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REVIEW

Agrobiodiversity on the Agenda

Franziska Wolff

Will the CBD fulfil our Expectations? Conserving
Biological Diversity

Monika Brinkmöller

Access to Genetic Resources and the fair and
equitable Sharing of the Benefits

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'Biodiversity Damage' Liability in the Environmental
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Environmental Concept for the UN Conference on
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The Economic Cost of Environmental Legislation

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The Alpine Convention

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Editorial

The main topic of this issue of the elni Review is the *Convention on Biological Diversity* (CBD). The ninth meeting of the Conference of the Parties (COP 9) will be hosted by Germany and held in Bonn from 19 to 30 May 2008. The global community will discuss measures against the ongoing destruction of biodiversity as well as ways towards a fair and responsible use of genetic material. The issues for in-depth consideration include:

- Agricultural and forest biodiversity
- Global strategy for plant conservation
- Invasive alien species
- Ecosystem approach
- Progress in the implementation of the strategic plan and progress towards the 2010 target and relevant Millennium Development Goals.

Non-Governmental Organisations take great interest in the success of this process and have made a number of recommendations to the negotiating parties.

The COP 9 issues are discussed in several articles in this issue: “Agrobiodiversity” is still an unknown quantity for most people, observes *Franziska Wolff*. Her contribution provides background information on the loss of agrobiodiversity and discusses recent international policy developments as well as the challenges that lie ahead pertaining to a reversal of this trend.

Monika Brinkmüller asks “Will the CBD fulfil our expectations?” Her article considers whether the acronym CBD also stands for “Conserving Biological Diversity” in a fair and responsible manner.

Another important topic is the “Access to Genetic Resources and the fair and equitable sharing of the benefits that result from their use”, which is analysed by *Susette Biber-Klemm*. Furthermore, *Hartmut Stahl* discusses the environment programme for the UN Conference on Biological Diversity in this issue.

‘Biodiversity damage’ liability as laid down in the Environmental Liability Directive is the topic of the contribution by *Volker Mauerhofer*. He scrutinises the definition in the Directive and its distinction from more stringent EU, international and national norms.

In the context of the “Better Regulation” initiative on the EU level, *Jochen Gebauer* takes a look at the economic cost of environmental legislation. From an environmental law perspective, he discusses whether the German standard cost model measurement can contribute to the EU action programme in terms of the reduction of administrative burdens.

Finally, *Birgit Dette* elaborates on the Alpine Convention as an international agreement with wide-spread dimensions.

Last but not least, the “New Books” column presents a review of the second edition of the Negotiator’s Handbook on “Multilateral Environmental Agreements” by *Simone Hafner*.

The next issue of the *elni review* will focus on Environmental Impact Assessment and the Revision of the IPPC Directive. Please send contributions on this topic as well as other interesting articles to the editors by the end of June 2008.

Martin Führ
March 2008

elni forum *Producer responsibility and WEEE revision*

takes place on Thursday, May 15, 2008, at 6 p.m.,

at the *Facultés universitaires Saint-Louis*,

Boulevard du Jardin botanique 43 (Metro Botanique/Rogier),
1000 Brussels, Salle du Conseil, 4th Floor, at the invitation of
CEDRE (Environmental Law Study Center)

Enforcement of individual producer responsibility through (smart) Labelling of electric and electronic products?

with an introduction by

*Gerhard Roller, University of Applied Sciences
Bingen/I.E.S.A.R*

*Martin Führ, University of Applied Sciences
Darmstadt/sofia*

The state of revision of the WEEE-Directive

with an overview by

Kurt van der Hertem, European Commission

Gerhard Roller and Martin Führ will present results of a research project that has been carried out by three Universities (Darmstadt, Pforzheim and Bingen) and funded by the German Ministry of Education and Research.

Please confirm your participation by e-mail to cedre@fusl.ac.be

‘Biodiversity damage’ liability in the Environmental Liability Directive – its definition and delimitation from more stringent EU, international and national norms*

Volker Mauerhofer

1 Introduction

The Environmental Liability Directive 1 (in the following ‘ELD’) of the European Union entered into force on 30th April 2004 and had to be implemented by 30th April 2007. It had been already from the early beginning 2 up to today subject to multiple considerations by many scholars 3 and is implemented quite differently in the different EU Member States 4. The ELD contains provisions concerning the liability for ‘environmental damage’, which is further defined inter alia as a specific damage of certain species and habitats (in the following ‘biodiversity damage’). Besides the ELD there are already other legal provisions on the European as well as on the international and national level covering several aspects of these liability issues more stringently. Hence the question arises as to how the new provisions of the ELD delimit from these similar but other EU, international and national norms.

2 Main elements of the ELD definition on biodiversity damage

The ELD defines biodiversity damages especially in Art. 2 (1) (a)⁵ and Art. 2 (2) – (3) ELD⁶ in more de-

tail. Therein the ELD concentrates on damages of certain species and habitats mentioned in the Annexes of the Birds Directive⁷ and of the Habitat Directive⁸ as well as providing exemptions in the case of prior consent based on these two Directives.⁹ Additionally Art. 2 (3) (c) ELD leaves it to the Member State to determine as ‘protected species or habitat’ any habitat or species not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives.¹⁰ Art. 3 ELD defines its scope further, whereas the ELD is applicable on biodiversity damages caused by any of the occupational activities listed in its Annex III, and to any imminent threat of such damage occurring by reason of any of those activities. Otherwise, only in the case of fault or negligence of an operator causing biodiversity damages the application of the ELD is unlimited regarding the manner of activities, which privileges biodiversity in comparison to water and soil. Furthermore Art. 4 ELD defines a number of exceptions from the scope (e.g. activities which have the main purpose of serving national defence or international security). The liability according to the ELD

* This paper constitutes an extended version with added footnotes of a presentation with a similar title held by the author at the European section of the 3rd Leipzig Platform for scientific legal environmental research (LPRU) at the UFZ in Leipzig/Germany at 28th June 2007.

¹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Official Journal L 143, 30/04/2004 P. 0056-0075.

² See, for example, a comparison of the European White Paper, including extended liability provisions, with the American CERCLA in M. Boyer and D. Porriani (2002), The choice of instruments for environmental policy: Liability or regulation? Research in Law and Economics 20: 245-267; but see also the comparison of the current ELD with the Swiss situation in A. Faeh (2007), Environmental Liability in Switzerland – Selected Aspects, JEEPL 3, 227-232 (231 ff).

³ See recently for example L. Krämer (2005), Discussion on Directive 2004/35 Concerning Environmental Liability, JEEPL 5, 250-256; A. Klaphake (2005), The Assessment and Restoration of Biodiversity Damages, JEEPL 4, 268-276; J. Kokott, A. Klaphake and S. Marr (2005), Key Elements of a Liability Regime Taking into Account Ecological Damages, JEEPL 4, 277-286; P. Weenerás (2005), A Progressive Interpretation of the Environmental Liability Directive, JEEPL 4, 257-267; K-H. Fehr, B. Friedrich and S. Scheil (2007), Liability Directive – a Useful Tool for Nature Protection? JEEPL 2, 110-116.

⁴ See, for example, F. Coroner (2007), Member States missing the opportunity to implement ‘polluter pays’ principle, elni review 1, 30 - 33 and J. Anstee-Wedderburn (2007), A Consideration of the Implementation of the Environmental Liability Directive to Date, JEEPL 3, 221-226 (223 ff).

⁵ 1. ‘Environmental damage’ means: (a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference

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

⁶ 2. ‘Damage’ means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly;

3. ‘Protected species and natural habitats’ means: (a) the species mentioned in Art. 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annexes II and IV to Directive 92/43/EEC; (b) the habitats of species mentioned in Art. 4 (2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annex II to Directive 92/43/EEC, and the natural habitats listed in Annex I to Directive 92/43/EEC and the breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC; and (c) where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives;

⁷ See Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal L 103, 25/04/1979 P. 0001 ff and its amending acts).

⁸ See Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Official Journal L 206, 22/07/1992 P. 0007 ff and its amending acts).

⁹ For a more extensive discussion on the relevant species and habitats, see for example K-H. Fehr, B. Friedrich and S. Scheil (2007) JEEPL 2, 112f.

¹⁰ For an overview of the situation in the Member States also with regard to this possible extension, see F. Coroner (2007), elni review 1, 30 (32 ff).

includes inter alia preventive, remedial as well as recovery measures, whereas the costs therefore should be primarily borne by the responsible operator and secondarily measures could be set by the public authorities.¹¹

3 Delimitation of ELD from other legal requirements

Originally, the draft ELD was supported inter alia by the argument that the Birds and the Habitats Directives ‘...lack liability provisions applying the polluter pays principle and thus encouraging efficient preventive behaviour by private (and public) parties. Currently few, if any, Member States fill this void by imposing liability for biodiversity damage on private parties’.¹² As the (private) liability aspect of the ELD became more or less lost during the legislative procedure and was replaced mainly by a (public) remediation scheme without compulsory insurance¹³, the reason cited from the draft does not hold much water for the issue of the delimitation of the ELD.

Finally adopted, the ELD statutes its general relationship to similar legal requirements inter alia in the sense that this Directive ‘shall apply without prejudice to more stringent Community legislation regulating the operation of any of the activities falling within the scope of this Directive’ (Art. 3 [2] ELD). Additionally recital 29 and Art. 16 (1) ELD determine that the ELD shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage. These provisions seem to clearly lay down something like a ‘Subsidiarity of the ELD’ that is valid not only for EU law and its implementation in national law but also simple national law without any direct connection to EU law. This verbal interpretation should be further assessed by a historical interpretation. In the ELD draft of the Commission¹⁴ the same sentence of Art. 3 (2) ELD already occurred. Therein the Commission also specifies in the Explanatory Memorandum to Art. 3 that ‘(w)here Community law already establishes a regulatory framework one of the purposes of which is to prevent the occurrence of accidents[1], these detailed regulatory requirements should not be disrupted by the proposed regime which aim is to supplement the existing arrangements and not to substitute them.’ This statement refers to footnote [1], which reads as follows: ‘See Council Directive 96/61/EC of 24 September 1996 concerning inte-

grated pollution prevention and control (OJ L 257, 10.10.1996, p. 26) and Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (OJ L 10, 14.1.1997, p. 13).’

Hence – without deeper analysis – it could be simply said that only the two Directives mentioned in footnote [1] are subject to Art. 3 (2) ELD and therefore exclusively constitute the more stringent Community legislation to which this Article is referring. Thus, by simply interpreting Art. 3 (2) ELD in a historical way only, the conclusion could be reached that more stringent measures of other Directives (than Directives 96/61/EC and 96/82/EC) are excluded from the above-mentioned ‘Subsidiarity of the ELD’, but which clearly stands in contradiction with the above-cited Art. 16 ELD. The wording of Art. 16 ELD was also included already in the draft¹⁵ where to the Commission explained that ‘Member States should remain free to maintain or adopt more stringent provisions than those set out in the proposed regime.’¹⁶ This obviously even includes legislative steps neither initiated by Community law or MEAs nor concluded according to Art. 300 (7) EC. If even such legal provisions are covered, the compulsory implementation of other Directives (than Directive 96/61/EC and 96/82/EC) should also be included without doubt. Hence, in contradiction to a simple historical interpretation of Art. 3 (2) ELD, an interpretation which also takes into consideration Art. 16 ELD leads to the conclusion that more stringent prevention measures are not limited to the ones mentioned in the Directives 96/61/EC and 96/82/EC.

4 Existing remediation duties

In general, there are more stringent remediation duties which could rise out of norms from different geographic levels and generally influence each other in a top down way. Thus, national remediation law such as the one of Austria is influenced by the Community level as well as by the international level due to its membership in the European Union.

4.1 General structure of legal levels

This influence may be pointed out by the following figure in which the scattered line symbolises the direct effect of EC Directives as well as the MEAs, which constitute an established jurisdiction, at least in Austria.¹⁷

¹¹ For more detail, see for example Art. 5 and 6 of the ELD.

¹² See pp. 5-6 in COM [2002] 17 final.

¹³ For this historic development, see for example L. Krämer, (2005) JEEPL 5, 250-253.

¹⁴ See in COM [2002] 17 final at Art. 3 (5) of the draft: ‘This Directive shall apply without prejudice to more stringent provisions of Community legislation regulating the operation of any of the activities falling within the scope of this Directive’

¹⁵ See Recital 27 and Art. 18 (1) in COM [2002] 17 final.

¹⁶ See the Explanatory Memorandum to Art. 18 (1) in COM [2002] 17 final.

¹⁷ See, for example, the first case on the application of an EU environment-related Directive in VfSlg. (Collection of the Judgements of the Austrian Constitutional Court) 14391 from 12th December 1995 and the Case of the direct effect of a protocol of the Alpine Convention by the ‘Umweltsenat’ (Environmental Senate) in US 6B/2003/8-57 from 22nd March 2004.

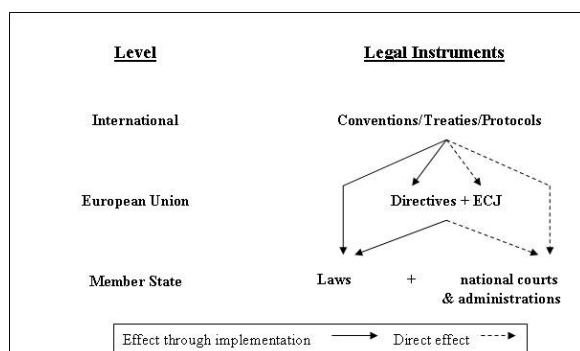


Figure 1: General structure of legal levels and effects in the European Union (without EC and regulations)

4.2 Internationally existing remediation duties in MEAs at least signed by the EU and Austria

Diverse remediation duties exist in several Multilateral Environmental Agreements (MEAs), which are at least signed by the European Union as well as by Austria.

For example, Art. 8 (f) Biodiversity Convention¹⁸ should be mentioned in this context; it includes the 'duty, as far as possible and as appropriate, to rehabilitate and restore degraded ecosystems and promote the recovery of threatened species...'. This duty, which of course allows for a certain amount of discretion, works from a much wider definition of biological diversity (Art. 2 CBD¹⁹) than the one covered by the ELD.²⁰

Furthermore, Art. III (4) [a] Bonn Convention²¹ specifies the 'duty to conserve and, where feasible and appropriate, to restore habitats of the species of importance in removing the species from the danger of extinction'. Based on this framework convention similar duties were introduced by the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA).²² The AEWA has not yet been signed by

Austria, but has already been ratified by the European Union²³. In international terms it covers many more water bird species than the ELD, which only refers to the European bird species of the Birds Directive.

Moreover, the Alpine Convention – which has been signed and ratified by both Austria²⁴ and the EU²⁵ – incorporates a remediation duty in one of its implementing protocols. Art. 2 Nature Conservation Protocol²⁶ stipulates the duty, as far as necessary, to ensure the restoration of natural species and their habitats with parallel consideration of a use that is ecologically wise [author's own translation].

4.3 Further more stringent EU-related remediation duties – principal aspects

Other Directives the implementation of which by the Member States is compulsory with regard to biodiversity damages – are above all the Habitat Directive and the Birds Directive, both of which have already been mentioned. In terms of the Polluter Pays Principle (PPP), these two directives also concern the remedying of environmental damage, e.g. the statement of the ECJ as to an unlawful permit²⁷ and/or construction²⁸, implying that the unlawful works have to be removed.²⁹ Yet in comparison to the ELD³⁰ they focus more strongly on the more stringent precautionary principle. This principle constitutes duties enacted earlier; thus, they could be seen as more stringent duties in comparison to the ones directly derived from the Polluter Pays Principle.

implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat; Annex 3 of the AEWA further states under the headline '3.3. Rehabilitation and restoration' that '(p)arties shall endeavour to rehabilitate or restore, where feasible and appropriate, areas which were previously important for the populations listed in Table 1.'

¹⁸ Signed by both the EU (see Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity) and by Austria ('Bundesgesetzblatt' [Federal Law Gazette] 1995 no. 213).

¹⁹ Art. 2 CBD reads as follows: 'Biological diversity' means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

²⁰ In this sense, see for example A. Klaphake (2005) JEEPL 4, 269.

²¹ Signed by both the EU (Council Decision 82/461/EEC of 24th June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals) and by Austria ('Bundesgesetzblatt' [Federal Law Gazette] III 2005/149).

²² For example, Art. 3 (2) AEWA statutes: 'To this end, the Parties shall: (c) identify sites and habitats for migratory waterbirds occurring within their territory and encourage the protection, management, rehabilitation and restoration of these sites, in liaison with those bodies listed in Art. IX(a) and (b) of this Agreement, concerned with habitat conservation; (d) coordinate their efforts to ensure that a network of suitable habitats is maintained or, where appropriate, re-established throughout the entire range of each migratory waterbird species concerned, in particular where wetlands extend over the area of more than one Party to this Agreement; (e) investigate problems that are posed or are likely to be posed by human activities and endeavour to

²³ See Agreement on the Conservation of African-Eurasian Migratory Waterbirds, Official Journal L 345, 08/12/2006 P. 0026-0072.

²⁴ 'Bundesgesetzblatt' (Federal Law Gazette) 1995 no. 213.

²⁵ Official Journal L 61, 12/03/1996 P. 0031-0036.

²⁶ Ratified and with direct effect in Austria ('Bundesgesetzblatt' [Federal Law Gazette] III 2002 no. 236) and signed at 20.12.1994, but not ratified yet by the EU (http://www.convenzionedellealpi.org/page3_de.htm viewed on 20th January 2008).

²⁷ See, for example, Case C 209/02 Commission v Austria (Wörschach Golf Course) [2004] ECR I-1211, paragraph 29.

²⁸ See, for example, Case C-355/90 Commission v Spain [1993] ECR I-4221, paragraph 15.

²⁹ Otherwise the Commission could start a penalty procedure under Art. 228 EC in order to enforce the re-establishing of the conditions respectively in accordance with EU law; only referring to the compensatory measures according to Art. 6 (4) Habitats Directive in this context referring P. Weenerás (2005) JEEPL 4, 265; without reference to the EC and the ECJ others statute (in my opinion too simply) that the Birds and the Habitats Directives 'do not give an answer to the question of consequences in cases of violations affecting these protected natural assets' [K-H. Fehr, B. Friedrich and S. Scheil (2007) JEEPL 2, 112].

³⁰ See, for example, L. Krämer, (2005) JEEPL 5, 253 on the – rather weak – focus of the ELD on the Polluter Pays Principle and with a comparison of the different approaches therefore used during its history.

In this sense the Habitats and the Birds Directives do not only prevent the occurrence of accidents; they even try earlier to prevent the danger of the occurrence of accidents and significant effects of plans or projects harmful to species, their habitats and habitat sites.³¹ In the case of plans and projects, the precautionary principle is, in terms of sustainable development, even applied through a double shift of the burden of proof to the operator of a potential harmful activity.³²

4.4 Existing and more stringent remediation duties in the Habitats Directive

The Habitats Directive contains a wide maintenance and restoration duty within several of its Articles on behalf of protected areas included into the network NATURA 2000.³³ In addition, damage preventing conservation duties exist under the Habitats Directive also concerning transmitted, but not yet in Community list included conservation areas.³⁴ Furthermore, a strict, preventive Species Conservation System is required under Art. 12 Habitats Directive according to the ECJ.³⁵

The Habitats Directive also does not include any exception from liability in case of 'prior consent' (in contrast to Art. 2 [1] a) ELD) on behalf of the operator. Of course at this point it could be argued that an EU Directive addresses the Member States and therefore does not need to include an exception on behalf of an individual. Yet already from the ECJ-Case *Wells*, where the ECJ found that the UK failed to include an EIA in the permit procedure concerning a

quarry, beside the possible loss of the operation permit any remediation duties on the environmental damages that might be borne by the operator.³⁶

The Habitats Directive - also more stringent - does not provide for discretion to the public authorities (and therefore to the Member State) in order to refrain from restoring the environment, in contrast to Art. 6 (3) ELD.³⁷

Furthermore, the Habitats Directive is not limited to certain damaging activities, as opposed to Art. 3 in connection with Annex III ELD. Also, the Habitats Directive does not include exceptions from its scope, while Art. 4 ELD provides for general exceptions on behalf of certain activities (e.g. national defence).

Finally, Art. 12 (1) [4] Habitats Directive does not contain any reference to fault or negligence with regard to the deterioration of breeding sites or resting places³⁸, while Art. 3 (1) [b] ELD does contain such restrictions.

Moreover, Annex 1 ELD incorporates certain damages which do not have to be classified as 'significant', which provides for a certain degree of discretion. For example, there are negative variations 'due to natural causes' mentioned in this Annex 1 ELD, but the ECJ already stated in connection with the Habitats Directive that 'it may be necessary to adopt ... measures to prevent natural developments'.³⁹ Hence damages should not even occur and if they nevertheless occur, preventive measures might not have applied in accordance with EU law.

Furthermore, Annex 1 ELD mentions in the case of damages (which do not have to be classified as 'significant') negative variations '... resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators'. However, this possible exception also has to be viewed with regard to a judgement of the ECJ, in which for example non-intentionally deteriorations of breeding sites and resting places have to be generally prevented.⁴⁰

Hence, in both cases of these negative variations of Annex 1 ELD, if necessary, there seems to remain no space for discretion, but rather a duty derived from the Habitats Directive.

³¹ For the application of the precautionary principle through the Birds Directive, see for example Case C-355/90 *Commission v Spain* [1993] ECR I-4221, paragraph 15 (referred to e.g. in Case C-117/00 *Commission v Ireland* [1993] ECR I-4221, paragraph 15 and Case C-186/06 *Commission v Spain* (2007) not published yet in the ECR, paragraph 37), in which there are obligations on Member States before any reduction is observed in the number of species or any risk of a protected species becoming extinct has materialised: for the on the application of the precautionary principle through Habitats Directive, see for example Case C-418/04 *Commission v Ireland* (2007) not published yet in the ECR, paragraphs 226 and 254 (with further reference to case law), which states that an assessment must be carried out of their effects on the conservation objectives of NATURA 2000 sites if there is doubt as to the absence of significant effects.

³² See V. Mauerhofer (2008), 3-D Sustainability: An approach for priority setting in situation of conflicting interests towards a Sustainable Development, *Ecological Economics* 65: 496-506 (504) with reference to the Case C-127/02 *Waddervereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 44 and 61, which states that an assessment must be carried out of the effects of plans or project on the conservation objectives of NATURA 2000 sites if there is doubt as to the absence of significant effects (see paragraph 44) and the competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site and there is no reasonable scientific doubt as to the absence of such effects (see paragraph 61); on this point, see also P. Weenerås (2005) *JEEPL* 4, 259 f.

³³ See, for example, Art. 1 [a], Art. 2 (2) and Art. 3 (1) Habitats Directive.

³⁴ See, for example, Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 26, and Case C-244/05 *Bund Naturschutz/Bayern and Others* [2006] ECR I-8445, paragraph 35.

³⁵ See, for example, Case C-183/05 *Commission v Ireland* [2007] not published yet in the ECR, paragraph 30.

³⁶ See Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67.

³⁷ Based on Art. 6 (3) ELD public authorities may restore the environment but do not have to do so if the polluter cannot be identified, cannot pay (see also the absence of compulsory insurances in the ELD) or has a valid defence under the Directive.

³⁸ See Case C-103/00, *Commission v Greece*, Case C-103/00 *Commission v Greece* [2002] ECR I-1147, paragraph 40.

³⁹ See Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 34.

⁴⁰ See Case C-98/03 *Commission v Germany* [2006] ECR I-53, paragraph 53-55, especially in connection with agriculture.

4.5 Existing remediation duties in the Birds Directive

Many of the more stringent aspects that have already been mentioned with regard to the Habitats Directive are also valid concerning the Birds Directive, which also contains several maintenance and re-establishing duties.⁴¹

These preventive duties based on the Precautionary Principle are even valid for Bird Species, which neither migrate nor are listed in Annex 1 of the Birds Directive, while these species are not included in the biodiversity definition of Art. 2 ELD.⁴²

Similarly, the remediation duties derived from Art. 3 Birds of the Birds Directive geographically cover not only areas fulfilling the designation criteria of Special Protection Areas (SPA's) Directive⁴³, while the Art. 2 ELD only explicitly refers only to such designated sites. According to the jurisdiction of the ECJ, the Birds Directive covers damage preventing conservation duties even with regard to sites not correctly classified as Special Conservation Areas for Birds.⁴⁴ In this sense the reference in Art. 2 ELD that was mentioned before most probably has to be interpreted as explicitly only refer to designated sites like the Birds Directive and the Habitats Directive.⁴⁵

4.6 EU remediation case law example: ECJ-Case C-209/02 Wörschacher Moos

In the C-209/02 case, the ECJ declared the alleged failure of Austria to implement the Birds Directive correctly.⁴⁶ Thus, by virtue of Art. 6 (3) Habitats Directive, the planned extension of the golf course on a site classified as a SPA should never have been authorised. The extension was likely to significantly affect the site and the corncrake population, thereby reducing considerably the function of the SPA with regard to the conservation objectives fixed by Community legislation. Furthermore, the conditions for authorisation of the project under Art. 6 (4) Habitats Directive were not met.⁴⁷

After the start of a penalty procedure under Art. 228 EC, a new, negative administrative decision was issued by the responsible national authority and the

constructed extension had to be remediated - the costs for this were borne by the public.

5 The ELD and national biodiversity related remediation

The relationship between the ELD and national law is in general a twofold one. More stringent national law can be newly created or uphold; less stringent law is influenced by the ELD and has to be changed in accordance with the provisions of the ELD.

For example, as already mentioned above, under the ELD remedial actions are only compulsory for certain damages of 'EU species and habitats', but optional to the Member State for other species according to Art. 2 (3) [c] ELD.

In the latter sense, for example, Art. 34 (1) of the Nature Conservation Act of the Austrian⁴⁸ province of Styria has already provided remedial action for decades for other species only protected by national law.

In contradistinction to that, while according to Art. 6 (2) [c] and Art. 6 (3) ELD remedial measures may, at any time, and shall be required by the authority from the operator, Art. 34 (2) of the Nature Conservation Act of Austrian province Styria states that no remedial measures shall be required five years subsequent to the occurrence of illegal activity. The latter constitutes a less stringent measure that would have to be changed in accordance with the ELD. However, this Styrian provision already contradicted the Habitats and the Birds Directive (as both do not provide for such a time limitation) for a long time before the ELD entered into force.

Hence, the ELD corrects less stringent duties concerning EU species; application of the Habitats and Birds Directives are already – and often in an even wider sense – compulsory and correct such less stringent norms earlier.

Nevertheless, it seems to be an added value of the ELD in Austria that it contains some more specifications on remedying of environmental damage than EU- and (some) Austrian norms.⁴⁹ However, some of these specifications have already been similarly applied in terms of definitions by implementing national legislation that already exists without influence of the EU.

Finally, there is a certain threat that a 'Race to the bottom' might occur through a 'prisoner's dilemma' concerning environmental remediation law as a result of the new legal situation based on ELD. However, this threat is likely to be prevented by three occur-

⁴¹ See, for instance, Art. 3 (1), Art. 3 (2) and see also Art. 4 Birds Directive.

⁴² See Case C-117/00 Commission v Ireland [2002] ECR I-5335, paragraph 15.

⁴³ See again Case C-117/00 Commission v Ireland [2002] ECR I-5335, paragraph 15.

⁴⁴ See Case C-374/98 Commission v France, Basses Corbières [2000] ECR I-10799, paragraph 47.

⁴⁵ See in this sense also already P. Weenerås (2005) JEEPL 4, 261.

⁴⁶ See Case C-209/02 Commission v Austria [2004] ECR I-1211, paragraphs 22 to 29.

⁴⁷ For a more detailed analysis, see V. Mauerhofer, Conservation of wildlife in the European Union with a focus on Austria, in Raj Panjwani and David Favre (Eds.) Comparative Wildlife Laws, American Bar Association - ABA (forthcoming).

⁴⁸ 'Landesgesetzblatt' (Provincial Law Page) number 65/1976 in the version of 9/2007.

⁴⁹ See Annex II ELD: (a) 'Primary' remediation to, or towards, baseline condition, (b) 'Complementary' remediation to compensate for not fully possible primary remediation (c) 'Compensatory' remediation to compensate for interim losses between date of damage and primary remediation.

rences, 1. an existing EU law more stringent, the implementation of which is compulsory, such as the Birds and the Habitats Directives; 2. the insight of the Member States that they have to bear the costs of remediation themselves if they do not force the polluter to do so; and possibly also by 3. the lack of ability of economic activities to relocate in other (Non-EU-Member) States.

6 Conclusions

The existing international EU and Austrian norms for definitions and remediation duties concerning environmental liability are mostly wider than the norms of the ELD.

In part, the remediation duties concretised through the ELD are more precise than is the case in Austria, but occasionally already existing national provisions are used in the same way in that country.

The applicability of the ELD seems to be subsidiary only with regard to more stringent EU law, to more stringent national law in which the implementation of more stringent EU law is compulsory; and also to more stringent national law (regardless of EU law).

Furthermore, national law has to implement more stringent EU laws than the ELD, such as the provisions of the Birds and the Habitat Directives.

The race to the ELD bottom concerning biodiversity damage liability is likely to be prevented, above all by this more stringent EU law as well as hopefully by the insight of the Member States that they have to bear the costs themselves of compulsory remediation based on more stringent EU law, if they do not impose a comprehensive remediation duty on the operator.

UN Conference of the Parties to the Convention on Biological Diversity in Bonn The environmental programme

Hartmut Stahl, Katja Kukatz

When Germany hosts the 9th Meeting of the Conference of the Parties to the Convention on Biological Diversity in May 2008, approximately 5000 participants from 190 Member States are expected in Bonn. The delegates of the UN will discuss possibilities for stopping the ongoing worldwide destruction of nature. In the run-up to the conference, about 1200 experts will hold a prior meeting; besides the experts, about 120 environment ministers are expected.

This means not only a tremendous challenge for the organisers but also for the environment. Experts are anticipating, for instance, additional greenhouse gas emissions of around 20,000 tons of CO₂-equivalent, mainly caused by the international flights of the delegates. As a result, the Secretariat of the Convention on Biological Diversity as well as the German Federal Government are aiming to create a suitable framework which gives consideration to the concerns of biodiversity and, more generally, to the protection of nature and the environment. On behalf of the Federal Environment Ministry, Öko-Institut is developing a comprehensive environmental programme for the Conference, thereby undertaking an exemplary role. One of the declared goals of the Federal Government is to hold the Conference in a carbon-neutral manner.

“We are delighted about this decision”, says project leader Dr. Hartmut Stahl of Öko-Institut. “We know from experience that the implementation of an ambitious environmental programme can bring about con-

siderable results for the environment.” This was also the case with the environmental programme for the Football World Cup in 2006 (‘Green Goal’) for which Hartmut Stahl’s input was instrumental.

Key areas that are addressed by the environmental programme for the UN Conference in Bonn comprise waste management, the environmentally friendly transportation of the participants, the conservation of resources in the area of energy and water as well as a catering service that makes a contribution to the promotion of agrobiodiversity. From a global perspective, climate protection is currently one of the greatest challenges of environmental policy and therefore plays a key role in the environmental programme.

1 Waste management

The primary goal of waste management is to avoid creating waste from the outset; thus, on the basis of good prior organisation, it needs to be made sure that large quantities of waste are not produced at the conference in the first place. In all areas, for example, systems for returnable items shall be preferentially implemented. Moreover, experts recommend that printed information leaflets be avoided as much as possible and that the internet be used to inform participants and interested parties.

The amount of created waste that cannot be avoided ought to be consistently separated when collected at source. This will generally take place in the back-

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Editors: Miriam Dross, Martin Führ, Gerhard Roller

Editors in charge of the current issue:
Miriam Dross and Martin Führ

Editor in charge of the forthcoming issue:
Martin Führ (fuehr@sofia-darmstadt.de)

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Focus of the forthcoming issue :

The next issue of the *elni Review* will focus on Environmental Impact Assessment and the Revision of the IPPC Directive.

Manuscripts should be submitted as files by email to the Editors using an IBM-compatible word processing system.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): € 52; private users, students, libraries: € 30. Non-members can order single issues at a fee of € 20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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Authors of this issue

Susette Biber-Klemm, Dr. iur., MAE; University of Basel, Program Sustainability Research, Basel, Switzerland, Susette.Biber-Klemm@unibas.ch

Monika Brinkmöller, German NGO Forum on Environment and Development, Bonn, Germany, m.brinkmoeller@forumue.de

Birgit Dette, Lawyer, former head of the Environmental Law and Governance Division of the Öko-Institut e.V., Darmstadt, Germany, birgiddette@freenet.de

Martin Führ, Professor of public law, legal theory and comparative law. Society for Institutional Analysis (sofia), University of Applied Sciences Darmstadt, Germany, fuehr@sofia-darmstadt.de

Jochen Gebauer, Dr., Office of the Federal Chancellor, Department for Reduction of Bureaucracy [Bundeskanzleramt, Geschäftsstelle Bürokratieabbau], Berlin, Germany, Jochen.Gebauer@bk.bund.de

Simone Hafner, qualified lawyer, research assistant of Prof. Th. Schomerus, and student of Master of Law programme for Environmental Law, Lüneburg, Germany, simonehafner@hotmail.com

Katja Kukatz, Öko-Institut e.V. – Institute for Applied Ecology, Journalist, Public Relations & Communication Department, Freiburg, Germany, k.kukatz@oeko.de, www.oeko.de

Volker Mauerhofer, Mag. rer. nat., Mag. iur., Dr. iur., MA (Ecological Economics) Leeds; Consultant and visiting lecturer in Nature and Landscape Conservation Law at the Biological Faculty of the University of Vienna, Austria, volker.mauerhofer@univie.ac.at Giessaufgasse, 28/5/34, 1050 Vienna, Austria

Hartmut Stahl, Dr., Öko-Institut e.V. – Institute for Applied Ecology, Research Division: Infrastructure & Enterprises, Darmstadt, Germany, h.stahl@oeko.de, www.oeko.de

Franziska Wolff, M.A., Öko-Institut – Institute for Applied Ecology, Research Division: Environmental Law & Governance, Berlin, Germany, f.wolff@oeko.de, www.oeko.de

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If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is €52 per year for commercial users (consultants, law firms, government administration) and €21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

Contact

Freiburg Head Office:

P.O. Box 50 02 40
D-79028 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:

Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:

Novalisstrasse 10
D-10115 Berlin
Phone +49(0)30-280 486 80
Fax +49(0)30-280 486 88

www.oeko.de

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

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Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
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- Water and energy management
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Contact

Darmstadt Office

Prof. Dr. Martin Führ – sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de
www.h-da.de

Göttingen Office

Prof. Dr. Kilian Bizer – sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de

www.sofia-research.com

elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

ElNi Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.