13. "services" and "natural resources services" mean the functions performed by a natural resource for the benefit of another natural resource or the public;

14. "baseline condition" means the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available;

15. "recovery", including "natural recovery", means, in the case of water, protected species and natural habitats the return of damaged natural resources and/or impaired services to baseline condition and in the case of land damage, the elimination of any significant risk of adversely affecting human health;

16. "costs" means costs which are justified by the need to ensure the proper and effective implementation of this Directive including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs.

Article 3

Scope

1. This Directive shall apply to:

(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.

2. This Directive shall apply without prejudice to more stringent Community legislation regulating the operation of any of the activities falling within the scope of this Directive and without prejudice to Community legislation containing rules on conflicts of jurisdiction.

3. Without prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage.

Article 4

Exceptions

1. This Directive shall not cover environmental damage or an imminent threat of such damage caused by:

(a) an act of armed conflict, hostilities, civil war or insurrection;

(b) a natural phenomenon of exceptional, inevitable and irresistible character.

2. This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned.

3. This Directive shall be without prejudice to the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, including any future amendment to the Convention, or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988, including any future amendment to the Convention.

4. This Directive shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V, including any future amendments thereof.

5. This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.

6. This Directive shall not apply to activities the main purpose of which is to serve national defence or international security nor to activities the sole purpose of which is to protect from natural disasters.

Article 5

Preventive action

1. Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures.

2. Member States shall provide that, where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible.

3. The competent authority may, at any time:

(a) require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat;

(b) require the operator to take the necessary preventive measures;

(c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or

(d) itself take the necessary preventive measures.

4. The competent authority shall require that the preventive measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 3(b) or (c), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself.

Article 6

Remedial action

1. Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services and

(b) the necessary remedial measures, in accordance with Article 7.

2. The competent authority may, at any time:

(a) require the operator to provide supplementary information on any damage that has occurred;

(b) take, require the operator to take or give instructions to the operator concerning, all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effect on human health, or further impairment of services;

(c) require the operator to take the necessary remedial measures;

(d) give instructions to the operator to be followed on the necessary remedial measures to be taken; or

(e) itself take the necessary remedial measures.

3. The competent authority shall require that the remedial measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 2(b), (c) or (d), cannot be identified or is not required to bear the costs under this Directive, the competent

authority may take these measures itself, as a means of last resort.

Article 7

Determination of remedial measures

1. Operators shall identify, in accordance with Annex II, potential remedial measures and submit them to the competent authority for its approval, unless the competent authority has taken action under Article 6(2)(e) and (3).

2. The competent authority shall decide which remedial measures shall be implemented in accordance with Annex II, and with the cooperation of the relevant operator, as required.

3. Where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary remedial measures are taken at the same time, the competent authority shall be entitled to decide which instance of environmental damage must be remedied first.

In making that decision, the competent authority shall have regard, inter alia, to the nature, extent and gravity of the various instances of environmental damage concerned, and to the possibility of natural recovery. Risks to human health shall also be taken into account.

4. The competent authority shall invite the persons referred to in Article 12(1) and in any case the persons on whose land remedial measures would be carried out to submit their observations and shall take them into account.

Article 8

Prevention and remediation costs

1. The operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive.

2. Subject to paragraphs 3 and 4, the competent authority shall recover, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions taken under this Directive.

However, the competent authority may decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified.

3. An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage:

(a) was caused by a third party and occured despite the fact that appropriate safety measures were in place; or

(b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.

In such cases Member States shall take the appropriate measures to enable the operator to recover the costs incurred.

4. The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

(a) 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, as applied at the date of the emission or event;

(b) 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 at the time when the emission was released or the activity took place.

5. Measures taken by the competent authority in pursuance of Article 5(3) and (4) and Article 6(2) and (3) shall be without prejudice to the liability of the relevant operator under this Directive and without prejudice to Articles 87 and 88 of the Treaty.

Article 9

Cost allocation in cases of multiple party causation

This Directive is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation especially concerning the apportionment of liability between the producer and the user of a product.

Article 10

Limitation period for recovery of costs

The competent authority shall be entitled to initiate cost recovery proceedings against the operator, or if appropriate, a third party who has caused the damage or the imminent threat of damage in relation to any measures taken in pursuance of this Directive within five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later.

Article 11

Competent authority

1. Member States shall designate the competent authority(ies) responsible for fulfilling the duties provided for in this Directive.

2. The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken with reference to Annex II shall rest with the competent authority. To that effect, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary.

3. Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or remedial measures.

4. Any decision taken pursuant to this Directive which imposes preventive or remedial measures shall state the exact grounds on which it is based. Such decision shall be notified forthwith to the operator concerned, who shall at the same time be informed of the legal remedies available to him under the laws in force in the Member State concerned and of the time-limits to which such remedies are subject.

Article 12

Request for action

1. Natural or legal persons:

(a) affected or likely to be affected by environmental damage or

(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,

(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a "sufficient interest" and "impairment of a right" shall be determined by the Member States.

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c).

2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the environmental damage in question.

3. Where the request for action and the accompanying observations show in a plausible manner that environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.

4. The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the persons referred to in paragraph 1, which submitted observations to the authority, of its decision to accede to or refuse the request for action and shall provide the reasons for it.

5. Member States may decide not to apply paragraphs 1 and 4 to cases of imminent threat of damage.

Article 13

Review procedures

1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

Article 14

Financial security

1. Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.

2. The Commission, before 30 April 2010 shall present a report on the effectiveness of the Directive in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III. The report shall also consider in relation to financial security the following aspects: a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the

light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission shall, if appropriate, submit proposals for a system of harmonised mandatory financial security.

Article 15

Cooperation between Member States

1. Where environmental damage affects or is likely to affect several Member States, those Member States shall cooperate, including through the appropriate exchange of information, with a view to ensuring that preventive action and, where necessary, remedial action is taken in respect of any such environmental damage.

2. Where environmental damage has occurred, the Member State in whose territory the damage originates shall provide sufficient information to the potentially affected Member States.

3. Where a Member State identifies damage within its borders which has not been caused within them it may report the issue to the Commission and any other Member State concerned; it may make recommendations for the adoption of preventive or remedial measures and it may seek, in accordance with this Directive, to recover the costs it has incurred in relation to the adoption of preventive or remedial measures.

Article 16

Relationship with national law

1. This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties.

2. This Directive shall not prevent Member States from adopting appropriate measures, such as the prohibition of double recovery of costs, in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under this Directive and by a person whose property is affected by environmental damage.

Article 17

Temporal application

This Directive shall not apply to:

- damage caused by an emission, event or incident that took place before the date referred to in Article 19(1),

- damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said date,

- damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred.

Article 18

Reports and review

1. Member States shall report to the Commission on the experience gained in the application of this Directive by 30 April 2013 at the latest. The reports shall include the information and data set out in Annex VI.

2. On that basis, the Commission shall submit a report to the European Parliament and to the Council before 30 April 2014, which shall include any appropriate proposals for amendment.

3. The report, referred to in paragraph 2, shall include a review of:

(a) the application of:

- Article 4(2) and (4) in relation to the exclusion of pollution covered by the international instruments listed in Annexes IV and V from the scope of this Directive, and

- Article 4(3) in relation to the right of an operator to limit his liability in accordance with the international conventions referred to in Article 4(3).

The Commission shall take into accountexperience gained within the relevant international fora, such as the IMO and Euratom and the relevant international agreements, as well as the extent to which these instruments have entered into force and/or have been implemented by Member States and/or have been modified, taking account of all relevant instances of environmental damage resulting from such activities and the remedial action taken and the differences between the liability levels in Member States, and considering the relationship between shipowners' liability and oil receivers' contributions, having due regard to any relevant study undertaken by the International Oil Pollution Compensation Funds.

b) the application of this Directive to environmental damage caused by genetically modified organisms (GMOs), particularly in the light of experience gained within relevant international fora and Conventions, such as the Convention on Biological Diversity and the Cartagena Protocol on Biosafety, as well as the results of any incidents of environmental damage caused by GMOs;

c) the application of this Directive in relation to protected species and natural habitats;

d) the instruments that may be eligible for incorporation into Annexes III, IV and V.

Article 19

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2007. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 April 2004.

(…)

ANNEX I

CRITERIA REFERRED TO IN ARTICLE 2(1)(A)

The significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data such as:

- 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.

Damage with a proven effect on human health must be classified as significant damage.

The following does not have to be classified as significant damage:

- negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question,

- negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators,

- damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or 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.

ANNEX II

REMEDYING OF ENVIRONMENTAL DAMAGE

This Annex sets out a common framework to be followed in order to choose the most appropriate measures to ensure the remedying of environmental damage.

1. Remediation of damage to water or protected species or natural habitats

Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition by way of primary, complementary and compensatory remediation, where:

(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;

(d) "interim losses" means losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public.

Where primary remediation does not result in the restoration of the environment to its baseline condition, then complementary remediation will be undertaken. In addition, compensatory remediation will be undertaken to compensate for the interim losses.

Remedying of environmental damage, in terms of damage to water or protected species or natural habitats, also implies that any significant risk of human health being adversely affected be removed.

1.1. Remediation objectives

Purpose of primary remediation

1.1.1. The purpose of primary remediation is to restore the damaged natural resources and/or services to, or towards, baseline condition.

Purpose of complementary remediation

1.1.2. Where the damaged natural resources and/or services do not return to their baseline condition, then complementary remediation will be undertaken. The purpose of complementary remediation is to provide a similar level of natural resources and/or services, including, as appropriate, at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition. Where possible and appropriate the alternative site should be geographically linked to the damaged site, taking into account the interests of the affected population.

Purpose of compensatory remediation

1.1.3. Compensatory remediation shall be undertaken to compensate for the interim loss of natural resources and services pending recovery. This compensation consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site. It does not consist of financial compensation to members of the public.

1.2. Identification of remedial measures

Identification of primary remedial measures

1.2.1. Options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame, or through natural recovery, shall be considered.

Identification of complementary and compensatory remedial measures

1.2.2. When determining the scale of complementary and compensatory remedial measures, the use of resource-to-resource or service-to-service equivalence approaches shall be considered first. Under these approaches, actions that provide natural resources and/or services of the same type, quality and quantity as those damaged shall be considered first. Where this is not possible, then alternative natural resources and/or services shall be provided. For example, a reduction in quality could be offset by an increase in the quantity of remedial measures.

1.2.3. If it is not possible to use the first choice resource-to-resource or service-to-service equivalence approaches, then alternative valuation techniques shall be used. The competent authority may prescribe the method, for example monetary valuation, to determine the extent of the necessary complementary and compensatory remedial measures. If valuation of the lost resources and/or services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time-frame or at a reasonable cost, then the competent authority may choose remedial measures whose cost is equivalent to the estimated monetary value of the lost natural resources and/or services.

The complementary and compensatory remedial measures should be so designed that they provide for additional natural resources and/or services to reflect time preferences and the time profile of the remedial measures. For example, the longer the period of time before the baseline condition is reached, the greater the amount of compensatory remedial measures that will be undertaken (other things being equal).

1.3. Choice of the remedial options

1.3.1. The reasonable remedial options should be evaluated, using best available technologies, based on the following criteria:

- The effect of each option on public health and safety,

- The cost of implementing the option,

- The likelihood of success of each option,

- The extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option,

- The extent to which each option benefits to each component of the natural resource and/or service,

- The extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality,

- The length of time it will take for the restoration of the environmental damage to be effective,

- The extent to which each option achieves the restoration of site of the environmental damage,

- The geographical linkage to the damaged site.

1.3.2. When evaluating the different identified remedial options, primary remedial measures that do not fully restore the damaged water or protected species or natural habitat to baseline or that restore it more slowly can be chosen. This decision can be taken only if the natural resources and/or services foregone at the primary site as a result of the decision are compensated for by increasing complementary or compensatory actions to provide a similar level of natural resources and/or services as were foregone. This will be the case, for example, when the equivalent natural resources and/or services could be provided elsewhere at a lower cost. These additional remedial measures shall be determined in accordance with the rules set out in section 1.2.2.

1.3.3. Notwithstanding the rules set out in section 1.3.2. and in accordance with Article 7(3), the competent authority is entitled to decide that no further remedial measures should be taken if:

(a) the remedial measures already taken secure that there is no longer any significant risk of adversely affecting human health, water or protected species and natural habitats, and

(b) the cost of the remedial measures that should be taken to reach baseline condition or similar level would be disproportionate to the environmental benefits to be obtained.

2. Remediation of land damage

The necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health. The presence of such risks shall be assessed through risk-assessment procedures taking into account the characteristic and function of the soil, the type and concentration of the harmful substances, preparations, organisms or micro-organisms, their risk and the possibility of their dispersion. Use shall be ascertained on the basis of the land use regulations, or other relevant regulations, in force, if any, when the damage occurred.

If the use of the land is changed, all necessary measures shall be taken to prevent any adverse effects on human health.

If land use regulations, or other relevant regulations, are lacking, the nature of the relevant area where the damage occurred, taking into account its expected development, shall determine the use of the specific area.

A natural recovery option, that is to say an option in which no direct human intervention in the recovery process would be taken, shall be considered.

ANNEX III

ACTIVITIES REFERRED TO IN ARTICLE 3(1)

(…)

ANNEX IV

INTERNATIONAL CONVENTIONS REFERRED TO IN ARTICLE 4(2)

(a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;

(b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;

(c) the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;

(d) the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;

(e) the Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

ANNEX V

INTERNATIONAL INSTRUMENTS REFERRED TO IN ARTICLE 4(4)

(a) the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963;

(b) the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage;

(c) the Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage;

(d) the Joint Protocol of 21 September 1988 relating to the Application of the Vienna Convention and the Paris Convention;

(e) the Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

ANNEX VI

INFORMATION AND DATA REFERRED TO IN ARTICLE 18(1)

The reports referred to in Article 18(1) shall include a list of instances of environmental damage and instances of liability under this Directive, with the following information and data for each instance:

1. Type of environmental damage, date of occurrence and/or discovery of the damage and date on which proceedings were initiated under this Directive.

2. Activity classification code of the liable legal person(s)(1).

3. Whether there has been resort to judicial review proceedings either by liable parties or qualified entities. (The type of claimants and the outcome of proceedings shall be specified.)

4. Outcome of the remediation process.

5. Date of closure of proceedings.

Member States may include in their reports any other information and data they deem useful to allow a proper assessment of the functioning of this Directive, for example:

1. Costs incurred with remediation and prevention measures, as defined in this Directive:

- paid for directly by liable parties, when this information is available;

- recovered ex post facto from liable parties;

- unrecovered from liable parties. (Reasons for non-recovery should be specified.)

2. Results of the actions to promote and the implementation of the financial security instruments used in accordance with this Directive.

3. An assessment of the additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce this Directive.

(…)

- **Position paper of the NGO "Justice and Environment" on the Environmental liability directive**

http://www.justiceandenvironment.org/wp-content/uploads/2008/01/eld-position-paper.pdf

- **Useful bibliographical references on environmental liability and remedying of environmental damage (in French):**

- Réflexions autour de la transposition de la directive sur la responsabilité environnementale en droit français, Pascale KROMAREK, Mathilde JACQUEAU, *Environnement*, novembre 2004, page 7

- La directive « responsabilité environnementale » et le droit administratif : influences prévisibles et paradoxales, Agathe VAN LANG, *Droit administratif*, juillet 2005, page 7

- *« Avant-projet de loi sur la responsabilité environnementale : vers le principe pollué-payeur » ? »*, Arnaud GOSSEMENT, Droit de l'environnement, n°145, janvier – février 2007, p.24

- Le nouveau dispositif de responsabilité environnementale et le droit commun, Françoise NESI, Dominique GUIHAL, *Droit de l'environnement* n°151, septembre 2007, page 230

- (C.) HUGLO, *« La réparation des dommages écologiques : entre discutions de principe, transposition incomplète du droit communautaire et apport constant de la jurisprudence »*, Christian HUGLO, Gazette du palais, n° 355 à 356, vendredi 21 et samedi 22 décembre 2007, p.5

- La réparation des atteintes à l'environnement par le juge judiciaire, Laurent NEYRET, Recueil Dalloz n°3, 2008, page 170

- Commentaires des propositions du rapport Lepage relatives à la responsabilité civile – Vers une adaptation du droit commun au domaine environnemental, Mathilde BOUTONNET, Laurent NEYRET, *Environnement* n°4, 2008, page 28

3/ ROUND TABLE N° 3 :

Extent of courts' review powers in the Member States

1/ Theme of the third round table

Environmental law often requires high technical competences and entails judges using experts' reports, for instance concerning environmental impact studies. The judge's control can either be minimum or thorough with a detailed analysis of the advantages and drawbacks of a project.

This third round table will address questions linked to the scope of the judge's control, to training needs, to expert's role, to the place of emergency and interim measures or the system of evidence.

2/ Presentation of the speakers

Presidency :

Georges RAVARANI

President of the Administrative Court and vice-president of the Constitutional Court of Luxembourg

After a master's degree in law at the University of Grenoble II (France), Georges Ravarani did his judicial training in a lawyer's office and at the district court of Luxembourg.

From 1980 to 1991, he worked at the first civil chamber of the district court of Luxembourg successively as judicial assistant, judge and first judge. He worked as partner lawyer at Wildgen, Ravarani & Ries from 1992 to 1996. President of the Administrative tribunal of Luxembourg from 1997 to 2007, Georges Ravarani is currently president of the Administrative court and vice-president of the Constitutional Court of the Grand Duchy of Luxembourg.

President of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, Georges Ravarani lectures at the University of Luxembourg in civil law. He is member of the *Pasicrisie luxembourgeoise* which publishes the main Luxembourg casebook and is in charge of the publishing of the *Bulletin de la jurisprudence administrative*.

Besides its publications in law reviews, Georges Ravarani has published *La responsabilité de l'Etat et des collectivités publiques* (1992) and *La responsabilité civile des personnes privées et publiques* (2006).

Speakers :

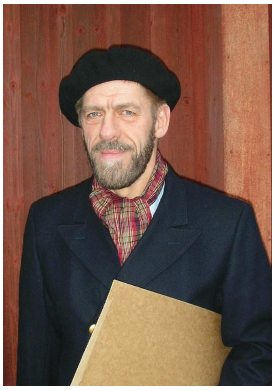
Joseph MICALLEF

Juge à la Cour d'appel de Malte

Joseph R. MICALLEF practised law from 1982. He was appointed judge of the Superior Courts of Malta in July of 2000. He is now assigned to hear cases of civil and commercial jurisdiction, constitutional applications involving alleged violations of human rights, as well as actions of judicial review involving administrative acts.

Joseph Micallef currently sits also in the Court of Criminal Appeal.

Jan EKLUND



Judge at the Administrative Court of Vasaa (Finland)

Jan Eklund graduated in 1976 as Master of Science at Helsinki University with a thesis on the ecology of Baltic herring. From 1976 to 1982, he worked as a biologist with the Finnish environmental administration on the ecological effects of river and lake regulation. In 1982, Jan Eklund became head of the newly-formed regional fisheries authority in Turku and worked as a biologist with the fisheries authority in Vaasa from 1986 to 1994.

In 1994, he entered the Water Rights Appeal Court as a judge. This special court, dealing with civil, criminal and administrative matters in the field of water rights and the exploitation of water resources, in addition to law judges, employed also engineers and biologists as full-time judges.

In 1999, Jan Eklund was transferred to the newly founded Administrative Court of Vaasa. This administrative court is a regional first-instance court in administrative matters and also, the national first-instance court in environmental and water exploitation matters. As an administrative judge, Jan Eklund takes environmental and water rights cases.

In the field of environmental jurisprudence, Jan Eklund has published articles on "Protection of the Baltic Sea by Finnish law and international agreement" (in: *The role of the judiciary in the implementation and enforcement of environmental law,* ed. A. Postiglione, ICEF International Court of the Environment Foundation, Rome 2003, pp. 345 - 350) and , together with Kari Kuusiniemi, on "Finnish legislation on the prevention and remedying of environmental damage" (in: *Prevention and remedying of environmental damage* eds. G. Cordine & A. Postiglione, Bruylant, Bruxelles 2005, pp. 135 - 144).

Ryszard MIKOSZ

Professor of Law and judge (Poland)

Ryszard Mikosz graduated in 1973 at the Faculty of Law of the University of Silesia in Katowice. Since then he is working as an academic teacher in the Department of Mining and Environmental Protection Law at this Faculty. He received his PhD degree in 1980, while already working as a Research Assistant.

In 1992, Ryszard Mikosz received a habilitation (equiv. to Doctor of Laws qualification) on the base of a monograph “Preventive Protection of Material Rights”. In he 2008 was awarded a Professors title. As a lecturer, tutor and researcher he deals mostly with legal problems of environmental law.

From 1990 to 1993, Ryszard Mikosz was working as a legal adviser of the President of the State Mining Authority. Since 1993 he has been working as a judge of the Supreme Administrative Court. In the period from 2001 to 2003 he was the President of the Regional Branch of Supreme Administrative Court in Gliwice. Since the 1st of January 2004, after changes of the legal status of Polish administrative courts, he continued to execute his duties as a President of the Voivodship (Regional) Administrative Court in Gliwice.

Ryszard Mikosz is author and co-author of over 100 scientific papers, including 13 books, mostly concerning selected problems connected to environmental protection. His field of interest encompasses geological and mining law. Especially, he deals with legal problems connected to protecting the mineral deposits, groundwater and other environmental components in conjunction with carrying out geological works afnd minerals exploitation. He is also interested in the issue of liability to damages caused by mining.

Among his publications:

- Agopszowicz A, Dobrowolski G, Lipiński A, **Mikosz R**, Walczak-Zaremba H (2000) Legal-Ecological Considerations of Geology and Mining with Regard to Areas Requiring Special Protective Endeavours (in Polish). Zakamycze, Cracow, Poland

- **Mikosz R** (2006) Liability for Damages Caused by the Operation of a Mining Plant (in Polish). Wolters Kluwer Poland/Zakamycze, Warsaw, Poland

Yann AGUILA

State councillor (France)

After graduating from the National School of Administration (ENA, class Jean Monnet – 1990), Yann Aguila entered the Council of State and joined, in 1994, the private office of the Secretary General of the Government (Renaud Denoix de Saint Marc then Jean-Marc Sauvé) as technical advisor. He was appointed commissaire du gouvernement.

In 1995, Yann Aguila became legal advisor of the President of the Republic of Senegal (Abdou Diouf puis Abdoulaye Wade).

In 2001, Yann Aguila came back to the Council of State as deputy secretary general. Since 2004, he is again commissaire du gouvernement. He concluded notably on the Clémenceau and KPMG cases.

Yann Aguila also heads the research mission “Law and Justice”. He lectures public law at Sciences-Po and at the Paris Law School (EFB). He is associate professor at the university Paris I Panthéon-Sorbonne where he taught environment law.

4/ ROUND TABLE N° 4 :

A court's review power in action : project carried out on a Natura 2000 site (comparative study)

1/ Theme of the forth round table

Directive 82/43/EEC (Habitats Directive) is the cornerstone of Europe's nature conservation policy. It establishes a network of protected areas: the Natura 2000 network. The protection system does not preclude human activities but rather tries to strike a balance between nature protection and economic development. In this context, impact studies play a key role in the authorisation of projects to be carried out on Natura 2000 sites. Since Natura 2000 sites cover almost 18% of European territory, it is clear that national courts often face (and will face) cases concerning such authorisations.

This forth round table will highlight the outline of the directive and the ECJ's case law. The round table will address several questions: the judge's powers, the role of experts' reports and impact studies, training needs and the ways judges assess the balance between possible damages to nature and socio-economic interests.

2/ Presentation of the speakers

Presidency :

Luc LAVRYSEN

Judge in the Belgian Constitutional Court, President of the European Union Forum of Judges for the Environment (UEFJE), Professor at Ghent University

Prof. Dr. Luc Lavrysen is a judge in the Belgian Constitutional Court (Brussels) and part-time professor teaching European and national environmental law at Ghent University (Belgium). He is Director of the Environmental Law Centre of that University, editor-in-chief of the *Tijdschrift voor Milieurecht*, a Flemish Environmental Law Review and member of the Belgian Federal Council for Sustainable Development, a multi-stakeholder advisory body.

Luc Lavrysen is chairman of the Working Group on Product Policy of that Council. He was a member of the Inter-University Commission for the Revision of Environmental Law in the Flemish Region.

As a judge he is involved in UNEP's Global Judges Project on Sustainable Development and the Role of Law. He is also a founding member of the European Union Forum of Judges for the Environment (EUFJE) and President of it, since the 1st of January 2008.

Luc Lavrysen regularly publishes in Dutch, English or French. Among his publications on environmental law: *Milieuheffingen & subsidies 2008-2009* (2008) , "The right to the protection of a healthy environment in the Belgian constitution" (2007), *Handboek Milieurecht* (2006).

Speakers :

Renate PHILIPP

Judge at the Federal Administrative Court of Germany

After a doctorate in law at Albert-Ludwig University in Freiburg, Renate Philipp was appointed jude at the administrative court of Hamburg then, in 2001, judge at the financial court of Hamburg.

From 1995 to 1997, she taught law at Hamburg university. After collaborating with the Federal Administrative Court, she was appointed judge of the same Court in 2004.

Renate Philippe is member of the 4th section which decides cases in the field of planning and development law and concerning the planning and operation of airports.

Marie-Claude BLIN

Deputy head of unit, European Commission, DG Environment

Marie-Claude Blin joined the European Commission in 1983.

As deputy head of unit of the Infringements unit at the DG Environment, Marie-Claude Blin is notably responsible for coordinating infringements proceedings. One of the main realms of infringements concerns the implementation of EU provisions concerning Nature.

In her previous assignments at the DG Environment as deputy head of unit in charge of Nature and Biodiversity, Marie-Claude Blin worked on the building of the Natura 2000 network, in compliance with the Birds directive (79/409/CEE) and the Habitats directive (92/43/CEE).

Jean-Claude BONICHOT

State Councillor, judge at the European Court of Justice (France)

After a law degree, Jean-Claude Bonichot went to Sciences-Po and the National School of Administration (ENA). He joined the Council of State in 1982, became "rapporteur", "commissaire du gouvernment", and president of the 6th sub-division of the judicial division of the Council of State from 2000 to 2006. Legal secretary at the European Court of Justice from 1987 to 1991, Jean-Claude Bonichot was appointed judge the 7th of October 2006.

Director of the Private Office of the Minister for Labour, Employment and Vocational Training, then Minister for the Civil Service and Modernisation of Administration (1991-1992), Jean-Cluade Bonichot also headed the legal mission of the Council of State at the National Health Insurance Fund for Employed Persons from 2001 to 2006.

Lecturer at the University of Metz and at the University Paris I Panthéon-Sorbonne, Jean-Claude Bonichot is also founder and chairman of the editorial committee of the *Bulletin de jurisprudence de droit de l'urbanisme*.

Carlos de MIGUEL PERALES

Partner at Uria & Menéndez (Spain)

Carlos de Miguel Perales holds a Doctorate in Law Cum Laude from the Universidad Pontificia Comillas - ICADE (1993) and has a Degree in Business Administration from the same University (1988). In 1988 he joined Uría Menéndez, where he has since become a partner of the Administrative and Environmental Law Department. He collaborates as Professor of Civil and Environmental Law at the Universidad Pontificia Comillas - ICADE.

His areas of expertise include environmental and civil law, advising companies and institutions on their compliance with environmental legislation and on litigation matters.

Carlos de Miguel Perales has published several books on environmental legal issues: He has written several articles concerning environmental matters in prestigious publications.

3/ Documentation

- ***Selection of judgments of the ECJ on environment***

The European Commission selected in the document « Nature and biodiversity cases – Ruling of the ECJ » the most relevant cases linked to the implementation of the Birds and Habitats directives. A part of the document (page 30 to 47) analyses the articles of the Habitats directive as they have been interpreted by the ECJ:
The document is available on the DG Env's website at the following address :

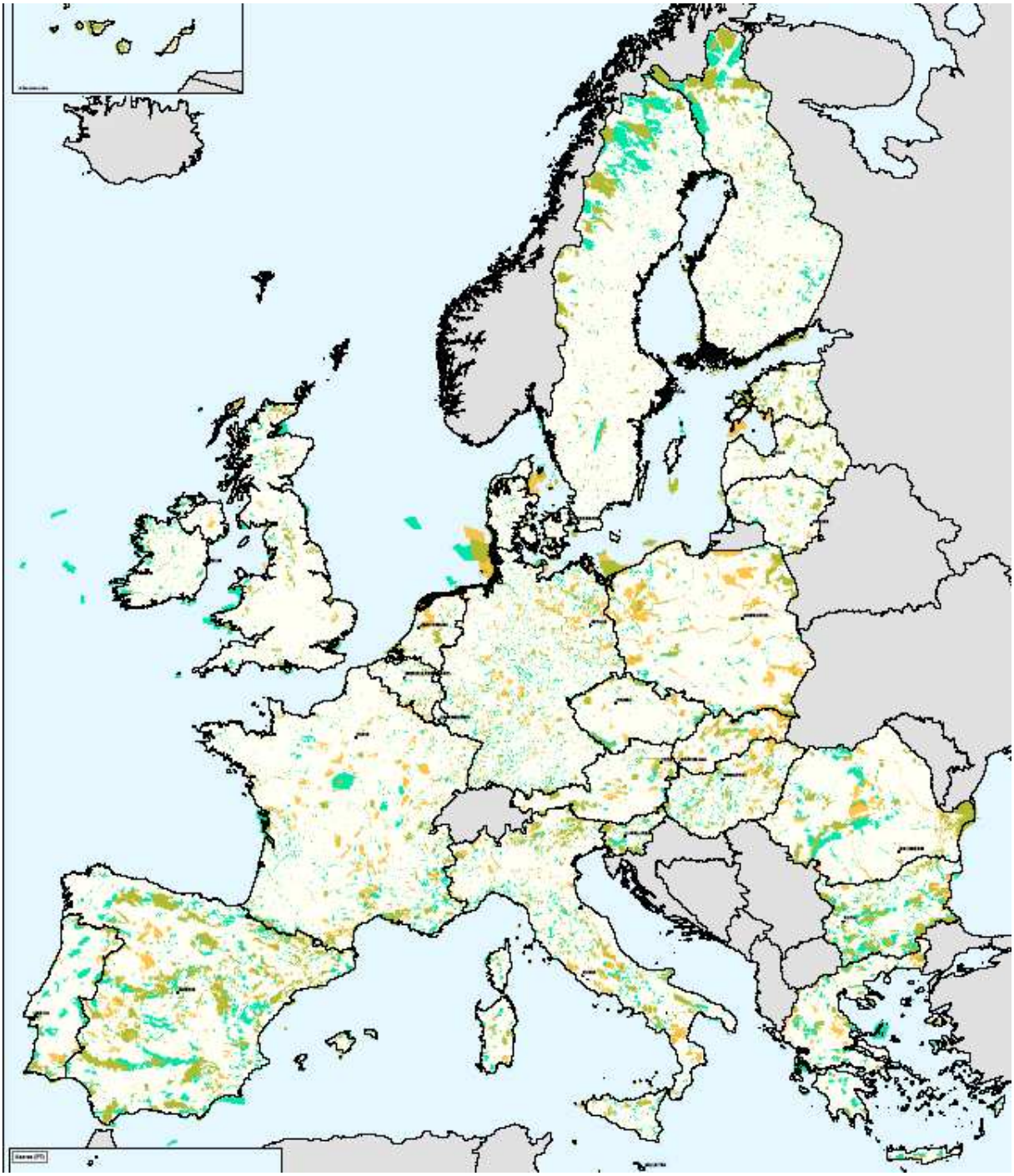
http://ec.europa.eu/environment/nature/legislation/caselaw/index_en.htm

A list of the leading cases and judgements of the ECJ on environment is also available on the DG Env's website at the following address:

http://ec.europa.eu/environment/law/cases_judgements.htm

- ***Map of sites included in the Natura 2000 network***

NATURA 2000: BIRDS AND HABITATS DIRECTIVES



- ***Judgements of the Federal Administrative Court of Germany on the 6th article of 92/43EEC directive (Natura 2000 Directive)***

Judgments of the German Federal Administrative Court concerning Art. 6 of the Council Directive 92/43/EEC*

(1) Judgment of 19 May 1998 – BVerwG 4 A 9.97 – Autobahn A 20

A site not yet proposed under Art. 4 (1) by the member state needs to be protected in anticipation of the directive, if apparently it has to be part of the Natura 2000 network, following the criteria set out in Annex III.

(2) Judgment of 27 January 2000 – BVerwG 4 C 2.99 – trunk road B 1

An alternative solution is not available if the costs significantly exceed the benefit for the site and are therefore beyond a reasonable proportionality.

Mitigating noise and air-polution in residential areas and resolving accident hotspots can qualify as considerations relating to human health in terms of Art. 6 (4) second subparagraph.

(3) Judgment of 17 May 2002 – BVerwG 4 A 28.01 – Autobahn A 44

To qualify as an alternative solution and not as a different project altogether, the solution must essentially achieve the objectives the project is designed for.

An alternative solution is not preferable if it can only be authorised after applying Art. 6 (4) and – in case the project in question affects priority natural habitat types or priority species – if that is true for the alternative solution too.

(4) Court-order of 31 January 2006 – BVerwG 4 B 49.05 – Airbus A380 hangar

A site which has been proposed under Art. 4 (1) by the member state but has not been listed by the Commission yet is "appropriately protected" (Case 117/03 – Dragaggi – par. 27, ECR 2005, I-167) if any necessary tests prescribed by Art. 6 (3) and (4) have been anticipated, before consent to the project is given.

(5) Judgment of 17 January 2007 – BVerwG 9 A 20.05 - Autobahn A 143 (Halle bypass west)

The object of the planning consent at issue is in essence a ca. 12 km section of the A 143 motorway which is projected to cross two areas in the Lower Saale Valley (Unteres Saaletal) designated as nature conservation sites by the European Fauna Flora Habitat Directive (FFH Directive), namely the Middle Triassic limestone hills west of Halle and porphyry landscape to the northwest of Halle. The A 143 is listed in the statutory plan for federal trunk roads as being of "urgent necessity" and is one of the "German Unity Transport Projects". To date, the southern section of the A 143 from the A 38 motorway through to the Halle-Neustadt junction (intersection with the B 80 trunk road) has been completed.

The Federal Administrative Court adjudicated that the plan did not meet the requirements of European nature conservation legislation despite the inclusion of impact-reduction measures (e.g. construction of wildlife crossings near the FFH sites). Constructing a motorway across FFH sites invokes a rigorous system of safeguards that is subject to comprehensive judicial supervision.

The Court adjudicated as follows: The agency responsible for the plan is obliged to demonstrate by means of an assessment of the impact on the FFH site, taking the best relevant scientific knowledge into account, that there can be no question of the FFH site's preservation goals being impaired. Measures to reduce and avoid impact on the FFH site can indeed be taken into account, but any doubts as to the efficacy of the measures are to be interpreted in favour of the FFH site. If there are reasonable scientific doubts about the reliability of the risk assessment or the efficacy of the planned risk management measures, the impact assessment may not be concluded with a result in favour of the plan.

In such a case, the plan may only be approved on the basis of an extraordinary review, in which it must be demonstrated that there are compelling grounds of overwhelming public interest which require the plan to be executed but which cannot be satisfied by an alternative solution that impacts on the FFH site less or not at all. In addition, all compensatory measures

necessary for safeguarding the European ecological networking programme "Natura 2000" must be undertaken. If the FFH impact assessment does not solicit, record and take into account the best scientific opinion on all concretely identifiable risks, these deficiencies inevitably "infect" any subsequent extra-ordinary review.

Under the principle of plan retention recognised in specialised planning law, a certain limited scope for remedy does exist within judicial proceedings. However, deficiencies in investigation relating to the FFH impact assessment cannot regularly be remedied by subsequent submission, and supplementary proceedings are required. Such proceedings have already been initiated by the respondent Landesverwaltungsamt Sachsen-Anhalt with regard to the protection of bats, which was not addressed in the planning approval order. These proceedings and the adjudication arising from them will also have to take into account site protection according to the FFH Directive, insofar as judicial review led to objections. Accordingly, the planning approval order is to be declared unlawful and be suspended.

The plaintiff's continued claim to set aside the planning approval order was unsuccessful. It has not yet been demonstrated that there are insurmountable obstacles to the plan. As long as the plaintiff continues to petition for the solicitation of expert opinion by the court, he has not recognised that judicial review may not carry out functions that European law allocates to the competent authority.

(6) Judgment of 26 April 2007 – BVerwG 4 C 12.05 – Airport Hamburg-Finkenwerder ("Mühlenberger Loch")

Individuals have no right to claim violation of EU Birds and FFH Directives.
The plaintiff, a local resident, brought an action against a planning approval order to allow Airbus Deutschland to manufacture the wide-body aircraft A380 at its works in Hamburg-Finkenwerder. The planning approval order permits part of the Mühlenberger Loch to be filled in order for the site to be expanded.

The Mühlenberger Loch is a tidal mudflat in the River Elbe. It was designated as a protected area in 1982 and notified to the Commission of the EU as a European Bird Protection Area according to the Directive on the Conservation of Wild Birds – Birds Directive – (Council Directive 79/409/EEC) in 1998. It was also notified to the Federal Ministry for the Environment as a potential area for protection according to the Fauna-Flora-Habitat Directive – FFH Directive (Council Directive 92/43/EEC).
In 2000, the landscape protection designation was abolished for part of the area.The plaintiff owns a piece of property on the banks of the Elbe. He brought an action to stop the extension of the airfield and the associated partial filling in of the Mühlenberger Loch on grounds that this violated the Birds and FFH Directives. The Commission issued a report on the project according to Art. 6 Para 4 FFH Directive and considered the negative impact of the project on an area designated as part of the Natura 2000 network to be justifiable on grounds of public interest. The Administrative Court upheld the claim and set the planning approval order aside. The Higher Administrative Court (OVerwG) dismissed the claim.

The plaintiff appealed against this last decision on point of law. The Federal Administrative Court (BVerwG) rejected the appeal and ruled that the Birds and FFH Directives do not confer on the individual the right to claim infringement against Art. 4 Para 4 (1) Birds Directive, Art. 7 in conjunction with Art. 6 Paras. 2-4 FFH Directive or against the basic principles protecting designated areas. The Court considers this sufficiently manifest that there can be no doubt even after taking into account the singularities of Community law, the extreme difficulty of interpretation and the possibility of divergent judicial rulings within the EU. Consequently, the matter will not be referred to ECJ according to Art. 234 EC.

The BVerwG points out that the regulations of the Birds and FFH Directives protect natural habitats and flora and fauna, including European bird species, and not the interests of humans living nearby. The Court holds that the protection of shared natural heritage is indeed a matter of special interest but that it is not a right that the individual may claim. The Birds and FFH Directives are not intended for the protection of health, unlike directives such as those for the protection of water, drinking water or ambient air quality, which ECJ has adjudged as protecting the individual.

The Court considers that the Birds and FFH Directives do not give the individual the right to the enjoyment of nature in the protected areas. The presence of humans in the environment should not endanger the protection of natural habitats and species; rather, both directives should protect the environment from humans. The BVerwG also ruled that the member countries are required to ensure the effective protection of the individual's rights only when Community law has invested the individual with a right, which is not the case with regard to the protection of habitats. As a result, the

member country is not required by Art. 10 Para 1 EC to provide the individual with the right to claim.

(7) Judgment of 12 March 2008 – BVerwG 9 A 3.06 – Autobahn A 44

The directive does not require the competent authorities to apply a specific method of identifying and assessing the protected habitat types and species. However, the method must be chosen in the light of the best scientific knowledge.

In general, compensatory measures can not ensure that the project does not adversely affect the integrity of the site because usually the compensation is not effective at the time the damage occurs and reasonable doubts remain whether the targeted compensation will be fully achieved.

If any area hosting a protected habitat type or a part of such an area is lost because the project touches upon this area, in general the integrity of the site is adversely affected. An exception to this rule can only be accepted if the loss does not exceed a minimum level (bagatelle).

Compensatory measures to ensure the overall coherence of Natura 2000 must be aimed at compensating the ecological function that is adversely affected by the project.

Measures are eligible for compensation if, according to present scientific knowledge, they will achieve the targeted compensation with high probability.

The restoration of severely damaged areas hosting protected habitat types or protected species can qualify as compensatory measure at least if the measure has not been integrated into a managment plan according to Art. 6 (1) and (2).

(8) Court order of 13 March 2008 – BVerwG 9 VR 9.07 – Autobahn A 4

After a site has been listed according to Art. 4 (2) its boundaries can be regarded as consistent with the directive. A claimant can not challenge this only by submitting that an adjacent area would have been as eligible for conservation as the protected site.

- ***Habitats Directive***

COUNCIL DIRECTIVE 92/43/EEC
ON THE CONSERVATION OF NATURAL HABITATS AND OF WILD FAUNA AND FLORA
(extracts)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 130s thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community, as stated in Article 130r of the Treaty;

Whereas the European Community policy and action programme on the environment (1987 to 1992)(4) makes provision for measures regarding the conservation of nature and natural resources;

Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;

Whereas, in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;

Whereas, in view of the threats to certain types of natural habitat and certain species, it is necessary to

define them as having priority in order to favour the early implementation of measures to conserve them;

Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable;

Whereas all the areas designated, including those classified now or in the future as special protection areas pursuant to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds(5), will have to be incorporated into the coherent European ecological network;

Whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued;

Whereas sites eligible for designation as special areas of conservation are proposed by the Member States but whereas a procedure must nevertheless be laid down to allow the designation in exceptional cases of a site which has not been proposed by a Member State but which the Community considers essential for either the maintenance or the survival of a priority natural habitat type or a priority species;

Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future;

Whereas it is recognized that the adoption of measures intended to promote the conservation of priority natural habitats and priority species of Community interest is a common responsibility of all Member States; whereas this may, however, impose an excessive financial burden on certain Member States given, on the one hand, the uneven distribution of such habitats and species throughout the Community and, on the other hand, the fact that the "polluter pays" principle can have only limited application in the special case of nature conservation;

Whereas it is therefore agreed that, in this exceptional case, a contribution by means of Community co-financing should be provided for within the limits of the resources made available under the Community's decisions;

Whereas land-use planning and development policies should encourage the management of features of the landscape which are of major importance for wild fauna and flora;

Whereas a system should be set up for surveillance of the conservation status of the natural habitats and species covered by this Directive;

Whereas a general system of protection is required for certain species of flora and fauna to complement Directive 79/409/EEC; whereas provision should be made for management measures for certain species, if their conservation status so warrants, including the prohibition of certain means of capture or killing, whilst providing for the possibility of derogations on certain conditions;

Whereas, with the aim of ensuring that the implementation of this Directive is monitored, the Commission will periodically prepare a composite report based, inter alia, on the information sent to it by the Member States regarding the application of national provisions adopted under this Directive;

Whereas the improvement of scientific and technical knowledge is essential for the implementation of this Directive; whereas it is consequently appropriate to encourage the necessary research and scientific work;

Whereas technical and scientific progress mean that it must be possible to adapt the Annexes; whereas a procedure should be established whereby the Council can amend the Annexes;

Whereas a regulatory committee should be set up to assist the Commission in the implementation of this Directive and in particular when decisions on Community co-financing are taken;

Whereas provision should be made for supplementary measures governing the reintroduction of certain native species of fauna and flora and the possible introduction of non-native species;

Whereas education and general information relating to the objectives of this Directive are essential for ensuring its effective implementation,

HAS ADOPTED THIS DIRECTIVE:

Definitions

Article 1

For the purpose of this Directive:

(a) conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

(b) natural habitats means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural;

(c) natural habitat types of Community interest means those which, within the territory referred to in Article 2:

(i) are in danger of disappearance in their natural range;

or

(ii) have a small natural range following their regression or by reason of their intrinsically restricted area;

or

(iii) present outstanding examples of typical characteristics of one or more of the five following biogeographical regions: Alpine, Atlantic, Continental, Macaronesian and Mediterranean.

Such habitat types are listed or may be listed in Annex I;

(d) priority natural habitat types means natural habitat types in danger of disappearence, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken as "favourable" when:

- its natural range and areas it covers within that range are stable or increasing, and

- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

- the conservation status of its typical species is favourable as defined in (i);

(f) habitat of a species means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle;

(g) species of Community interest means species which, within the territory referred to in Article 2, are:

(i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region; or

(ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or

(iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or

(iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

(h) priority species means species referred to in (g) (i) for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority species are indicated by an asterisk (*) in Annex II;

(i) conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as "favourable" when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

(j) site means a geographically defined area whose extent is clearly delineated;

(k) site of Community importance means a site which, in the biogeographical region or regions to which is belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

For animal species ranging over wide areas, sites of Community importance shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction;

(l) special area of conservation means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

(m) specimen means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species;

(n) the committee means the committee set up pursuant to Article 20.

Article 2

1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.

Conservation of natural habitats and habitats of species

Article 3

1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.

3. Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10.

Article 4

1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction. Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1 (c) (iii) and of the whole of the territory referred to in Article 2 (1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which lost one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5 % of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be

adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6 (2), (3) and (4).

Article 5

1. In exceptional cases where the Commission finds that a national list as referred to in Article 4 (1) fails to mention a site hosting a priority natural habitat type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6 (2).

Article 6

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

Article 7

Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.

Article 8

1. In parallel with their proposals for sites eligible for designation as special areas of conservation, hosting priority natural habitat types and/or priority species, the Member States shall send, as appropriate, to the Commission their estimates relating to the Community

co-financing which they consider necessary to allow them to meet their obligations pursuant to Article 6 (1).

2. In agreement with each of the Member States concerned, the Commission shall identify, for sites of Community importance for which co-financing is sought, those measures essential for the maintenance or re-establishment at a favourable conservation status of the priority natural habitat types and priority species on the sites concerned, as well as the total costs arising from those measures.

3. The Commission, in agreement with the Member States concerned, shall assess the financing, including co-financing, required for the operation of the measures referred to in paragraph 2, taking into account, amongst other things, the concentration on the Member State's territory of priority natural habitat types and/or priority species and the relative burdens which the required measures entail.

4. According to the assessment referred to in paragraphs 2 and 3, the Commission shall adopt, having regard to the available sources of funding under the relevant Community instruments and according to the procedure set out in Article 21, a prioritized action framework of measures involving co-financing to be taken when the site has been designated under Article 4 (4).

5. The measures which have not been retained in the action framework for lack of sufficient resources, as well as those included in the abovementioned action framework which have not received the necessary co-financing or have only been partially co-financed, shall be reconsidered in accordance with the procedure set out in Article 21, in the context of the two-yearly review of the action framework and may, in the maintime, be postponed by the Member States pending such review. This review shall take into account, as appropriate, the new situation of the site concerned.

6. In areas where the measures dependent on co-financing are postponed, Member States shall refrain from any new measures likely to result in deterioration of those areas.

Article 9

The Commission, acting in accordance with the procedure laid down in Article 21, shall periodically review the contribution of Natura 2000 towards achievement of the objectives set out in Article 2 and 3. In this context, a special area of conservation may be considered for declassification where this is warranted by natural developments noted as a result of the surveillance provided for in Article 11.

Article 10

Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence af the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora.

Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems for marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.

Article 11

Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.

Protection of species

Article 12

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

4. Member States shall establish a system to monitor the incidential capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

Article 13

1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

2. The prohibitions referred to in paragraph 1 (a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.

Article 14

1. If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. Such measures may also include in particular:

- regulations regarding access to certain property,

- temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,

- regulation of the periods and/or methods of taking specimens,

- application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations,

- establishment of a system of licences for taking specimens or of quotas,

- regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens,

- breeding in captivity of animal species as well as artificial propagation of plant species, under strictly controlled conditions, with a view to reducing the taking of specimens of the wild,

- assessment of the effect of the measures adopted.

Article 15

In respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI (a);

(b) any form of capture and killing from the modes of transport referred to in Annex VI (b).

Article 16

1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.

3. The reports shall specify:

(a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used;

(b) the means, devices or methods authorized for the capture or killing of animal species and the reasons for their use;

(c) the circumstances of when and where such derogations are granted;

(d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry but the task;

(e) the supervisory measures used and the results obtained.

Information

Article 17

1. Every six years from the date of expiry of the period laid down in Article 23, Member States shall draw up a report on the implementation of the measures taken under this Directive. This report shall include in particular information concerning the conservation measures referred to in Article 6 (1) as well as evaluation of the impact of those measures on the conservation status of the natural habitat types of Annex I and the species in Annex II and the main results of the surveillance referred to in Article 11. The report, in accordance with the format established by the committee, shall be forwarded to the Commission and made accessible to the public.

2. The Commission shall prepare a composite report based on the reports referred to in paragraph 1. This report shall include an appropriate evaluation of the progress achieved and, in particular, of the contribution of Natura 2000 to the achievement of the objectives set out in Article 3. A draft of the part of the report covering the information supplied by a Member State shall be forwarded to the Member State in question for verification. After submission to the committee, the final version of the report shall be published by the Commission, not later than two years after receipt of the reports referred to in paragraph 1, and shall be forwarded to the Member States, the European Parliament, the Council and the Economic and Social Committee.

3. Member States may mark areas designated under this Directive by means of Community notices designed for that purpose by the committee.

Research

Article 18

1. Member States and the Commission shall encourage the necessary research and scientific work having regard to the objectives set out in Article 2 and the obligation referred to in Article 11. They shall exchange information for the purposes of proper coordination of research carried out at Member State and at Community level.

2. Particular attention shall be paid to scientific work necessary for the implementation of Articles 4 and 10, and transboundary cooperative research between Member States shall be encouraged.

Procedure for amending the Annexes

Article 19

Such amendments as are necessary for adapting Annexes I, II, III, V and VI to technical and scientific progress shall be adopted by the Council acting by qualified majority on a proposal from the Commission.

Such amendments as are necessary for adapting Annex IV to technical and scientific progress shall be adopted by the Council acting unanimously on a proposal from the Commission.

Committee

Article 20

The Commission shall be assisted by a committee consisting of representatives of the Member States and chaired by a representative of the Commission.

Article 21

1. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The Chairman shall not vote.

2. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Supplementary provisions

Article 22

In implementing the provisions of this Directive, Member States shall:

(a) study the desirability of re-introducing species in Annex IV that are native to their territory where this might contribute to their conservation, provided that an investigation, also taking into account experience in other Member States or elsewhere, has established that such re-introduction contributes effectively to re-establishing these species at a favourable conservation status and that it takes place only after proper consultation of the public concerned;

(b) ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction. The results of the assessment undertaken shall be forwarded to the committee for information;

(c) promote education and general information on the need to protect species of wild fauna and flora and to conserve their habitats and natural habitats.

Final provisions

Article 23

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its notification. They shall forthwith inform the Commission thereof.

2. When Member States adopt such measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive.

Article 24

This Directive is addressed to the Member States.
Done at Brussels, 21 May 1992. (…)

- ***Summary of the Birds directive, 2nd, April 1979***

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds

Summary:

This Directive as well as its amending acts seek to:

- protect, manage and regulate all bird species naturally living in the wild within the European territory of the Member States, including the eggs of these birds, their nests and their habitats;
- regulate the exploitation of these species.

The Member States must also conserve, maintain or restore the biotopes and habitats of these birds by:

- creating protection zones;
- maintaining the habitats;
- restoring destroyed biotopes;
- creating biotopes.

Special measures for the protection of habitats are adopted for certain bird species identified by the Directives (Annex I) and migratory species.

Directives establishing a general scheme for the protection of all bird species. The following are prohibited:

- to deliberately kill or capture the bird species covered by the Directives. However, the Directives authorise the hunting of certain species on condition that the methods used comply with certain principles (wise use and balanced control, hunting outside the period of migration or reproduction, prohibition of large-scale or non-selective killing or catching methods);
- to destroy, damage or collect their nests and eggs;
- to disturb them deliberately;
- to detain them.

Apart from a number of exceptions, in particular for certain species that may be hunted, the following are not permitted either: the sale, transport for sale, detention for sale and offering for sale of live and dead birds or of any part of a bird or any product produced from it.

The Member States may on certain conditions derogate from the provisions on protection laid down in the Directives. The Commission will ascertain that the consequences of such derogation are not incompatible with the Directives.

The Member States must encourage research and activities conducive to the protection, management and exploitation of the bird species covered by the Directives.

The full text of the Birds directive is available with the following link: directive **79/409/EEC**.

5/ ROUND TABLE N° 5 :

Conclusion on cooperation between courts in Europe and training requirements

1/ Theme of the fifth round table

The discussions of the previous round tables should enrich the cooperation program the Commission commits oneself into with national judges. This last round table seeks to confirm, from the orientation paper of the Commission and in the light of the discussion of the seminar, training needs and expectations of magistrates, justices auxiliaries and justiciables. The outline of the training programs must be precised as well as the relevant ways of organizing a proper dialogue between judges, lawyers and the doctrine.

The participants in the round table will react to the difficulties and problems raised during the seminar in order to give their point of view on the issues of training, of knowledge of different legal systems and of strengthening the dialogue between the national judge and European institutions and the European legislator. DG Env will finalize its orientation paper by incorporating the conclusions of this round table.

2/ Presentation of the speakers

Presidency :

Pia BUCELLA

Director of communication, governance and civil protection in the directorate-general for environment of the European Commission

Pia Bucella joined the Commission in 1979 after graduating in Philosophy from the Catholic University of Milan, Italy. Starting off her career as a translator, she went on to work for different directorate-generals in a number of roles. As head of civil protection between 2002 and early 2006 she contributed to improving the preparedness and response of European teams called upon to provide collective assistance in case of disaster.

Pia Bucella is director of communication, governance and civil protection in the directorate-general for environment of the European Commission.

Speakers :

Xavier DELCROS

Director of continuing education at the Paris Law School

Xavier Delcros taught at the universities Paris Nord (Paris XIII), Paris Sud (Paris XI) et Panthéon-Sorbonne (Paris I). He is currently director of continuing education at the Paris Law School (trainee lawyers' school).

Xavier Delcros contributed to the report "Lamassoure" (27th of June, 2008) for the parties concerning the Erasmus programs and the difficulties students face for the recognition of their degree abroad.

Wolfgang HEUSEL

Director of the Academy of European Law (ERA)

Wolfgang Heusel studied law in Mainz and Dijon from 1976 to 1981 and passed his first and second law state examinations in Mainz in 1981 and 1985, respectively. In 1983, he did his postgraduate practical legal training at the German-Portuguese Chamber of Industry and Commerce in Lisbon. He became research assistant to the chair of criminal law and law of criminal procedure in Mainz. He also acted as a part-time representative for a lawyer between 1985 and 1989.

Wolfgang Heusel obtained a Ph. D. degree in law with a dissertation on "Soft" International Law in 1989. He then worked as a public prosecutor in Koblenz, as section head in the Ministry of Justice of the State of Rhineland-Palatinate, as member of the civil division of the Regional Court of Mainz between 1990 and 1992, and as member of the civil division of the Koblenz Court of Appeal in 1995. His publications deal with criminal law and public international law.

Wolfgang Heusel worked part-time for the Academy of European Law since 1991, and full-time since 1993 (Deputy Director and Programme Director of the Academy). Since January 2000, he is Director of the Academy.

Mary SANCY

Environment law Professor at University of Nantes

Doctor in environment law, Mary Sancy is currently associate professor at University of Nantes and member of the professorial body of the degree of continuing education on sustainable development at University of Geneva. During her career, Mary Sancy taught in several European, south and north-American universities, often as an invited professor.(Universities of Limoges, Narbonne, Cortès, Stockholm, Gainesville-USA, Rio de Janeriro, Québec-Montréal…)

Mary Sancy is member of the European Council of Environment Law, expert judge for the environment section of the Permanent Court of Arbitrage and member of the International private Court of Arbitration concerning environment.

From 1997 to 1998, Mary Sancy developed at the DG Environment specific trainings in environment law for judges. From 2001 to 2006, as program coordinator at the United Nations Institute for Training and Research (UNITAR), she sets up, with the National School of Judges (France), intensive training workshops in environment law for judges (water, waste, impact studies, legal liability and criminal liability concerning environment law…).

In 2006, she organized a seminar in Milan with the European association of Lawyers concerning air pollution and climate change. Currently, Mary Sancy is working of training projects with the "Procudoria" of the Rio de Janeiro city.

3/ Documentation

- ***Working paper of the European Commission***

The EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT
Directorate A - Communication, legal affairs and civil protection
ENV. A - Director

WORKING PAPER

Subject: Preparation of a concluding round table for the Conference "Courts in Europe and Community environmental law" - Paris - 9-10 October 2008

The communication from the Commission entitled "A Europe of results – applying Community law" [COM(2007) 502 final] stressed at the political level the importance of the correct application of Community law and insisted on the role of the national courts and judges in this respect. In this context, the strengthening of cooperation between the national courts and the Commission departments is regarded as an essential step in improving the implementation of Community environmental law**.**

It is not necessary to recall that national judges, who deal with the ordinary jurisdiction of Community law, are more than ever guardians of the application – at a level close to the citizen - of Community law that is increasingly present in the national legal systems. Of course the Commission has the power of referral to the Court of Justice, but in a geographical area comprising 27 Member States and nearly 500 million inhabitants, it is evident that the actions of the Commission can only regulate a minute part of the litigation relating to the application of Community law. Therefore, we must think in terms of partnership between the Commission and the judges, in the respect of independence of judges.

What form could this cooperation take and what type of actions should be envisaged?

First of all, we should make clear that our plans are not to develop a programme as if there were no existing national-level training intended for judges or as if this training did not take account of European law. The added-value of an action at the Community level is indeed to encourage exchanges between the different Member States and legal traditions, as well as between the national courts and the Commission in order to improve a uniform implementation of community law.

This is why the approach envisaged by the Commission seeks to combine two aspects. On the one hand, it proposes actions for providing useful information to the judges (analysis of European law, case law, case analysis), by avoiding an overly academic approach and encouraging practical case studies coming from several countries. On the other hand, this approach encourages exchange between judges themselves, as well as exchange between the judges and the Commission in the context of these actions. This presupposes establishing methods which rely on the active participation of each party concerned.

The Commission, at this stage, is not proposing a programme that would claim to be exhaustive, and it is clear we are placed in the context of a co-operative approach which will be built progressively. This involves including and identifying the needs expressed by the judges and adapting a programme of cooperation and training to meet the direct and real requirements of the magistrates.

Nevertheless, we can outline some points here that we consider should be developed in the short term:

(1) **Training seminars** intended for an individual Member State or group of Member States. These seminars would be centred on specific fields of Community environmental law (for example, waste, nature, impact assessment) and/or fields corresponding to the activities of the courts and the judges (for example, access to justice, judge's powers).
The aim of these seminars is not only to improve the knowledge of environmental Community law among the judges, but also to encourage contacts between judges of different nationalities. Thus, an important part of these seminars could be the sharing of knowledge on the way in which Community law is implemented in different Member States of the EU, either through the contributions from the participants themselves, or via the trainers, who could be judges from other Member States, for example.

(2) **The development of common training modules**: certain seminars could be addressed specifically at national judges, who are trainers in their respective Member States.
This would then involve thinking about the development of national training modules based on a common approach. Again, this could lead us to call on the participation of judges from other Member States in seminars designed for the national training centres.

(3) **Workshops on the implementation of Community environmental law** aimed at encouraging contacts between the Commission departments and the national courts. The number of participants would be limited to allow wide-ranging discussions and debate. The subjects of the workshops would be defined jointly by the Commission departments and associations representing judges.
This would involve producing elements on a subject such as the difficulties encountered by judges in the implementation of certain provisions of a directive, or certain subjects of a more general nature such as the confrontation of various judicial practices (access to justice, judicial control methods).

(4) **Implementation of tools for exchange of information** in particular by using electronic means (internet websites, forums). The information spreading through the associations representing courts and judges could be supported. Publication of reports or articles in specialized legal journals could be developed.

In conclusion, with prejudice of discussions which will take place during the Conference, some themes for the very next seminars could be proposed for the sake of discussion: technical expertise and legal decisions, assessment of environmental damage, compensation of damage, concept of waste in case-law, usage of content of environmental impact assessments by judges, assessment of impact of projects in Natura 2000 sites …

Pia BUCELLA
Chairperson of the Conclusion roundtable

Closing session : Hubert Haenel and Vassilios Skouris

Hubert HAENEL

President of the Senate's delegation for the European Union

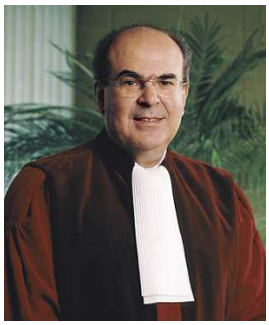
Hubert Haenel graduated in law and criminology before passing the French Judiciary School's exams. After one year at the Ministry of Justice and two years at the High Council of the judiciary, Hubert Haenel joined the Council of State in 1977.

Senator since 1986, Hubert Haenel is member of the foreign affairs, defence and armed forces commission. He is Vice-president of the local government of Alsace (French region) since 1992. He was administrator of the French Railway Company (SNCF) from 1996 to February 2008.

Since 1999, Hubert Haenel is also president of the Senate's delegation for the European Union. He was member of the Convention in charge of the Charter of Fundamental Rights and member of the Convention on the Future of Europe. (2002-2003).

Hubert Haenel has notably published *Le juge et le politique* with Marie-Anne Frison-Roche (PUF, 1998), and *Enraciner l'Europe* in collaboratio n with François Sicard (Seuil, 2003).

Vassilios Skouris



President of the European Court of Justice

Vassilios Skouris was awarded a doctorate in constitutional and administrative law at Hamburg University in 1973. Vassilios Skouris taught public law at the university of Bielefeld (Germany) and Thessaloniki.

In 1989 and in 1996, Vassilios Skouris was Minister of Internal Affairs in Greece. He was director of the Centre for international and European economic law from 1997 to 2005. He is also member of the Academic Council of the European law academy (ERA) since 1995.

Vassilios Skouris is judge at the European Court of Justice since 1990. He was appointed President of the ECJ in 2003.

NB: The Revue juridique de l'environnement *will publish a special issue including the speeches and debates of the conference*. A subscription form is available at the entrance.