The Future Role of Civil Liability for Environmental Damage in the EU

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1. INTRODUCTION

Early in 2000, the European Commission issued its White Paper on Environmental Liability, which is an important step in the legislative process.[1] The long awaited White Paper outlines the views of the Commission on some of the key elements needed for an effective and practicable EU-wide environmental liability regime. The regime as proposed in the White Paper not only covers damage to persons, goods and soil pollution, but also damage to nature. However, the latter is limited to natural resources protected under relevant EU law. The natural resources concerned, are viewed as being of importance for the conservation of biodiversity in the European Community and are generally considered to be of a special interest and of public value.[2]

In this contribution, we will first examine the proposals by the Commission as laid down in the 2000 White Paper on Environment Liability, and offer comments on the various specific issues (§ 3). Subsequently, a number of these issues will be followed up in a more general discussion as to - in our opinion - desirable elements of a future EU-wide liability regime (§ 4). Thirdly, three specific policy areas – mining industry, GMOs and oil pollution – are discussed in the light of the regulatory choice between a general environmental liability regime versus sector-specific liability rules, and by way of illustration of the interrelationship between civil law remedies and regulatory control (§ 5). Finally, paragraph 6 contains some concluding remarks. However, before discussing the contents of the White Paper, a short overview is given of the developments within the EU before the publication of the document (§ 2).

2. CHRONOLOGY

In order to discuss possible and desirable developments of civil liability for damage to the environment in the future, a brief look at the past may be helpful. We will therefore shortly review the recent history of environmental liability law at the Community level. One reason for showing that things have not exactly been moving fast - if past developments are anything to go by -, is that caution must be expressed about the speedy adoption of future legislation. On the other hand, the political climate in this first year of the 2000s differs from that in the 1990s in that there is a growing public concern over *e.g.* the environmental consequences of the various pollution incidents that have occurred over the years and the possible effects of releases of genetically modified organisms (GMOs) on public health and the environment. The increase in public awareness over environmental matters provides an incentive for regulators to establish rules on environmental liability. The White Paper is an

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[1] COM(2000) 66 final, Brussels, 9 February 2000 (hereafter White Paper).

[2] According to *inter alia* the preambles to the Wild Birds and Habitats directives, the natural resources concerned form part of the Community's common natural heritage. Cf. Case C-252/85 *Commission v. France*, [1998] ECR I-2234.

important step in that direction. As will be seen, the Commission is now determined to establish a so-called horizontal regime, covering damage to the environment resulting from harmful activities generally, instead of adopting sector-specific liability rules such as those for liability for damage caused by GMOs or waste.

The first time that harmonisation of environmental liability law was mentioned in an EC legislative instrument, was in 1984 in Article 11(3) of Directive 84/631,[3] pursuant to which the Council was under a duty to regulate the liability for damage caused by waste. Although this obligation applied since 6 December 1984, legislative progress has so far only resulted in an Amended Proposal for a Council Directive on civil liability for damage caused by waste.[4] However, this duty to legislate is no longer in force as Directive 84/631 has been replaced by Council Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community.[5] The Regulation does, however, not contain any reference to a regime for the liability of producers of waste; liability is thus governed by the legal systems of the Member States. Nonetheless, this is unlikely to remain so as this Regulation also gives effect to the Basel Convention dealing with transboundary waste shipments on a global level.[6] Since a supplementary Protocol on liability has been adopted in 1999, it would seem to follow that the EU will eventually also become bound to give effect to these liability rules, although by July 2000 the EU had not yet signed the Protocol.[7]

Liability clauses have been present at various moments in time in several other proposals, such as the Landfill Directive[8] and the PCB/PCT Disposal Directive.[9] Both directives would have imposed a strict liability on the operator for damage and impairment of the environment. However, the liability clauses were removed in favour of one instrument of general applicability even at a stage where the actual envisaging of this was uncertain, to use an understatement. The only Commission initiative which was adopted prior to the 2000 White Paper was the 1993 Green Paper, which examined in broad terms the policy issues involved in formulating an EU-wide environmental liability regime.[10] The Green Paper did

[3] Council Directive 84/631 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, [1984] OJ L 326/31.

[4] [1991] OJ C 192/6; see for an extensive commentary Peter v. Wilmowsky and Gerhard Roller, *Civil Liability for Waste* (Frankfurt am Main etc.: Peter Lang, 1992), Studies of the Environmental Law Network International, Vol. 2.

[5.] [1993] OJ L 30/1; applicable as of 1 May 1994.

[6] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, 28 I.L.M. 649 (1989), 1 JEL 255 (1989); see also Geert van Calster, "The legal Framework for the Regulation of Waste in the EC" 1 YEEL 161, 181 (2000).

[7] Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999, text at http://www.basel.int for the text and signatures/ratifications; see generally Duncan A. French, "The 1999 Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wsates and their Disposal" [2000] *Environmental Liability* 3.

[8] Article 14 of the Amended Proposal, [1993] OJ C212/33; not included in Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, [1999] OJ L182/1. However, Article 13d does impose a post-closure monitoring duty on the operator `without prejudice to any Community and national legislation as regards liability of the waste holder'.

[9] Article 6(3b) of the Amended Proposal, [1991] OJ C299/15; not included in Council Directive 96/59/EC of 16 September 1996 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCB/PCT), [1996] OJ L243/31.

[10] Communication from the Commission to the Council and the Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage, COM(93)47 final.

not include a proposal for legislation as its aim was to stimulate the debate on the future liability regime and to collect the opinions of various interested parties. One of the conclusions of this paper was that '[c]ivil liability is a useful legal instrument for recovering the costs of restoring environmental damage as well as for its prevention and enforcement functions'.[11] However, due to the strong opposition of the economic operators against a horizontal EU liability regime and the difference of opinions among Member States, the Green Paper was not followed up by a (draft) directive.

In 1994 the European Parliament called for legislation in this area and adopted a resolution calling on the Commission to submit a proposal for a directive on civil liability for environmental damage.[12] In January 1997 the Commission decided, taking into account the need to reply to the resolution, to prepare a White Paper on environmental liability. In the meantime, the Commission commissioned a number of studies on the state of the legal art in the various domestic legal systems (including the U.S.), the economic aspects of environmental liability and the valuation of 'ecological damage'.[13] Interesting is also that the European Parliament recently tried to introduce a liability clause in a directive on the deliberate release of genetically modified organisms. However, the Commission opposed adoption of such a regime, and in favour of an EU horizontal liability regime, the proposed amendment was rejected (see § 5.2).

Finally we mention a recent parallel development in terms of criminal law, which could have some interesting implications for civil suits (*e.g.* by facilitation of fact finding and establishing unlawfulness under traditional tort law). Within the framework of the EU's Third Pillar, Title VI of the Treaty on European Union on Police and Judicial Cooperation in Criminal Matters, a Danish initiative for a Council Framework Decision has been put forward.[14] Framework decisions, like EC directives, are concerned with the harmonisation of Member States' laws and regulations, but, unlike EC directives, are expressly excluded from producing any direct effect (Article 34(2b) TEU). The proposal is primarily concerned with international cooperation and exchange of information, and ensuring jurisdiction to prosecute cross-border pollution. However, it also introduces criminal liability for legal persons. Yet, noteworthy from a civil law point of view is that Member States are under an obligation - so is proposed - to ensure that `serious environmental crime is covered by effective compensation rules and rules on environmental rehabilitation under national law' (Article 2(2e)). Interesting is also a proposed amendment by the EP's Committee Rapporteur on preventing the statute of limitations to constitute a bar to prosecution for crimes `which may only be

[11] Green paper, at 27. On various occasions afterwards the usefulness of environmental liability is underlined. See e.g. Commission's Communication of 24 November 1999 on the Global Assessment of the 5th Environmental Action Programme, COM(1999) 543, at 24.

[12] EP Resolution on preventing and remedying environmental damage, [1994] OJ C128/165. See also opinion of the Economic and Social Committee (ECOSOC) on the Green Paper, [1994] OJ C133/8, para. 2.2.1.

[13] Summaries are published in the version of the White Paper published by the Office for Official Publications of the European Communities, ISBN 92-828-9179-8; see also Gerrit Betlem, "Liability for Damage to the Environment'" in: A.S. Hartkamp et al. (eds.), *Towards a European Civil Code* (The Hague etc.: Kluwer, 1998), 473, 477.

[14] Initiative of the Kingdom of Denmark with a view to adopting a Council Framework Decision on combating serious environmental crime, [2000] OJ C39/4. This instrument is comparable to the Council of Europe's Convention on the Protection of the Environment through Criminal Law, Strasbourg, 4 November 1998, *European Treaty Series* 172, http://conventions.coe.int.

detected over a longer period of time'.[15] It would seem to follow that, after adoption, Member States must ensure that latent serious environmental crimes cannot be time barred (or, that the limitation period does not run without the damage having become manifest), whilst making available their civil liability rules in these situations as an adjunct to criminal suits.

3. THE WHITE PAPER ON ENVIRONMENTAL LIABILITY

On the 9th of February 2000, the Commission published the final version of the White Paper on Environmental Liability.[16] The document sets out the structure of a possible future EC environmental liability regime. It contains the core elements and principles of a horizontal environmental liability directive. The regime as proposed, is set up as a framework regime with minimal requirements and standards and is to be completed over time and on the basis of experience with its initial application. The regime outlined in the White Paper has a closed character and is linked with relevant EC environmental legislation. It covers two areas; damage caused by activities that bear an inherent risk of causing damage to the environment and that are subject to EC law, and damage to natural resources but only insofar as these are protected by Community law. A strict liability applies for damage caused by inherently dangerous activities and a fault-based liability for damage to (what is called) biodiversity that is caused by an activity not listed as dangerous. The regime will not be applied retroactively. Environmental damage that was caused in the past is considered to be a matter that should be dealt with by the Member States.

The Council of (environmental) Ministers, in a preliminary policy debate on the matter, welcomed the initiative.[17] A majority favoured Community action covering a broad scope of types of loss (traditional damage: personal injury and property damage, as well as environmental damage) and, more generally put, a wide-ranging regime. Like the Commission, the majority of the Council was also in favour of a framework directive, rather than acceding to the 1993 Council of Europe Convention on environmental liability.[18] The scope of the Council of Europe convention is thought to be too wide and open[19], and some of its provisions too general to provide legal certainty. The latter especially concerns the provisions on liability for damage to natural resources. It is thought that with an EU framework directive the scope of the future liability regime can better be delimited and that the part of the regime that deals with damage to natural resources, can be better developed.

Given the moderately positive reactions of the Environmental Council, the Committee of the Regions and the Economic Social Committee on the White Paper, it is not unlikely that finally an EU liability directive will be established. Commissioner Wallström noted in that respect that every effort will be made to present a Proposal for a Directive before the end of

[15] EP Doc. No. A5-0178/2000, Amendment 14 (Art. 2(1)(ba)(new)).

[16] COM(2000)66 final; http://www.europa.eu.int/comm/environment/liability/.

[17] 2253rd Council Meeting, Environment, Brussels, 30 March 2000, PRES/00/91, at X (RAPID database), Agence *Europe* No. 7689 (1 April 2000), p. 7

[18] *Id.* CoE Convention: Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, *European Treaty Series* No. 150 (http://conventions.coe.int), 32 I.L.M. (1993); not in force; signed by Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands and Portugal.

[19] The concern is that unlike the White Paper, the 1993 CoE Convention is not limited to the listed dangerous activities and may also cover activities that are not explicitly referred to in the convention as dangerous (Art. 2).

2001.[20] However, if the speed of progress so far is not increased, such a timetable seems to be too optimistic (on the other hand, the concern over the release of GMOs for the environment and public health may be decisive in establishing a regime on relatively short notice (see further §5.2)). In January 2001, the Commission confirmed its commitment in its proposal for a sixth environmental action programme 2001-2010 "Environment 2010: Our Future, Our Choice."[21]

3.1 Aims and objectives of the regime

The main objectives of the proposed regime will be of an environmental nature. It is believed that an EC environmental liability regime is an effective way of implementing the key principles of the EC's environmental policy, such as the "polluter pays" principle and the "preventive action" principle (Art. 174(2) (ex. 130r(2) EC Treaty).[22] Its main purpose is to ensure - in compliance with the polluter pays principle - the funding of measures necessary to cleanup and restore the environmental damage caused. Moreover, it is expected that the future EU regime will lead to improved compliance with existing Community legislation and will encourage a better implementation of existing and future EC environmental law. It is also expected that it will stimulate potentially liable parties to take greater care to avoid damage arising and invest in research and development to further prevent environmental harm.

Another important argument for an EC regime is that there are at present gaps in the environmental liability regimes of most Member States as far as natural resource damage is concerned. This is especially apparent in cases where damage is caused to unowned natural resources, which makes it difficult to recover damages for this type of harm.[23] There is also a wide disparity between Member States in respect of liability for soil pollution and the clean-up standards and objectives that are used in these cases. So to prevent or correct distortions in competition between Member States, the EU-wide environmental liability regime will also harmonize these clean-up standards and clean-up objectives. Furthermore, since there does not exist at the moment an effective liability instrument for transfrontier environmental damage, the future regime is also expected to solve problems that emerge in these cases.

3.2 Key features of the proposed possible regimes

3.2.1 A Two track regime

One of the main features of the proposed liability regime is that it has a closed scope of application and is linked with EC environmental law. The proposed regime covers damage to

[20] Intervention at EP Plenary Session regarding revision of the GMOs Directive, Strasbourg, 11 April 2000 (SPEECH/00/142); IP/00/374 (RAPID Database).

[21] See Para. 2.3 Encouraging the Market to Work for the Environment and Art. 3 Strategic approaches to meeting environmental objectives, (7): To create a Community liability regime requires: Legislation on environmental liability, available at the Commission's Website at http://www.europa.eu.int/comm/environment/newprg; see also the Press Release of 24 January 2001, IP/01/102.

[22] White Paper, para. 3.1. For more details on these principles, see: L. Krämer, *EC Environmental Law*, London 2000, at 16-20 and N. de Sadeleer, *Les principes du pollueur-payeur, de prévention et de précaution. Essai sur la genèse et la portée juridique de quelques principes du droit de l'environnement* (Bruylant/ A.U.F.: Brussels 1999), Part I.

[23] See McKenna & Co, *Study of Civil Liability Systems for Remedying Environmental Damage*, London 1996 , 273-303. This is one of the studies commissioned by the European Commission in preparation for the publication of the White Paper. For a summary of the study, see: annex 1 of the Office of Official Publications' version of the White Paper.

persons and goods (traditional damage) and contamination of sites, but only if such damage is caused by dangerous or potentially dangerous activities regulated by EC law. Damage to natural resources such as wildlife, habitats and ecosystems, is also covered but only if it concerns natural resources in sites designated under EU nature conservation law (§ 3.2.4). For the application of this part of the proposed regime it is immaterial whether such damage is caused by an EC regulated dangerous activity or an activity that is not covered by EC law (and which is considered a non-dangerous activity). The only difference here is the type of liability that is applicable. The White Paper provides for a strict liability for damage caused by EC regulated dangerous activities and a fault-based liability for damage caused by the (so-called) non-dangerous activities. So damage to natural resources covered under the proposed regime is recoverable, whether it is caused by a dangerous activity or not. Only the type of liability may differ as this depends on the nature of the activity that caused the damage. Tables I and II further illustrate how the proposed regime is set up.

Scheme as proposed in the White Paper (Table I)

Nature of Liability	Type of Activity	Traditional damage	Damage to Biodiversity	Damage Threshold	Contami-nated Sites
Strict	(Potentially) dangerous and covered by EC law	X	X	Significant for biodiversity damage and contaminated sites	x
Fault	All, including non-dangerous activities		X	X (significant damage only)	

From the perspective of heads of damage or types of loss (Table II)

	Nature of Liability	Activities	Place of Harm	Threshold
Traditional Damage	Strict	(potentially) dangerous and EC regulated	Anywhere	No threshold
Damage to Biodiversity	Fault and Strict	All (including non-dangerous)	Natura 200 sites only	Significant damage
Contaminated Sites	Strict	(potentially) dangerous and EC regulated	Anywhere	Significant damage

3.2.2 Dangerous and non-dangerous activities

So strict liability applies for damage caused by EC-regulated dangerous activities. But what dangerous activities are meant here? In the White Paper only an indication is given of the activities that are covered. The activities to be covered include those that are regulated by EU environmental legislation and relate to, or contain discharge or emission limits for hazardous

substances into water or air; the transport of dangerous substances; the prevention and control of accidents[24]; the transport, storage and disposal of hazardous and other waste; and biotechnology. A final list of activities is not yet available but will be developed at a latter stage.[25]

Although a wide range of dangerous activities seems to be covered, it is difficult to determine on the basis of the information provided in the White Paper whether the most important potentially dangerous activities are falling under the scope of the proposed regime. The legislation referred to basically covers industrial companies, transporters and other professional parties who produce, use or transport dangerous substances. It has been suggested that all industrial activities are covered except for a small group of almost innocent industrial activities..[26] However, there are serious doubts whether this is the case indeed. It is for instance not entirely certain that mining sites, such as the one in Spain from which pollutants were released that seriously affected the Doñana national park, are covered (see § 5.1). Furthermore, since EC law covers primarily activities for which there is an apparent reason to regulate them, it may well be that activities below this "threshold", but which are potentially dangerous to the environment, are not covered. It is not entirely clear - for instance - whether an illegal discharge of toxic waste by a private person is covered. If the latter is not regulated by the above-mentioned categories of EC law, it is - according to the White Paper - not a dangerous activity and will therefore be covered by fault liability.

In other words, the scope of EC law with regard to activities potentially dangerous to the environment is crucial here. However, not only for the type of liability that applies in a certain case, it also has an effect on the type of damage that is recoverable under the regime. As noted earlier, the future directive will only cover personal injury, property damage, contamination of sites and damage to the natural resources covered by EC conservation law, if such damage is caused by an EC regulated dangerous activity. As to the damage caused by other (so-called non-dangerous) activities, the scope of regime is limited to natural resources protected under EU law and does not cover *inter alia* the contamination of land or groundwater (see Table II).

3.2.3 Types of loss covered

The future liability regime will cover traditional damage (personal injury and damage to property) and environmental damage. The White Paper uses "environmental damage" as an overarching concept encompassing two subcategories: "damage to biodiversity" (also termed "natural resource damage") and "damage in the form of contaminated sites".[27] However, it would seem that the White Paper may give rise to some terminological confusion where it distinguishes between traditional and environmental damage. The latter is especially apparent for contaminated sites, which is regarded as environmental damage while this type of harm always concerns a 'very' traditional head of damage: damage to real property. Land always has an owner (at least in the legal system we know best, Dutch law: Article 5:24 Civil Code providing for State ownership of land in the absence of another owner). So there does not seem to be a need for its inclusion under the notion of environmental damage; it is already

[24] Directive 96/82/EC of 9 December1996 on the control of major-accidents hazards involving dangerous substances, [1997] OJ L10/13; Directive 96/61/EC on integrated pollution prevention and control, [1996] OJ L257/26. The last mentioned directive covers a number of specifically listed large industrial installations (about 10% of the industrial installations in the EU).

[25] White Paper, para. 4.2.2.

[26] L. Bergkamp, The Commission's White Paper on Environmental Liability: A weak Case for an EC Strict Liability Regime, *EELR* 2000, at 111.

[27] White Paper, para 4.2.1.

included under material loss. More generally speaking, it is - as has been done by many Member States - preferable to regulate clean-up of contaminated land in a separate instrument as it primarily concerns public law duties of owners vis-à-vis public authorities about their own property. Incorporating provisions in the future directive on the contamination of sites is therefore probably only necessary for reasons of harmonizing cleanup standards and objectives (it would have been different if the Commission had been willing to cover historic pollution (*Altlasten*)).

Confusion may also arise because the category of environmental damage covers more than damage to unowned natural resources (see § 3.2.4). Introducing the category of environmental damage next to the traditional types of compensatable harm, is useful from the perspective that damage to unowned natural resources is not recoverable under the national laws of most Member States.[28] Most other losses incurred by the environment are, in principle, already covered (or are at least capable of being so covered as damage to property or as pure economic loss). However, there are other reasons to include a separate category of damage (apart from traditional damage). One is the Commission's intention to develop a regime that also covers damage to certain owned natural resources (see § 3.2.4). The reason for extending the scope of the regime to these resources, is that some privately owned natural resources exceed private interests as they are of public value. These natural resources directly or indirectly support public interests, such as in human health and recreation, but such natural resources may provide all kinds of other services to man and nature. A wetland for instance, provides nursery and feeding habitat for birds and certain wildlife species. It forms a buffer zone between the water and the upland, it supports the purification of groundwater and provides shoreline stabilization benefits.

A difficult issue here is, of course, that these natural resources are subject to property rights and that harm to such resources is, in principle, recoverable as damage to property. However, since there does not exist a duty for the property owner to file a claim or to use the recovered sums for restoration, one cannot be sure that the damage to these public natural resources will be restored. To tackle (part of) the problem, the Commission therefore proposes special rules on standing as regards these natural resources (see § 3.2.9). Another reason to separate environmental damage from what is called 'traditional damage', is that damage to natural resources, whether owned or unowned, is often difficult to value as there does not exist a market value or the market value does not fully capture all the value of the natural resources concerned. To solve this problem, the Commission has introduced a deviating measure of damages for these natural resources (see § 3.2.5).

So in order to distinguish damage to public natural resources from traditional damage, a separate category of damage has been introduced. We support the Commission in its approach to separate damage to public natural resources from traditional damage, but using the term 'environmental damage' as a overarching term is somewhat confusing as the term is often given a very general meaning in the legal literature and legislative documents and encompasses damage caused via the environment as well as to the environment itself. The White Paper uses also the term 'biodiversity damage' to distinguish damage to certain public natural resources from traditional harm, but as will be seen also this term does not seem to cover what is intended to be covered (see below). We therefore prefer using the term natural resource damage or damage to public natural resources.

A second reason for confusion, but this has nothing to do with the distinction between traditional and environmental damage, is the use of the term "biodiversity damage". Confu-

[28] Cf. Ann Carette, *Herstel van en vergoeding voor aantasting aan niet-toegeëigende milieubestanddelen* (Antwerpen/Groningen: Intersentia 1997).

sion may arise here because of the Commission's interpretation of the term 'biodiversity', which differs from more authoritative and generally accepted interpretations, such as provided by the 1992 Convention on Biological Diversity. In this Convention, 'biodiversity' is defined as the number, variety and variability of all species of plants, animals and micro-organisms as well as the ecosystems of which they are part (Art. 2).[29] Biodiversity is thus more than just the number of species in a certain area.[30] In fact, there are four levels at which biodiversity is assessed: genetic diversity within a species, the variability among species, functional diversity which refers to the variety of biological functions of ecosystems, and ecological diversity which refers to the variety of types of habitats and ecosystems.[31]

The White Paper proposes to impose liability for damage to 'natural resources that are important [for] the conservation of biological diversity in the Community'.[32] From this quote it appears that the polluter will not be liable for the loss of genetic diversity within species, the variety among species or the loss of ecological diversity, but for the injury to, destruction of or loss of, natural resources itself.[33] This is important, since one may wonder whether it would have been possible to establish (at this moment) a realistic regime that imposes a liability for damage to biodiversity (as defined in the 1992 Biodiversity Convention). Currently, there is only limited information about the extent of biodiversity[34], which makes it difficult to determine the extent of a biodiversity loss caused by a particular incident. Furthermore, it is probably also rather difficult to prove that damage has been caused to the variability among species or the genetic diversity within species. At any rate this is more difficult than proving that a certain animal species or habitat has been impacted by an oil spill or other incident.[35]

This is not to say that one cannot incorporate biodiversity considerations into restoration planning activities developed in response to an incident that has caused an injury to the natural resources covered by the proposed EU liability regime, but this is different from holding the responsible party liable for damage to biodiversity as defined under the above-mentioned convention.

3.2.4 What natural resources are covered?

As explained, the proposed regime will not cover all natural resources. The scope of the proposed regime is limited to (certain) natural resources covered by the EU's nature conserva-

[29] Rio de Janeiro, 5 June 1992, 31 I.L.M. 818 (1992); O.J. 1993 L 309/3.

[30] J.L. Harper, D.L. Hawksworth, Preface, in D.L. Hawksworth (ed.), *Biodiversity. Measurement and Estimation*, London 1996, 7-10.

[31] *Id.*, at 6; UNEP, *Global Biodiversity Assessment*, Cambridge 1995, 27 et seq; B. Thorne-Miller, *The Living Ocean. Understanding and Protecting Biodiversity*, Wash. D.C. 1999, 6-7.

[32] White Paper, at 1.

[33] As a matter of fact, in the earlier drafts of the White Paper the term 'natural resources' was used instead of 'biodiversity'. No clear explanation is given for this change in terminology.

[34] Harper, Hawksworth, above n. 30, at 9-10; R. Perman (et al), *Natural Resources & Environmental Economics*, 1999 (2 ed.), 47.

[35] A. Ascencio, R. Mackenzie, *Legal Issues Relating to Liability and Compensation for Damage in Relation to the Transboundary Movement of Living Modified* Organisms, in K.J. Mulongoy (ed.), *Transboundary Movement of Living Modified Organisms Resulting from Modern Biotechnology: Issues and Opportunities for Policy-Makers*, Geneva 1997, 151.

tion law, namely the Wild Birds and Habitats directives.[36] Both directives are aimed at the preservation, protection and improvement of natural habitats and of wild flora and fauna, and require the establishment of protection areas.[37] Many Member States are still in the process of classifying these protection areas. The Member States use certain objective ornithological criteria and other scientific criteria, to determine which sites are to be designated or are to be proposed for designation.[38] The protection areas that are (going to be) designated will form together a European ecological network (called Natura 2000). It is expected that finally about 10% of the territory of the European Union will be classified as a Natura 2000 site. By April 2000, 2525 sites were designated under the Wild Birds directives (about 173,691 km²) and Member States had proposed 10,250 sites for designation under the Habitats directive (about 360,681 km²).[39] Since several sites have been proposed under both directives, either in part or in total; one cannot simply add up the figures. Noteworthy also is that some Member States, such as the Netherlands and the United Kingdom, have designated substantial portions of their coastal waters as protection areas.

The regime as proposed in the White Paper is limited to natural resources in Natura 2000 areas. Since the Natura 2000 network will finally cover only a small percentage (about 10%) of the EU's land, wetlands and waters, the future regime will have a very limited scope. The main reason for this limitation is probably clarity - the natural resources located in these areas are relatively easy identifiable - and allied to the fact that Member States are already under an obligation to manage and protect the natural resources in these areas and to take restoration measures if significant harm is caused to the natural resources in the Natura 2000 sites.[40]

Damage to natural resources located outside the Natura 2000 sites is thus not covered by the proposed regime, even where the species and habitats concerned are listed in the annexes to the Wild Birds and Habitats directives and where both directives require protection of these natural resources. The geographical limitation to Natura 2000 sites is thus a serious restriction to the scope of the regime.

With others, we oppose the limitation to natural resources in Natura 2000 sites because it unduly restricts the scope of the regime.[41] First of all, natural resources outside the Natura 2000 sites and protected under national or EC law, are of no less importance than the natural resources in these areas. Furthermore, even if finally 10% of the EU territory is designated, it will not necessarily cover all qualifying sites. According to a WWF study, a significant number of sites needing protection are indeed not listed.[42] In addition, it is not

[36] Resp. Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, [1979] OJ L103/1; Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L206/7

[37] White paper, para. 4.5.1.

[38] With regard to the Wild Birds Directive there is relied on the Inventory of Important Bird Areas. Cf. Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, para. 70.

[39] *Natura 2000*, April 2000, at 6-7. It should be noted that Member States have added new sites to the list of Natura 2000 sites, but these figures have not been incorporated in this issue of the journal.

[40] White Paper No. 4.2.

[41] See also Opnion of the Committee of the Regions of 14 June 2000 on the White Paper, Brussels, 21 June 2000, CdR 13/2000 (COM-4/031), No. 2.1 and European Environmental Law Association (EELA), *Comments to the European Commission's White Paper on Environmental Liability (COM (2000) 66 final)*, July 2000, No. 4.2.1.

[42] Agence *Europe* No. 7741 (21 June 2000), p. 16. See also the Opinion of the Economic and Social Committee on the White paper of 12 July 2000, CES/2000/803, http://www.esc.eu.int, No. 4.1.1.

even required to designate all sites which constitute a relevant habitat under the Habitats and Birds Directives. It is sufficient to list those with high conservation value.[43] It follows that to link an environmental liability regime to this designation system, sits uneasily with the environmental protection obligations of the EU under the EC Treaty. It has also been argued that the positive system of the Habitats Directive – only those species and habitats included in a list are protected – is less in keeping with the precautionary principle than the negative system of the Birds Directive, which protects all the species within its scope.[44] The same can then be argued for a civil liability regime stated to be a form of implementation of the precautionary principle and that is linked to the Habitats Directive.

Another concern relates to the delay or even denial in designating Natura 2000 sites. Two matters giving rise to uncertainties merit attention. Firstly, does the future regime apply to sites not designated, but which should have been designated? Secondly, which acts by national authorities actually constitute designation? Interestingly, regarding the first point, it follows from ECJ case law that some of the obligations of the Wild Birds Directive, notably Article 4(4) requiring Member States to take steps to avoid significant pollution in the Special Protection Area, apply not only where the sites have been designated, but also where they should have been.[45] It is true that this specific pollution prevention obligation is no longer in force as it has been replaced by Article 7 of the Habitats Directive; but the obligations to prevent deterioration of the habitat and disturbance of species still apply. Failure to take Measures to prevent deterioration of habitats , even with respect to sites which should have been designated, is thus still capable of giving rise to an ECJ judgement declaring an infringement of the Directive.[46] On the basis of these decisions it would seem that the future liability regime will also apply to areas not yet designated under the Wild Birds directive, but for which it is clear that an obligation exists to classify the areas concerned. This is different for the areas to be proposed for designation under Habitats directive. Under the Habitats directive obligations to manage and protect the natural habitats concerned arise only after the area has been included in the list of sites of Community importance (Art. 4(5)). Hence, these obligations do not apply to sites that should have been proposed but that have not been proposed yet, or that have been proposed but have not been included yet in the list of sites of Community importance. So likely, the future regime will not apply to areas not included in the list of sites of Community importance.

Regarding the second uncertainty (what constitutes the act of designation), following the ECJ's *Leybucht* judgment,[47] Backes has pointed out that a free standing act of designation may not be required; it apparently suffices, according to the ECJ in this case, for a site to be regarded as `Birds-Directive-designated' that it is given a relevant nature protection status under national law. This is both remarkable and undesirable given the important legal consequences of such a status.[48] This uncertainty is inherent in the regime as neither the Wild

[43] Cf. Art. 4 of the Wild Birds directive and Art. 4 and Annex III of the Habitats Directive. For further details, see: Joanne Scott, *EC Environmental Law* (Harlow: Longman 1998), p. 113-114.
[44] Scott, *id*, 116.
[45] Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221 (Re Santoña Marshes) at paras. 22, 57 and 58; see also Scott, above n 43 at 110. Confirmed in Case C-166/97 *Commission* v *France* [1999] ECR I-1719 (Re Seine Estuary) at para. 38 and Case C-96/98 *Commission* v *France* [1999] ECR nyr (judgment of 25 November 1999; Re Poitevin Marsh) at para. 41.
[46] Ibid, Case C-96/98, at para. 46.
[47] Case C-55/89, *Commission v. Germany* [1991] ECR I-883.
[48] Ch. Backes, *Juridische bescherming van ecologisch waardevolle gebieden* (1993) p. 304-305. In addition, under the very complex procedure of Article 7 of the Habitat Directive certain substantive

Birds nor the Habitats Directive prescribe any method of designation; establishing the form of this decision is entirely up to national law.

3.2.5 Valuation and assessment

One of the primary objectives of the White Paper is to restore damage caused to natural resources in Natura 2000 sites. In that respect it is not surprising that the Commission has put the emphasis on restoration and chooses restoration costs as the primary and preferred method to assess damages. In addition to the restoration costs, the responsible party will also be held liable for the reasonable cost of assessing damages.[49]

To prevent disproportionate claims, the White Paper proposes that the cost of restoration measures are only recoverable if the costs are reasonable. Such an approach is in line with most international civil liability conventions[50], previous EU proposals for liability directives and the law of some Member States. To determine whether restoration costs are reasonable, the White Paper proposes to apply a reasonableness test or cost-benefit analysis (CBA). The starting point here is the weighing of the cost of the restoration measures (including assessment costs) against the benefits of these measures. To value the benefits of the measures, the Commission proposes the use of abstract methods or economic valuation methods, such as the contingent valuation method (CVM) and the travel cost method.[51] To save on the costs, it is proposed however to use - in situations, where appropriate - the benefit transfer method. This is a relatively cheap and timesaving method because the results of previous valuation studies are used to estimate economic values for changes in environmental goods and services.

With regard to the application of a cost-benefit analysis or a reasonableness test - used to determine whether or not restoration measures are reasonable -, it is to be noted that the format of a reasonableness test is probably more flexible than a cost-benefit analysis. A reasonableness test often involves the weighing of various factors, including the costs of a restoration plan, the extent to which the restoration plan accelerates natural recovery and the expected successfulness of the measures. A cost-benefit analysis is more focussed on reaching economic efficient solutions and compares the costs of a certain restoration plan with future benefits (in dollars). The underlying assumption of a cost-benefit analysis, is that economic efficiency is reached where the future benefits - as measured by the above-mentioned abstract models or economic valuation techniques such as CVM - are equal to, or

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obligations apply without designation, but only after a long period of time. Also, failure to designate sites listed in the Inventory of Important Bird Areas in the EC is actionable in its own right under Article 226 EC Treaty (ex Art. 169), see Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031.

[49] White Paper, para. 4.5.1. The White Paper does not use the term 'reasonable' here, but we presume that it is Commission's intention to permit the recovery of reasonable assessment costs only.

[50] See Article I(6) of the International Convention on Civil Liability for Oil Pollution Damage, Brussels 29 November 1969, 9 I.L.M. 45 (1970), as amended by the Protocol of 1984, Trb. 1986, 13 and the Protocol of 1992, IMO Document LEG/CONF.9/15 (The 1992 Civil Liability Convention); Article 1(1) of the UN-ECE Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), Geneva, 10 October 1989, *Uniform Law Review* 1989-I, p. 281; Article 1(6) of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), 35 I.L.M. 1415 (1996); Article 2 of the Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999, http://www.basel.int.

[51] For a description of these methods, see: Perman, above n. 34.

greater than, the costs involved in restoring the natural resources injured.[52] Economic efficiency thus plays a key role here.

So both methods may be applied to determine whether or not a certain restoration plan is reasonable. However, both only provide an indication as to the reasonableness of the costs of a certain restoration plan. They support the decision-making process in restoration planning, but one still has to make a balancing judgement. It could be decided to introduce a certain standard above which the costs are clearly disproportionate. However, such a standard is necessarily arbitrary. Illustrative in this respect is the suggestion of the U.S. Court of Appeal in the *Ohio*-case, to consider the costs of restoration measures unreasonable if they exceed three times the value of the natural resources impacted.[53] Obviously, such a standard is arbitrary. In addition, it requires a full assessment of the value of the natural resources impacted, which is often difficult, costly and time-consuming.

We are in favour of using various factors or criteria (cost-benefit considerations being one of them) to determine the reasonableness of proposed restoration measures. This is also the approach taken in the 1997 Vienna Convention on Civil Liability for Nuclear Damage. In this convention a number of factors are indicated including the likely effectiveness of the restoration measures, proportionality and scientific and technical expertise.[54] Also, in the U.S. factors or criteria are used to determine whether the cost of implementing a restoration plan are reasonable or not. However, there is one important difference with the above treaty. The US Oil Pollution Act and CERCLA both require that the extent of the interim losses - that is the loss of natural resource services from the time of the injury until full recovery - is considered under the various restoration options. So apart from factors such as the technical feasibility of the various restoration options, the likelihood of success of each of these options, the extent to which each option is expected to return the injured resources and services to baseline condition, and the cost of implementing the various restoration alternative(s), one needs also to take into account the extent of the interim losses under the various options. It is striking that the White Paper does not address this type of harm at all.[55] However, this might change in the future directive - or in the guidelines that accompany the directive (if established) (see § 4.1).

Where restoration is impossible for technical or financial reasons, the cost of alternative solutions may be used as a measure of damages. These alternative solutions should be aimed at re-establishing the level of nature conservation and biological diversity embodied in the Natura 2000 network and may include actions to acquire the equivalent of the damaged natural resources.[56] Damages may thus be assessed also on the cost of *e.g.* the purchase of land to be re-created as a habitat favourable to the animal species concerned and that replaces the site irreversibly affected. This is in line with some of the more recently drafted international civil liability conventions, such as the 1993 Council of Europe Convention. Article 2(8) of this convention provides that where restoration is not possible an equivalent site may be developed.

[52] Perman (et al), above n. 34, at 144-5.
[53] *Ohio v. DOI*, 880 F.2d 432, 444 (D.C. Cir. 1989).
[54] Article 1(o) of the 1963 Convention as amended by the Protocol of 12 September 1997, 36 I.L.M. 1454 (1997).
[55] The issue of the compensation of interim losses is raised however in a background study to the White Paper. See for a summary: Annex 3 to the White Paper (Edward H.P. Brans, Mark Uilhoorn, *Liability for ecological damage and assessment of ecological damage*) (Office of Official Publications version).
[56] White paper, para. 4.5.1.

The focus in the White Paper is thus on restoration or replacement of the natural resources impacted. In that line it is understandable that monies recovered from an operator must be spent on restoring or replacing the environment (earmarked damages). This is a useful innovation compared with the traditional law of damages, where generally it is up to the plaintiff how to spend the money. Support for this approach can be found in the 1990 German Environmental Liability Act, which, moreover, includes advance payments for restoration (§ 16(2) UmweltHG).[57] The 1999 Austrian Nuclear Liability Act likewise has adopted this form of earmarked damages.[58]

Finally in this context, the White Paper delimits the notion of natural resource damage further by the introduction of the positive requirement of `significance': in keeping with the linkage of the conceptualization of natural resource damage to EC nature protection law, significant damage alone is actionable.[59] Such a threshold would thus have to be passed by the plaintiff, the uncertainty inherent in this notion would act as a disincentive to bringing action. It would be more in keeping with traditional law of damages to introduce a *de minimis* defence (a negative requirement).[60] In this approach it is up to the defendant to establish negligible damage. Once again the 1997 Vienna Convention on Civil Liability for Nuclear Damage is an appropriate model as it refers to the compensation for the restoration costs of impaired environment `unless such impairment is insignificant'.[61]

3.2.6 Defences to liability

In the White Paper it is proposed to allow at least the commonly accepted defences..[62] In that respect it is noted that a responsible party should be able to escape liability if that party proves that the damage was attributable to: an act of God, contribution to the damage or consent by the plaintiff, and the act or omission of a third party.[63] The White Paper refers also to the "regulatory compliance" defence, according to which the operator is exempted from liability if he can prove that the damage was caused entirely and exclusively by emissions that were explicitly allowed by his permit. Although, the "regulatory compliance" defence itself is rejected in the White Paper, the Commission notes that if the operator can prove that the damage was caused by an authorized release, that the courts may decide, on a case by case basis, that 'part of the compensation [is] to be borne by the permitting authority'.[64] The Commission justifies its proposal by noting that under these circumstances it would be

[57] In English: B.S. Markesinis, *A Comparative Introduction to the German law of Torts* (Oxford: Clarendon Press, 1994), p. 871. See, for a further elaboration, the equivalent of this provision in the Draft Environmental Code, Independent Expert Commission on the Environmental Code, Ministry for the Environment, *Environmental Code: Draft* (Berlin: Duncker & Humblot, 1998).

[58] Willibald Posch, "New Developments in the Law of Civil Liability for Nuclear Damage Spearheaded by Austria" [1999] 3 *Environmental Liability* 82.

[59] White Paper, p. 16.

[60] European Environmental Law Association, "Repairing Damage to the Environment - A Community System of Civil Liability", [1994] *Environmental Liability* 1. See also Opinion of the Committee of the Regions of 14 June 2000 on the White Paper on Environmental Liability, CdR 13/2000 (COM-4/031), No. 2.4.

[61] Article 1k of the 1963 Convention as amended by Protocol of 12 September 1997, 36 I.L.M. 1454 (1997).

[62] White Paper, para. 4.3.

[63] *Id.*

[64] *Id.*

'inequitable for the polluter to have to pay the full compensation'.[65] Although not explicitly so stated, it is likely that this rule is proposed to provide an incentive to the polluter to comply with his permit.[66] In addition, it is expected that this rule will result in an increased care by the administration when acting in their permitting capacity and setting permit restrictions or standards.[67] It is not explained how the liability is to be divided between the public authorities and the operator, and on the basis of what criteria. It has been noted that the court may take into account, for instance, whether the operator has done everything possible to avoid the damage.[68] This could mean that if the operator knew on the basis of new technical and scientific knowledge that the standards as set in the permit were too lenient, that it is expected that he/she acts according to these knew insights and should not wait for a new or updated license. Hopefully, the final directive will be more specific here.

The White Paper is not very specific about other defences, such as the 'state of the art' or 'development risk' defence. The 'state of the art' defence is an important defence for the economic operators involved in dangerous activities. It makes it possible to escape liability if the defendant proves that the dangerous effects were impossible to foresee given the state of scientific and technical knowledge in the given field at the time the activity took place.[69] The Commission recognizes the importance of the defence but no clear position is taken in the White Paper.[70] The reason is probably the debate within the EU on the implementation of the precautionary principle, which is included in Article 174(2) (ex 130r(2)) of the Treaty.[71] Although there is uncertainty about the precise meaning and scope of the precautionary principle, the principle is generally understood as justifying measures to prevent environmental impairment, even where there is no full scientific certainty to prove a causal link between emissions or inputs and the effects.[72] The absence of adequate scientific information is thus not necessarily a sufficient reason to postpone certain measures to prevent environmental harm. Since the 'state of the art' defence enables the defendant to exempt himself from liability if an investigation into the possible dangerous effects of the activity concerned would not have produced sufficient information on the dangers, there exists a certain tension

[65] *Id.* Interestingly, the EU Committee of the Regions (COR) rejects this proposal as it is of the opinion that the party responsible for the damage should pay for the restoration costs and not the permitting authority. Opinion of the Committee of the Regions of 14 June 2000 on the White Paper on Environmental Liability, CdR 13/2000 (COM-4/031), No.. 1.5.

[66] Cf. Green Paper on Remedying Environmental Damage, COM(93) 47def., 14 May 1993, 9; Draft White Paper, version 14.9.98, para. 7.3.

[67] *Id.* -

[68] White Paper, para. 4.3.

[69] The defence has proven to be of importance in environmental cases, such as those concerning soil pollution and liability of employers for the asbestos-related illnesses of their employees. For more details; G. Betlem, *Civil Liability for Transfrontier Pollution*, London 1993, at 455-57.

[70] An earlier version of the White Paper is far more specific here as it notes the "state of the art" defence should not be allowed because it 'would considerable reduce the benefits of a strict liability approach'. In addition, the non-allowance of the defence is considered the only way to stimulate operators to undertake measures through research and development to minimize risks (version 14.9.98, para 6.2).

[71] See Communication of the Commission on the precautionary principle, COM (2000)1, Brussels 2.2.2000.

[72] The precautionary principle is included in many treaties and policy documents, including the 1992 Rio Declaration. For more details, see: D. Freestone, E. Hey, Origins and Development of the Precautionary Principle, in D. Freestone, E. Hey, *The Precautionary Principle and International Law*, London 1996, 3-15; Krämer, above n. 22, at 16-7.

between this defence and the precautionary principle. It is difficult to predict what position will finally be taken by the Commission.[73]

Finally in the context of defences, the White Paper notes that certain procedural aspects such as limitation are relevant.[74] No further examination of the important question of limitation periods is carried out; we will discuss this aspect below (see § 4.3).

3.2.7 Burden of proof of causation

With regard to the issue of the burden of proof, the White Paper is not very specific. The Commission recognizes that an impossible burden of proof would undermine the positive effects a of strict liability, but no concrete proposal is included on the alleviation of the burden of proof.[75] It is only indicated that "[t]he Community regime could also contain one or other form of alleviation of the traditional burden of proof, to be more precisely defined at a later stage".[76] Decisions regarding this issue thus have been postponed.

The previous versions of the White Paper were more specific as to this issue. For instance, in one of the earlier drafts of the White Papers it was proposed to alleviate the plaintiff's burden of proof with respect to causation by including a rebuttable presumption.[77] According to this proposal, the plaintiff would have to 'prove the damage and indicate its origin and present elements that make causation between the two plausible'.[78] So it seems that the plaintiff may suffice with proving that a certain substance is capable of causing detrimental effects to the natural resources concerned or his personal health, and that the defendant is responsible for the exposure to the substance rather than having to show a scientifically proven individual link between the loss and the release of the individual substance. However, to prevent defendants from being subjected to unreasonable liabilities, it is further noted that if the plaintiff succeeds in this, the burden of proof would then rest with the defendant who has to prove with a 'prevailing probability' that his activity did not cause the damage.[79] The Commission further noted that it depends on the circumstances of the individual case how this criterion is to be applied.

The proposal was probably inspired by the German Environmental Liability Act of 1990 (*Umwelthaftungsgesetz*), which includes a provision that alleviates the burden of proof (Art. 6).[80] However, the German Act is more specific on the circumstances that can be relied on to presume that a certain facility has caused the damage and on how to rebut the presumption of causation. It might also be that Commission looked at other parts of Community law, such a the field of sex discrimination law where the burden of proving indirect discrimination is alleviated both by legislation and case law.[81]

[73] See text n. 70. Striking is that the 'state of the art' defence was not included in the 1991 Amended proposal for a waste liability directive (COM(91) 219 final). The defence is however is included in the Product liability directive (Dir. 85/374/EEC, [1985] OJ L210/29).

[74] Para. 4.3, footnote 12.

[75] White Paper, para. 4.3.

[76] *Id.*

[77] Draft White Paper, version 14.9.98, para. 7.1.

[78] *Id.*

[79] *Id*.

[80] Art. 7 UmweltHG is also of interest here as it creates an alleviation of the burden of proof in the case where several installations could have caused the damage.

[81] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, [1998] OJ L14/6 (amended by Directive 98/52/EC); case law: see most recently Case C-226/98 *Jørgensen* [2000] ECR nyr (6 April 2000).

So with regard to the issue of the burden of proof no decisions have been taken yet. It thus remains to be seen what position will be chosen. However, it should be noted that since a future liability directive would *inter alia* give effect to the precautionary principle, scientific certainty should not be required in the context of proof of causation,[82] just like it is not required in the context of public authorities taking preventive measures such as happened with the ban on exportation of British beef to reduce the risk of BSE infection and transmission to humans or in upholding legislation to protect the ozone layer.[83] At least in the context of damage caused by GMOs, to be included in the future directive in the absence of a *lex specialis* (§. 5.2 below), courts must be expected to apply and interpret the liability regime in the light of the precautionary principle as these liability rules will be complementary to the regulatory regime of the forthcoming GMO-Directive, which, in turn has been based upon that principle and is to be taken into account at the implementation stage.[84] We would argue that any rules regarding proof of causation, be they of national or Community origin, are to be construed in the light of this principle. Operation of the precautionary principle at the national law level as a result of the combined effect of (future) directives and Article 174 EC (ex Art. 130r) will thus be comparable to its role as an aid to interpretation at Community level.[85]

3.2.8 Who will be held liable?

The White Paper recommends channeling liability to the person who exercises control over the activity by which the damage is caused (often the operator).[86] Where the activity is carried out by a company in the form of a legal person, liability will rest on the legal person and not on the managers or other employees who may have been involved in the activity.[87] This approach is in line with most of the international civil liability conventions, previous EC liability proposals and the law of some Member States.[88]

Unlike previous drafts of the White Paper there is not anticipated on the use of legal persons specifically set up to reduce the liability risk, such as through the development of separate entities with minimal assets. It is further proposed that lenders, such as banks and

[82] See De Sadeleer, above n 22 p. 223 citing French case law regarding HIV infection due to blood transfusion and Communication from the Commission on the precautionary principle, COM(2000)1, p. 15.

[83] Respectively Re BSE: Case C-157/96, *National Famers' Union* [1998] ECR I-2211, paras. 63-64 and Case C-180/96, *UK* v. *Commission* [1998] ECR I-2265, paras. 99-100; Case C-284/95, *Safety Hi-Tech* [1998] ECR I-4301. See also Case T-199/96 *Bergaderm and Goupil v. Commission* [1998] ECR II-2805, para. 66 (on appeal, the ECJ did not rule on the complaint against this consideration because it was not decisive for the operative part: case C352/98 P, [2000] ECR nyr (judgment of 4 July 2000), para. 53); Pres. CFI Case T-70/99 R, *Alpharma* v. *Council* [1999] ECR II-2027, para. 153.

[84] Common Position (EC) No. 12/2000 of 9 December 1999 with a view to adopting Directive 2000/…/EC of the European Parliament and of the Council of … on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, [2000] OJ C64/1, recital 8, Arts. 1 and 4, Annex II.

[85] See Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland* [2000] ECR nyr (judgment of 4 July 2000), para. 39-40, where the ECJ stipulates that the concept of waste cannot be interpreted restrictively consistent with the principles laid down in Art. 174 EC.

[86] White Paper, para. 4.4.

[87] *Id.*

[88] See e.g. the 1999 Protocol to the Basel Convention and 1997 Protocol to the Vienna Convention on Civil Liability for Nuclear Damage. An example of an EC proposal is the 1989 proposal for a Council Directive on civil liability for damage caused by waste. For a comparative overview of national laws, see McKenna & Co, above n. 23.

other financial institutions, should not be held liable for the damage caused by their clients, except where the lender exercises a form of operational control over the company (which is not further defined).[89]

3.2.9 Access to justice. Two-tier approach

In civil liability cases, the right to sue is normally given only to the party with a legal interest in recovering compensation. Where damage is caused to the flora and fauna in one of the designated protection areas, the question arises which parties have the right to sue. Where damage is caused to a habitat, it is the owner of the land of which the habitat forms a part who has the right to sue. However, under civil law there does not exist a duty to file a claim or to use the compensation obtained for restoration purposes. So in order to ensure the recovery and restoration of damage to the natural resources that are of Community interest, it is necessary to develop a certain mechanism. There also exists a problem if damage is caused to the wildlife that uses the habitat for breeding, wintering or as a staging post during the spring and autumn migration. These natural resources are unowned which makes damage to these resources difficult to recover via (traditional) civil liability.

The White Paper includes an interesting proposal for access to justice for cases where damage is caused to Natura 2000 sites. The aim of the proposed mechanism is to ensure restoration of damage to the areas and species protected under the Natura 2000 network. The Commission proposes a 'two-tier' approach.[90] Under this approach, the state is empowered to file claims against the polluter and is responsible in the first place for the restoration and decontamination of the affected area and species concerned. It is further proposed to provide public interest groups with a right to act on a subsidiary basis (second tier). Only in cases where the public authorities do not act at all - or not properly -, will such collective action groups have the right to take action.[91] Thus, public interest groups are granted an indirect form of access to justice. They must respect a 'waiting period' - although it is not specified how long this should take - during which the public authorities have the exclusive right to take action and decide on the necessity of restoration measures and the extent of such measures. There is one exception; in case of urgent situations, public interest groups can ask a court for an injunction in order to prevent significant damage or to avoid further damage.[92] In these urgent cases they may sue the alleged polluter and do not have to wait for the state. It is noted also that NGOs may bring a claim for reimbursement of the reasonable costs incurred in the taking of urgent preventive measures (see below).

The proposed regime on access to justice only applies to damage to the natural resources in Natura 2000 areas and contaminated sites, and not for personal injury or property damage and possibly even pure economic loss is excluded.[93]

a. Member States

The European Commission thus proposes to grant to States the primary right to sue if damage is done to the natural resources falling under the scope of the proposed regime. The legal status of the natural resources covered is of little relevance. Even with regard to the natural

[89] White Paper, para. 4.4. See further: M. Grant, Environmental Liability, in G. Winter, *European Environmental law*, Hants 1996, at 232-3; European Environmental Law Association, *Comments to the European Commission's White Paper on Environmental Liability (COM (2000) 66 final)*, at 14-5.
[90] White Paper, at para. 4.7.
[91] White Paper, para. 4.7.1.
[92] *Id.*
[93] *Id.*, para. 4.5.3.

resources that are owned - such as a habitat which forms a part of private land -, the state has the right to file a claim against the polluter.

The White Paper does not explain in much detail why the State should be awarded the first responsibility to act (even with regard to natural resources that are privately owned). It is only explained that 'the protection of the environment is a public interest' and that the natural resources protected in the Natura 2000 areas are important for the conservation of biodiversity in the Community.[94] In other words, the natural resources concerned are of Community interest and have - where it concerns natural resources subject to ownership rights - a value that exceeds the interests of a private owner. The approach is in line with the approach taken in the Wild Birds and Habitats directives; protecting certain species and their habitat irrespective the existence of property rights.

Interestingly, this part of the proposal is more or less comparable with certain aspects of the US Oil Pollution Act and CERCLA. Under OPA and CERCLA certain governmental agencies have been appointed as trustees. These trustees act on behalf of the public and are authorized to assess and recover damages for injuries to certain natural resources. These natural resources include the natural resources that 'belong to, are managed by, held in trust by, appertaining to, or otherwise controlled by' the United States, any state or Indian tribe.[95] So if the public authorities have an interest in certain natural resources, these resources are covered and it is immaterial whether the resources privately owned or not. When considering the legal obligations for EU Member States with regard to the natural resources in the Natura 2000 areas, a parallel can be drawn with the coverage of OPA and CERCLA.[96] The natural resources in Natura 2000 areas are managed and controlled by the public authorities of the various Member States.[97] One could even argue that these natural resources are held in trust for the benefit of the public (and future generations). From this point of view - and the fact that states are already under a duty to protect, preserve and manage the natural resources concerned[98] - it is not that surprising that the state is granted the primary right to sue. However, the White Paper does not address the issue of who has standing in case the state itself (or another public authority) caused the damage. It could be that NGOs are entitled to file claims in these cases, but the White Paper is unclear as to this issue. Hopefully, a more clear position is taken in the future directive.

b. NGOs

As noted earlier, the Commission proposes to grant public interest groups a secondary right of standing.[99] Only in cases where the public authorities do not act at all or not properly, will collective action groups have the right to take action. Public interest groups thus must respect a 'waiting period' during which the public authorities have the exclusive right to take action and decide on the necessity of restoration measures and the extent of such measures. This rule obviously creates the risks of delays being so extensive that effective action by NGOs can be blocked. At the very least, any future directive should therefore include a period within which public authorities must act. Failure to act after expiry of this period would then open the

[94] *Id.*, para. 4.7.1, p. 2.
[95] 42 U.S.C.A. § 9601(16); 33 U.S.C.A. § 2701(20).
[96] See for a short description of some of these obligations § 4.2.3.d.
[97] Obviously, certain natural resources belong to the local or state governments.
[98] Currently the EU and its Member States are spending considerable amount of money to preserve and restore the natural resources concerned. For instance, the EU's budget for financing nature conservation projects in Natura 2000 sites is 450 million Euro (LIFE 1996-99).
[99] White Paper, para. 4.7.1.

doors to the NGO. Alternatively, one could include the requirement that the NGO first seeks redress extra-judicially from the operator itself.[100]

Although the White Paper is not very specific here, NGOs - if applying their secondary right of action - may raise all types of claims against the potential liable person, including claims for monetary damages. However, the recovery of damages for the injury to, or the loss of natural resources is subject to limitations on the use of the sums obtained. The compensation is only to be used for restoration purposes. From the White Paper it appears that NGOs may take the measures of reinstatement themselves, provided that the measures are carried out in co-operation with the public authorities.[101]

There is one exception to the rule on respecting a waiting period. For so-called urgent situations, it is proposed to grant NGOs the right to directly ask a court for an injunction in order to prevent significant damage or avoid further damage to the environment. Under these circumstances NGOs may also ask for an injunction ordering the reinstatement of the environment.[102] In addition, NGOs may take action to prevent or limit damage to the natural resources falling under the scope of the proposed regime, and may recover the reasonable cost incurred in the taking of these urgent preventive measures. One could think here of the costs made to cleanup oiled birds. It should be noted that such costs are already recoverable in some Member States and under some of the international civil liability conventions.[103]

Not every NGO will be entitled to file claims. The Commission proposes that only public interest groups that comply with objective qualitative criteria are granted standing to sue. No further details are available in the White Paper on what criteria need to be fulfilled. However, parallel to the criteria as included in the in Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests[104], it can be expected that in order to be entitled to file claims, NGOs need to be properly constituted according to the law of the Member State, have legal capacity, and have the purpose to protect the environment (appearing from their articles of association).[105] In addition, it can be expected - as is required under the above directive - that in order to be able to take action in case of a transboundary incident, that the NGOs willing to take action in that type of cases, need to be listed as qualified national entities. Such a list is drawn up under the Consumer Injunction Directive and will be published in the Official Journal of the EC.[106] The same could be done with the list of qualified environmental NGOs.

c. Outlook.

[100] Cf. Article 3:305a(2) Dutch Civil Code. This provision of the Civil Code entitles an NGO with full legal capacity to bring an action in court - other than a damages claim - for the purpose of protecting the interests of other persons, inasmuch as it promotes these interests according to its articles of association. However, NGOs first need to seek redress by way of consultation with the defendant. For further details, see: G. Betlem: Environmental Standing for Ecosystems. Going Dutch, 54 *Cambr.L.J.* 1995 160-167.

[101] White Paper, para. 4.7.3.

[102] *Id.* This proposal is not new, as it was already included in one of the earlier proposals on environmental liability. See Art. 4(b)(iii) Amended proposal for a Council Directive on civil liability for damage caused by waste, COM(91) 219 final. Cf. Art. 18(1)(d) of the 1993 Lugano Convention.

[103] Rb. Rotterdam, 15 March 1991, 23 *NYIL* 1992, 513 (Borcea-case).

[104] [1998] OJ L166/51. For more details, see: G. Betlem, C. Joustra, The Draft Consumer Injunctions Directive, *Consum. L.J.* 1997, 8-17; G. Betlem, Verbodsacties consumenten, *TMA/ELLR* 1998, 167-9.

[105] Art. 3, 4 of Directive 98/27/EC.

[106] Art. 4(2).

From the White Paper and some of the other EC documents - including the Aarhus Convention that has been signed by the EU -, it appears that the EU is currently in the process of granting NGOs (and individuals) more extensive rights of legal standing.[107] The aim here is to ensure a better implementation and enforcement of Community (environmental) law.[108] The NGOs, as environmental watchdogs, are considered a welcome supplementary power to assist in the protection of the environment.[109]

In our view, granting standing to NGO's and permitting them to file claims for damages is a positive development. However, to what extent are NGOs capable of playing the environmental watchdog? It is not unlikely that the high costs of civil procedures forms an obstacle for NGOs to file claims and seek monetary compensation for injuries to natural resources covered. Not only is there the risk of losing the case and being forced to pay the cost of the winning party[110], in many natural resource damage cases NGOs will have to undertake studies to determine *e.g.* the extent of the injuries to natural resources. These high costs may thus influence the willingness of NGOs to file claims. To prevent NGOs from seldom using their right of action - or only in high profile cases - the EU should consider the establishment of a mechanism to compensate NGOs for the costs made in these legal procedures. There are various options here. The EU could establish a fund to assist in civil litigation. It could also expand its current program that provides NGOs financial assistance for activities that are of Community interest and that contribute to the implementation of EC law.[111] Another option is to include in the future directive a specific (and more favorable) costs rule.

Apart from the issue of the costs of litigation, being relevant to NGOs as well as indivuals who suffered personal injury or property damage, barriers to access to justice particularly concern the opportunities for private enforcement by NGOs. From this perspective it is difficult to see why the White Paper (§ 4.5.3) rules out the application of any specific future provisions on access to justice insofar as traditional damage (possibly even including pure economic loss) is concerned. It would seem to follow that the rules on access to justice are only concerned with environmental damage. Surely, to take the example of an NGO suing a Member State for non-implementation of a directive, non-compliance with EC environmental law standards may give rise to a variety of kinds of loss, environmental and `traditional' in the sense of the White Paper. Why should an a priori restriction on a contemplated lifting of barriers to access to justice be introduced in the sense that litigation may thus be further complicated by requiring a separation of kinds of losses at the stage of the admissibility of a claim?

[107] See Communication of the European Commission on Implementing Community Environmental law, COM(96) 500 def., para. 40-1; Preamble to Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests, [1998] OJ L166/51. See also the discussion paper of the Commission "The Commission and non-governmental organisations: building a stronger partnership", COM(2000) 11 final.

[108] *Id.*

[109] COM(96) 500 def., para. 37; Council Decision 97/872/EC of 16 Dec. 1997 on a Community action programme promoting non-governmental organizations primarily active in the field of environmental protection, [1997] OJ L354/25.

[110] Most EU Member States apply the rule that the loser has to pay the costs of the winner and will be left to bear his own. McKenna Report, 312-4.

[111] Council Decision 97/872/EC of 16 December 1997 on a Community action programme promoting non-governmental organizations primarily active in the field of environmental protection, [1997] OJ L354/25.

4. DESIRABLE ELEMENTS OF AN EC ENVIRONMENTAL LIABILITY REGIME

In addition to the comments and criticisms made above in the discussion of the key features of the proposed regime, this paragraph puts forward some further proposals for an effective EU-wide regime, partly based on domestic legal experience. Where appropriate in order to support any possible initiatives regarding the forthcoming harmonisation, we will briefly refer to developments outside the environmental law sphere – such as consumer law. In particular, instances of a Community law impact on the domestic law of obligations of the Member States are sketched where they have relevant `precedent-value' for the Community legislature in preparation of a forthcoming framework directive on environmental liability.

4.1 A Mother Directive with Daughters

Just as the CERCLA and the US Oil Pollution Act are supplemented by secondary statutory instruments, which outline in great detail the determination and assessment of natural resources damages,[112] a future Framework Directive should be supplemented (at a later stage) by guidelines on assessment of natural resource damage. [113] Such guidelines will benefit the public authorities and NGOs in determining the nature and extent of the losses, the assessment of the natural resource damages, the development of reasonable restoration alternatives and the selection of the most appropriate restoration plan. Such rules may also support an even application of the liability rules within the Member States and will support the courts in applying these new rules and assess natural resource damages.[114] Interestingly, the Commission recently issued a call for tender for a study on valuation and restoration of natural resource damage. The objectives of the future study are to provide guidance to the Commission on how to value natural resource damages and to develop criteria for determining whether or not a certain injury is above the minimum threshold and is to be considered significant. Although, it is unclear whether it is the Commission's intention to use the result of the future study to finally develop a secondary statutory instrument, it may be used as a step in that direction.[115]

Is the suggestion to lay down further detailed provisions in a Regulation complementing a Directive unprecedented in Community law? Disregarding the precise form of the instruments involved, the establishment of detailed secondary regulations by the Commission is not new. The Commission has, for instance, developed such regulations for the imposition of a sanction in the form of a lump sum fine or periodic penalty payment against Member States for non-compliance with a judgement of the European Court of Justice (Article 228(2) EC Treaty). The Treaty itself says no more than, in the event of non-compliance with a judgment, that the ECJ may impose a lump sum or penalty payment. The Commission, however, has formulated rules on the factors determining the calculation of the fines or penalties it would request the ECJ to impose. These factors include the Member States' gross domestic product

[112] 43 CFR. 11; 15 CFR 990.

[113] The White Paper itself talks about a step-by-step approach, § 6.

[114] See also the ERM Economics' Study on economic aspects of liability, Annex 2 to the White Paper, p. 38 (Office for Official Publications version).

[115] The follow up to the White Paper is made public on the Commission's Website, see http://europa.eu.int/comm/environment/liability/followup.htm.

and voting power as well as the seriousness and duration of the infringement.[116] The seriousness coefficient includes taking into account the effects of the infringement such as irreparable damage to the environment.[117]

Insofar as the combination of Directive and Regulation is concerned, the Community legislature may be inspired by the current system regarding the licencing of the placing on the market of certain high-technology medicinal products. A 1993 Regulation introduces uniform Community-level procedures for the authorization of such medicines alongside the national procedures of the Member States which had already been extensively harmonized by directives; it follows that any future Framework Directive can be supplemented by a Regulation.[118]

Finally, In the environment sector itself, the `parent/child' approach is of course well known. For instance, both with respect to air and water pollution, daughter directives are envisaged laying down emission limit values. However, the Community legislature has not been a very `productive parent'; only a limited number of substances are covered after years of negotiation.[119]

4.2 Two Complementary Roles: Enforcement in addition to Compensation

The White Paper repeatedly refers to the need for facilitating the enforcement of Community environmental law.[120] It is in this context that the Commission is proposing to open up the `ordinary' tort law regimes both for new actors – NGOs – and for new forms of damage. However, in order to facilitate the enforcement of EC law before national courts with civil law remedies, the Community legislature should not merely set the aims and objectives while leaving the instruments to the Member States, *i.e.* the choice between public and private law instruments.[121] The Community legislature should take harmonisation one step further than that. Of course any directive within the meaning of Article 249 EC (ex Article 189) is only binding as to the result, leaving choice of form and methods to the Member States, but the result of any future environmental liability directive is not (only) environmental protection as such, but also the availability of civil law remedies at national level. The freedom of member States to choose form and methods is therefore restricted to the exact national law instrument (adaptation of the national Civil Code, enacting of separate act of environmental liability, etc.). The Directive should therefore take an approach comparable to the directives dealing with cultural goods, consumer injunctions and the Public Procurement Remedies Directive.[122] All these instruments either introduce a specific right of action or set standards to the

[116] Memorandum on applying Article 171 of the EC Treaty [now Article 228], [1996] OJ C42/6 and Method of calculating the penalty payments provided for pursuant to article 171 of the EC Treaty, [1997] OJ C36/2.

[117] In its first ruling on this Article, Case C-387/97, *Commission* v *Greece* [2000] ECR nyr (judgment of 4 July 2000; Re Waste Disposal), the ECJ regarded the guidelines not as binding but as a useful point of reference. It also considered Greece's endangerment of the environment as being particularly serious.

[118] See Council Regulation (EEC) 2309/93 of 22 July 1993 laying down community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, [1993] OJ L 214/1.

[119] Scott, n. 43 above, p. 26.

[120] See e.g. White Paper, para. 1.1, 3.3

[121] White Paper, para. 6.

[122] Council Directive 93/7/EC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, [1993] OJ L74/74 and Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers'

already available ones. For example, in the cultural goods sphere, Community law creates an independent right of action (i.e. next to any rights based on ownership) for the State of the country from which the good in issue has been unlawfully removed before the civil courts of the State where the good is situated; it does not merely say that the member States must ensure adequate remedies. Likewise, the Consumer Injunctions Directive entitles, in a cross-border situation, relevant recognized so-called qualified entities of one State to institute legal proceedings before the courts of another without them having to fulfill any requirements of that second State's law, provided it satisfies the criteria of the Directive, i.e. the organisation in question has been placed on list of qualified entities. The Directive specifically prescribes that the courts of this second State (i.e. other than the home State of the entity) must accept this list as sufficient proof of the applicant's capacity to bring the proceedings. So again, this Directive does more than prescribe `adequate measures' in general. An independent right of action has been created; a fact confirmed by the Dutch implementation legislation which has added an additional cause of action for foreign qualified entities to the two existing categories of possible plaintiffs under the Civil Code.[123]

Only where the envisaged Environmental Liability Directive creates remedies itself or sets standards for existing remedies will common enforcement within the whole Community be attainable. It is not enough that in some Member States NGOs can apply to the civil courts whereas in others they can only, if at all, seek judicial review of decisions of the public authorities to act or not to act. Indeed, that is the present situation which was deemed inadequate by the Commission in its 1996 Implementation Communication. The Commission here also notes that there will always be a lack of resources at Community level (centralized enforcement through Article 226 EC) to deal with even the minority of cases of alleged breach of EC environmental law. [124]

The Council, for its part stressing the role of liability in the enforcement process, notes that there is a need for improving the implementation and enforcement of EC environmental law and is concerned about the lack of progress in broadening the range of instruments; it is recommending new instruments as a priority and a preferred option under the forthcoming 6th action programme.[125] Detailed legislative action of this kind is needed to prevent private enforcement remaining `an unfulfilled promise'.[126]

In the main, a choice between two techniques is open to the EC legislature. It could introduce specific rights of action for the purpose of enforcement along the lines of the U.S.

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interests, [1998] OJ L166/51; Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures in the award of public supply and public works contracts, [1989] OJ L395/33, regarding civil and/or administrative law.

[123] See Articles 3:305c and 6:240(6) Civil Code inserted by Act of 25 April 2000, Stb. 2000, 178.

[124] Communication of the European Commission on Implementing Community Environmental law, COM(96) 500 def., paras. 12-15, 25.

[125] 2253rd Council Meeting, Environment, Brussels, 30 March 2000, PRES/00/91. We cannot help noticing that it was of course mainly the Council that emphasized the application of national liability law rather than developing EC law, see e.g. Common Position (EC) No. 20/97 of 17 April 1997 with a view to adopting Decision No. .../97/EC of the European Parliament and of the Council of ... on the review of the European Community programme of policy and action in relation to the environment and sustainable development `Towards Sustainability', [1997] OJ C157/12, Article 3(1)d: `encouraging the application of the concept of environmental liability at Member State level'.

[126] Han Somsen, "The Private Enforcement of Member State Compliance with EC Environmental Law: an Unfulfilled Promise?" 1 YEEL 311 (2000).

citizen suits provisions. Typically, they provide that any person may commence a civil action `against any person (including the United States and any other governmental […] agency) […] who is alleged to be in violation of any standard, regulation, condition [..]' . of the relevant Act.[127] The plaintiff is entitled to seek any order necessary to correct the violation as well as civil penalties (comparable with periodic penalty payments). The second option would be to require modification of domestic tort law in terms of widening the range of interests protected by tortious liability to include the general interest of environmental protection as such as well as granting locus standi to relevant organisations promoting it. Dutch tort law is a case in point where it is well established that breach of a norm which aims at environmental protection constitutes unlawfulness within the meaning of the relevant Civil Code provision vis-à-vis organisations with a `matching' purpose.[128] During the 1980 this non-contractual liability regime has been judicially adapted to enforcement purposes to that effect. Breaches of environmental statutory duties are actionable by environmental protection organisations (NGOs). Community law can and should require this kind of adaptation of the law of obligations throughout the EU. (Such a possible requirement in tort law may be compared with the sphere of contract law where EC law comparably requires the Member States to ensure that contracts concluded electronically have the same effect and validity as `normal' contracts;[129] by implication, their contract law may have to be modified to reach this result.)

Finally on enforcement, is the linkage of the future liability regime to existing administrative EC environmental law as proposed by the White Paper desirable? With or without formal linkages, only a limited number of Community environmental law provisions are of a kind capable of being enforced before the national (civil) courts in any event. In practice, the main categories concern emission limit values, permits, designation of conservation areas and non- or incorrect implementation of Directives.[130] Within this category, an argument in favour of the link between liability and administrative environmental law is legal certainty. A list could be drawn up with those instruments of EC environmental law qualifying for enforcement under the liability regime; this approach reflects the Consumer Injunctions Directive.[131] It defines actionable infringements by referring to an Annexed list of Directives. The disadvantage of this approach, however, is that a list is likely to leave gaps whereas legal certainty can only be advanced to the extent of the level of clarity of the scope of the norm to be enforced. Defining waste and determining which birds are covered by the Birds Directive have certainly not been straightforward, for instance.[132] So even under a list-based regime, legal uncertainty cannot be prevented here.

[127] See e.g. CERCLA, 42 U.S.C.9659; see generally William Wilson, *Making Environmental Laws Work. Law and Policy in the UK and USA* (Oxford, Hart Publishing 1999).
[128] Betlem, n. 69 above, p. 317 and 375.
[129] Article 9 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), [2000] OJ L178/1.
[130] Somsen, n. 126 above, p. 337. See also Scott, n. 43 above, pointing out that for hazardous substances, emission standards are to be preferred over quality objectives, in particular from the point of view of enforcement, p. 35.
[131] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, [1998] OJ L166/51.
[132] See for the former Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95, *Tombesi* [1997] ECR I-3561 and for the latter Case C-169/89, *Gourmetterie Van den Burg* [1990] ECR I-2143, Case C-149/94, *Vergy* [1996] ECR I-299 and Case C-202/94, *Van der Feesten* [1996] ECR I-355.

The preferred option, in our view, is therefore to follow the model of the Product Liability Directive which contains no linkage with Community product safety law at all; simply *any* defective product, as defined by the Product Liability Directive itself and not by other (administrative) product safety rules, is covered. It is a free standing regime. Apart from ensuring gap-less enforcement of EC environmental law, such an approach would have the additional benefit of facilitating the enforcement of other environmental law, be it based on either domestic or international law. A consistent approach to enforcement should take into account that Community law does not operate in isolation but leaves scope for more stringent protection under national law (Article 176 EC; ex Article 130t) on the one hand, while being itself subject to international obligations on the other. A first step in this direction has been made by the 1998 Aarhus Convention, signed by the EU, which requires Contracting Parties to ensure that qualified persons have access to justice where both private persons and public authorities have contravened provisions of its national environmental law.[133] At the end of the day, and as a matter of enforcing Community law proper, it may not matter much one way or the other as most environmental damage will be caused by discharges to water or air, by dangerous substances or GMOs; they are all covered by EC legislation (White Paper, § 4.2.2).

4.3 Limitation periods

Unlike the Green Paper on Liability for Defective Products,[134] the White Paper on Environmental Liability makes no mention of the issue of limitation periods within which actions must be brought (prescription).[135] Litigation concerning the detrimental effects of hazardous substances – which likely constitutes the bulk of environmental liability cases – involves complex and time consuming scientific assessments. Moreover, the harmful impact on man and/or the environment may take years to materialise (latent damage), whereas it may take even more years to establish a causal connection between the exposure to substances and personal or natural resource injuries. Illustrative for personal injury cases are a number of English High Court cases dealing with personal injury resulting from the exposure to organophosphates (OHPs). A typical situation is the one of farm workers required to `dip' sheep in baths containing OHPs; the basis of liability is alleged insufficient protection of health and safety at work by their (former) employer. Even though ultimately successful, one plaintiff's case, even despite admission of liability by the ex-employer, involved a lengthy debate on medical causation.[136] Another, however, was struck out on prescription grounds.[137]

Although this situation is also concerned with possible product liability on the ground that the manufacturers had given insufficient warning/instructions, it is quite telling that these cases were not pleaded on the basis of the English implementing legislation of the Product Liability Directive. Both limitation periods applicable to this cause of action (article 10 of the

[133] UN-ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, *Tractatenblad* 1998, 289; http://www.unece.org/env/

[134] Brussels, 28 July 1999, COM(1999)396 final.

[135] It merely notes, in the context of defences, that certain procedural aspects such as limitation are relevant; there is no further discussion, see para. 4.3, footnote 12.

[136] *Hill* v. *Tomkins*, judgment of 17 October 1997 (QBD, unreported, cited from Lexis). Most of the four week trial was taken up with medical expert testimony on causation. See also *Re Human growth Hormone Litigation*, judgment of 19 July 1996 (QBD, unreported, cited from Lexis), involving a 25 day oral hearing.

[137] *Liversidge* v. *Coopers Animal Health Farm Ltd .and Another*, judgment of 29 October 1998 (QBD, unreported, cited from Lexis).

directive) are too short in these scientifically complex cases.[138] Given possible long periods of latency, the ten year period linked to the date the product was put into circulation will have been expired before there is enough certainty about the damage; even where the plaintiff has become aware of the injury, the defect and the identity of the producer, the relevant three year period running form this date may be too short to gather sufficient medical evidence.

Contrary to the Product Liability Green Paper, we cannot accept that these relatively short limitation periods are necessary to strike a proper balance between consumer protection and interests of producers. Effectively, shorter prescription periods are regarded as the price to be paid for a strict rather than a fault-based liability.[139] However, as illustrated by the practical problems facing victims of exposure to hazardous substances, one should not see this as a bargaining issue because, in these situations, the 3 and the 10 year limitation periods exclude all compensation due to factors outside the control of the victim. Extended periods of limitation taking into account these difficulties should thus be part of the future regime.[140]

Exactly because of the above noted difficulties, a proposal to amend the Dutch Civil Code in situations of personal injury resulting from latent damage, is pending before the Dutch Parliament.[141] In this proposal it is suggested to extend the three year (short stop) period to five, whereas the running of the 20 or 30 year (long stop) period following the harmful event is excluded altogether.[142] In addition to these legislative developments, the Dutch Supreme Court recently determined in two asbestos cases - concerning two former employees who suffered from mesothelioma -, that under certain conditions the 30 years limitiation period can be circumvented.[143] A somewhat comparable development has taken place in the 1997 Vienna Convention on Civil Liability for Nuclear Damage, where personal injury claims will be extinguished after 30 years instead of the 10 years in the 1963 version.[144]

Finally in this context, mention may be made of Article 7(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state,[145] which takes a 30 years period as its starting point. An extension of this period applies in the case of certain specially protected cultural goods to 75 years or even longer if (inter)national law so provides. It follows that the national, international and Community legislatures have been prepared to give extra weight to the interests of victims in special cases. In order to protect the environment effectively and to prevent injustice to individuals, careful consideration should be given to regulating limitation periods. In particular, as follows from the Dutch and English case law and the Dutch proposed legislation, extinction of rights to compensation before there could have been any sufficiently certain assessment about the occurrence of loss at all must be prevented. In situations of complex (medical) causation connected with the release of hazardous substances, a ten year extinction period following this liability triggering event proved to be too short; under certain circumstances, the `right' will then

[138] Interview with Peter Bright, solicitor, Plymouth, 9 May 2000.

[139] Green Paper Liability for Defective Products, COM(1999) 396, p. 26.

[140] See also, in the context of product liability, the Opinion of the EP's Committee on the Environment, Public Health and Consumer Policy, PE Doc. A5-0061/2000, p. 10.

[141] Amendment of the provisions on the statute of limitations in the Civil Code in cases of latent damage resulting in personal injury or death, *TK* 1999-2000, No. 26 824.

[142] *Id.*

[143] HR 28 April 2000, *RvdW* 2000, 118 (*Van Hese/De Schelde*); HR 28 April 2000, *RvdW* 2000, 119 (*Rouwhof/Eternit*).

[144] N. 54 above, Article VI.

[145] [1993] OJ L74/74.

have expired even before the loss had occurred (i.e. any loss that can be proven with a sufficient degree of certainty). That is unacceptable.

5. SPECIFIC SECTORS OF ENVIRONMENTAL LIABILITY LAW

Partly because of recent incidents or related legislative reform of the regulatory framework, the question of liability for damage to the environment has come to the fore in connection with three sectors: regulating the mining industry, the release of GMOs into the environment and oil pollution at sea. There is merit in surveying the developments in these sectors as they highlight public concern about the issue of environmental liability and raise the question whether the legislative process should focus on adopting a general framework directive (horizontal approach) to the exclusion of any sector-specific liability rules or whether these could both be developed along side each other.

5.1 Mine spills

The first and as yet EC-unregulated sector which has recently proved to be capable of causing significant damage to the environment, is the mining industry and in particular the companies extracting minerals such as gold, tin and other metals. According to a study by the Institute for Environmental Studies, Free University Amsterdam, particularly problematic is the fact that toxics such as cyanide are used in the extraction process, generating acid mine water which is then either stored in the mines (in particular in abandoned ones) or in above-ground lagoons. Leaks and spillages affect the surrounding environment; also, dams which contain the acid water within the lagoons have been know to give way. One such serious accident occurred in Southern Spain in 1998, affecting the Doñana wetlands, a Natura 2000 site. The study concludes that an effective legislative framework at EC level on the protection of health and the environment from mining activities is lacking at present.[146]

A second large incident took place in Romania in January 2000, affecting the river Danube in Hungary: the Baia Mare cyanide spill. In a statement after her fact finding mission to Romania and Hungary, Commissioner Wallström announced seven steps to be taken in order to prevent such accidents from happening again, including a review and adaptation of current EU environmental law, i.e. explicit inclusion of mining activities where this is presently not the case or uncertain, and the acceleration of the preparation of legislation on environmental liability.[147] As a first step, the Commission has adopted a Communication on the broad policy lines for promoting sustainable development in the mining industry. [148] Priorities include the prevention of mining accidents and sound management of waste. No explicit mention is made of operator liability, although it can clearly be relevant in the context of prevention of incidents. It is worth noting that `typical' mining damage, i.e. subsidence of the soil, has been subjected to strict liability as early as the 1920s by the Dutch courts, applying the general tort law rules of the (old) Civil Code as referred to in the 1810 Mining Act. So within the context of tort law in general – not under a special regime – it was

[146] V.M. Sol, S.W.M. Peters & H. Aiking, "Toxic Waste storage sites in EU countries. A preliminary risk inventory", IVM Report No. E-99/02, commissioned by WWF; see Agence *Europe* No. 7656 (16 February 2000), p. 16. Cf. for a similar lack of regulation the potential release into the Baltic sea of dioxines and furanes embedded in the sediment of the Kymijoki river in Finland, Written Question E-2311/99 by Esko Seppänen, "Environmental disaster in the Kymijoki river, [2000] OJ C219E/145.

[147] "Cyanide Pollution Statement by Commissioner Wallström", BIO/00/32, Brussels 18/2/00, Website EU Commission, D-G XI.

[148] Press release 3 May 2000, "Commission sets out plans for sustainable development of EU mining industry", IP/00/431 (RAPID database).

reasoned that the special nature of mining and the serious risks it poses for neighbouring property justifies such a high level of due diligence that any shortcoming by the operator constitutes fault. The familiar issues of environmental litigation already feature during this period: the irrelevance of the plea that the operator managed the mine according to usual practice in that line of business (aka `state of the industry'), absence of fault only where the damage would have been completely unforeseeable and dismissal of the plea that the costs of preventive measures were too high.[149]

Mining incidents may also spur legislative action at the international level. In a UNEP Report on the Baia Mare-Danube cyanide spill it is noted that the issue of liability and compensation would be easier to settle if there would be an international regime. It is therefore recommended that a Liability Protocol be developed to the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the UN/ECE Convention on Transboundary Effects of Industrial Accidents.[150] The Report notes that the mine had been wrongly classified under Romanian law as not requiring special monitoring. The mine thus operated in compliance with its licence; but, being wrongly classified, the conditions of the licence were too lenient. It would be doubtful if the operator would be liable under a regime which accepts compliance with a licence as an exoneration of liability (see § 3.2.6).

5.2 GMOs

Directive 92/220/EEC constitutes the current legal framework on the regulation of genetically modified organisms (GMOs); it establishes a system of coordinated licencing, where permits granted by the relevant Member State authority must be recognised by the other Member States through the intermediary of the Commission.[151] If other Member States object to the purported licencing, the decision to permit the release of the GMOs is taken at Community level. This regime is considered to be inadequate by the Community legislature; a proposal for a new directive replacing the old one is being debated. More stringent requirements are proposed regarding public participation (currently consultation takes place where a Member State considers this appropriate), labelling and traceability. Indeed, certain Member States (Denmark, France, Greece, Italy and Luxembourg) are refusing to grant any licences for GMO products/crops under the old regime (de facto moratorium) pending the entry into force of new legislation on labelling, traceability and producer liability.[152] There are no rules on producer liability in the current GMO Directive (of course, where applicable, a producer may be liable under the Product Liability Directive).

In April 2000, the European Parliament finalised its involvement in pending GMO legislation by adopting several amendments to the Council Common Position; the final text will be shaped in the conciliation procedure (Article 251 EC, ex Article 189b). The Common Position provides no other guidance as to liability than that the `Directive shall be without

[149] Betlem, n. 69 above, p. 450-452.

[150] UNEP/OCHA, "Cyanide Spill at Baia Mare Romania" Geneva March 2000; http://www.unep.ch.

[151] Council Directive of 23 April 1990 on the deliberate release into the environment of genetically modified organisms, [990] OJ l117/15. And see European Commission, "Facts of GMOs in the EU", MEMO/00/43, Brussels, 13 July 2000.

[152] "Most Member States will not give up moratorium on GMOs until Parliament and Council agree and new complete legal framework is known" Agence *Europe* No. 7760 (18 July 12000), p. 10.

prejudice to national legislation in the field of liability'.[153] The EP did not adopt the following amendment:

"Those legally responsible for deliberate releases of genetically modified organisms shall have strict civil liability for any damage to human health and the environment caused by the release in question. Before the activities begin, they shall take out sufficient liability insurance to cover such losses as might be occasioned thereby."[154]

It is perhaps no surprise that this provision met with opposition as it includes taking out compulsory insurance without any further defining of `damage to the environment' which `might occur'. At this stage of the legislative development, it is more appropriate to supplement the Product Liability Directive rather than introduce a new unspecified GMO-liability. Insofar as GMOs are contained in products placed on the market, this regime is currently already applicable and it does not require producers to take out compulsory insurance. Indeed, some larger producers have opted for self-insurance: they can meet their obligations more cheaply this way (or are unable to insure their products at reasonable costs).[155] Furthermore, the Product Liability Directive provides for joint and several liability of multiple defendants, with the possibility of recourse or contribution actions against third parties (Article 8). Supplemental legislation would then be required in view of the limited scope of heads of damages under the Product Liability Directive, the development risk defence, prescription periods and, of course to cater for damage caused by GMOs not covered by the definition of a product which was placed on the market.[156]

The Commission also opposed the liability clause; it is not in favour of separate GMO-liability.[157] A general/horizontal not a sector-specific regime is preferred. One argument is that it were difficult to explain why one sector should be singled out. However, does this mean that Commission should be against such rules *ab initio*? Not at all: there is no harm in *starting* to legislate in a limited field. If and when - after how many years? - a horizontal directive will have been adopted, one simply amends the specific directive by removing c.q. modifying the specific regime.

[153] Common Position (EC) No. 12/2000 of 9 December 1999 with a view to adopting Directive 2000/…/EC of the European Parliament and of the Council of … on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, [2000] OJ C64/1, recital 16.

[154] See Recommendation for Second Reading, Rapporteur David Bowe, PE Doc. A5-0083/2000; Minutes EP, 12 April 2000, no. 12, PE 289.451; Agence *Europe* No. 7705 (27 April 2000), p. 14.

[155] Christopher Hodges, *Product Liability. European Laws and Practice* (London: Sweet & Maxwell, 1999), No. 23-003. Erroneously, the Economic and Social Committee states that compulsory insurance is already regulated for defective products: Opinion on the White Paper of 12 July 2000, CES/2000/803, http://www.esc.eu.int, No. 4.6. Cf. the ESC's Opinion on the Green Paper Liability for Defective Products, [1999] OJ C117/1, No. 3.8, supporting the current *absence* of compulsory insurance.

[156] See for analyses of GMO liability under English tort law Mark l. Wilde, "The Law of Tort and the `Precautionary principle': Civil Liability Issues Arising from Trial Plantings of Genetically Modified (GM) Crops" [1998] *Environmental Liability* 163 and A.J. Waldron, "Transgenic Torts" [1999] *Journal of Business Law* 395.

[157] White Paper, para. 5.5 and see Press Release IP/00/374 of 12 April 2000.

For example Council Regulation (EC) No. 2027/97 of 9 October 1997 on Air Carrier Liability in the Event of Accidents[158] has been adopted as an interim measure awaiting review of the relevant international conventions in this field; apparently, that was no reason to abstain from regulation at EU level. Moreover, there are good reasons -the scale and uncertainty of the risks involved - why the GMO sector can justifiably be `singled out'; it is recalled that Dutch case law of the 1920s already took the special risks created by certain activities, in this case mining, into account to vary the level of due care required from operators and that the GMO risks have prompted certain Member States to refuse all applications for permits.

Finally on GMOs, without a specific regime all GMO liability will be regulated in the context of the future general Environmental Liability Directive. However, if established as proposed, the scope of future regime will be limited to Natura 2000 sites which is highly inappropriate, since GMOs are likely to (primarily) cause environmental damage elsewhere. We assume that sites with genetically modified crops will – of course - not be situated in or close to Natura 200 areas. Yet contrary to the somewhat rosy picture of the White Paper which understands that dangerous activities are not supposed to take place in protected areas, a substantial number of Natura 2000 sites, in particular at estuaries, may be affected by them as these sites are surrounded by heavy industry.[159] Such damage – damage to unowned natural resources outside the Natura 2000 network and resulting from the release into the environment of GMOs - would not then be compensatable at all as in the main domestic tort law regimes do not cover this kind of loss apart from limited exceptions in terms of clean-up costs.

5.3 Oil pollution: European Commission initiatives

An interesting feature of the legislative initiatives in this field is, that the Commission does not hesitate to propose EC law where there already exists a detailed regulation of liability for oil pollution in international conventions.[160] Unlike the 1993 Council of Europe Convention which completely excludes from its scope damage caused by oil pollution insofar as covered by these instruments (as well as liability for nuclear accidents, it may be added), the Commission's proposals from the Safety of the Seaborne Oil Trade Communication regard that regime as insufficient and seek to adopt additional, complementary, EC law.[161] These proposals are a reaction to the oil spill of the tanker *Erika*, causing extensive damage to the coast of Brittany. In keeping with the Commission's stance, the French authorities are contemplating to sue other parties than the one to which liability is channelled under the

[158] [1997] OJ L 285/1. See for further `updating': Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, COM(2000) 340 final, Brussels, 6 June 2000.

[159] White Paper, at p. 20; EELA Comments, n 41 above, 4.2.2(b). Moreover, adequate protection of Natura 2000 sites is not necessarily guaranteed: French law allowed waiver of impact assessment for certain projects on the grounds of their low costs, see Case C-256/98, *Commission* v *France* [2000] ECR nyr (Re Habitats Directive, judgment of 6 April 2000), para. 39. And see e.g. the following newspaper reports about possible GMO-damage elsewhere: "Monster salmon scare for fish farmers" the *Guardian*, 12 April 2000 and "Beekeepers seek GM halt after honey contamination, the *Guardian*, 17 May 2000.

[160] 1969 International Convention on Civil liability for Oil Pollution Damage, 9 *ILM* 1970 at 45; the 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 11 *ILM* 1971 at 284 and the 1992 Protocols to these conventions, *Int. Transp. Treaties*, Suppl. 17, I-459/476 (Sept. '93).

[161] COM(2000)142 final, 21 March 2000.

international regime; the shipowner. They intend to engage the owner of the cargo who is also the charter of the vessel.[162]

Supplementing international regimes rather than stepping back from any regulation at EC level is not unprecedented in the context of harmonisation of liability rules. As said, Council Regulation (EC) No. 2027/97 of 9 October 1997 on Air Carrier Liability in the Event of Accidents does just that.[163] The White Paper itself also envisages the possibility of complementary rules in that it states that a future regime should "clarify to which extent there is room for application in those areas already covered by international law".[164] We would welcome this approach and recommend not to restrict oneself to oil pollution. Other international civil liability regimes, such as the nuclear accidents regime of the Paris and Brussels Conventions[165] would certainly benefit from complementing legislation, e.g. extension of limitation periods as it now `allows' victims, as Van Maanen has put it, a ten year period within which to contract cancer or leukaemia.[166] One EU Member State has decided to produce its own `update': in 1999 Austria adopted the Atomic Liability Act, which contains a number of interesting features including a presumption of causation and the concept of pure ecological loss.[167]

6. CONCLUDING REMARKS

The White Paper. it is a positive step in the direction of a EU environmental liability regime. Despite the fact that the White Paper is not very specific with regard to some important issues - and that some issues have not been addressed at all[168] - the document contains some very interesting proposals. Especially those concerning *locus standi* for environmental groups, and the measure of damages are most interesting. However, if established as proposed, the future regime will have a very limited scope.

First of all, with regard to damage to nature, the future regime will only apply to natural resources located in, or forming part of, Natura 2000 sites. The regime will therefore finally cover only about 10% of the territory of the EU (unless Member States decide to expand the regime). A majority of the wild flora and fauna and nature habitats is located outside these areas and will therefore not be covered, even if these natural resources are listed in the annexes to the Habitats and Wild Birds directives. A positive element of the restricted scope is that it will be relatively easy to know what natural resources are covered by the EU regime. Positive is also that probably sufficient data are available on the state of the environment in these areas or at least that it is clear for which natural resources such data need be collected. So although disappointing from an environmental point of view, such clarity will

[162] Edward H.P. Brans, "The 1999 *Erika* Oil Spill in France. Can the cargo-owner be held liable for the damage caused?" 2 *International law FORUM du droit international* 66 (2000).
[163] [1997] OJ L 285/1.
[164] White paper, para. 4.8.
[165] Convention on Third Party Liability in the field of Nuclear energy, Paris, 29 July 1960, *Tractatenblad* 1964, 175 (as amended); Supplementary Convention, Brussels, 31 January 1963, *Tractatenblad* 1963, 176 (as amended).
[166] G.E. van Maanen, "Wettelijke aansprakelijkheid voor kerncentrales" *Nederlands Juristenblad* 1981, 286.
[167] Posch, n. 58 above.
[168] The White Paper leaves several important matters unresolved. Examples are: the limitation periods for commencement of actions; the apportionment of liability in multiparty cases; and rules regarding the recovery of cost of preventive measures taken in response to threats of damage. Many other issues need to be addressed with greater clarity (see above).

prevent (some) legal battles over the exact scope of the regime and the pre-injury condition of the natural resources impacted or destroyed. However, these aspects are outweighed by the incompatibility of the restriction with the need to cover damage caused by e.g. GMOs wherever this may occur, in compliance with the requirements of the precautionary principle. The restriction should therefore be removed.

A second element that provides a serious limitation to the regime is the nature of the liability. It is proposed that unless the damage is caused by a listed (potentially) dangerous activity, that the regime will be covered by a fault-based liability. Since proving fault will be difficult in many cases, this will provide an obstacle and influences the effectiveness of the regime. However, it is suggested in the White Paper that the Commission might include provisions that will alleviate the burden of proof of causation regarding both strict and fault liability. We will wait and see.

The proposed measure of damages, which is based on reasonable cost of restoration and the assessment costs, is most appropriate in the light of the objectives of the EC's nature conservation law. The measure of damages is comparable to most international civil liability conventions, national regimes and previous EC liability proposals. However, unlike some of the international conventions and previous EC proposals, the White Paper clearly provides that where restoration is infeasible, the measure of damages is the reasonable cost of alternative solutions. This may include actions to acquire a site close to or some distance away from the impacted site and the costs necessary to re-create the land into a habitat with comparable functions and comparable in size. Other options are - but the White Paper is not very specific here - enhancing degraded habitats or improving the biological value of an area already listed as Natura 2000 site but not being in the required condition.

The White Paper does not provide much guidance as to how to measure the extent of the injuries to natural resources, the loss of natural resources services, or to determine appropriate scale of the restoration measures. For an efficient liability regime it essential to provide guidance on these and other issues. Without strong guidance it will be difficult (and expensive) for public authorities, NGO's and others to determine the extent of the loss and estimate the amount of damages. This might affect the willingness of parties to press claims. In addition, strong guidance might help courts to cope adequately with NRD cases. As noted earlier, dealing with natural resource damages requires an understanding of biology as well as economics. In order to prevent unpredictable and deviating court decisions, it should be considered to develop such guidelines.

The proposal on standing for NGOsis a step in the right direction. However, it should be noted that the introduction of a formalised two tier approach sits uneasily with one of the Commission's own earlier proposals in the context of the 1996 Communication on Implementing Community Environmental Law: access to justice. Having identified insufficient access to justice by NGOs for enforcement purposes, it proposed - as a first step - a broadening of *locus standi* for NGOs before national courts without mentioning any priority right of action for the state. Although granting a secondary right of standing for damages claims is understandable, we do not see why NGOs should have to wait for the state if they consider pressing claims for injunctions. However, the harmonisation of standing rules is positive development and must be seen against the backdrop of the enforcement function of liability rules. Having identified the need for law reform in this connection (endorsed by the Council), the Commission should also consider to include proposals for adapting tort law in order to facilitate enforcement. Minor adjustments regarding the scope of protected interests and eligible plaintiffs will suffice.

Finally, although the White Paper is to some extent a disappointing document as it contains serious flaws and is - with regard to some issues - so vague that it difficult to draw any final conclusions, it is an important step in the development of an EU-wide liability regime. Given the fact that many of the parties involved - including the European Parliament, the Economic and Social Committee, and the Council of Ministers - have reacted positively on the publication of the White Paper, there is a bigger chance that finally such a directive will be established. We are convinced that it will be possible to establish a reasonable and effective liability regime for natural resource damages. However, the European Commission will have to change parts of its proposal - in particular the limited definition of environmental damage - in order to make the future regime a powerful tool.