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Peter E. Nahmias

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The European Community's Regulation and Control of Waste and the Adoption of Civil Liability

By PATRICK E. THIEFFRY*
PETER E. NAHMIAS**

I. INTRODUCTION

Long before the recent surge of worldwide attention to the environment, the European Economic Community (EC) engaged in an effort to match its envisioned economic expansion with a parallel protection of Europe's natural environment.¹ Indeed, and perhaps not ironically, the year 1992 will mark not only the date for the completion of the European internal market,² but also the twentieth anniversary of the declaration of the EC's first environmental action program.³ As efforts designed to im-

* Member of the Paris, New York, and Georgia Bars and a partner in the New York office of the Paris-based law firm of Thieffry *et* Associates.

** Member of the New York and New Jersey Bars, and an associate with Thieffry *et* Associates.

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The 12 original Member States of the EC are: Belgium, Denmark, France, Ireland, Italy, the Federal Republic of Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. The EC relies on a number of institutional bodies for its operation: the Commission, which proposes and administers the implementation of Community legislation, the Council of Ministers, the Community's legislative branch, the European Parliament who enjoys budgetary and advisory rights, and the European Court of Justice which is empowered to interpret the Community's legislation and enforce it against Member States.

2. Comm'n of Eur. Comm., *Completing the Internal Market, White Paper from the Commission to the European Council*, COM(85) 310 final (June 14, 1985).

3. *Council Resolution on a European Community Policy and Action Programme on the Environment*, 16 O.J. EUR. COMM. (No. C 112) 1 (1973) [hereinafter *First Environmental Action Programme*]. The original objectives, principles, and implementation deadlines were modified and amended by the *Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment*, 16 O.J. EUR. COMM. (No. C 139) 1 (1977) [hereinafter *Second Environmental Action Programme*]; the *Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment*, 20 O.J. EUR. COMM. (No. C 46) 1 (1983) [hereinafter *Third Environmental Action Programme*]; and the *Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment*, 26 O.J. EUR. COMM. (No. C 328) 1 (1987) [hereinafter *Fourth Environmental Action Programme*].

plement the 1992 program accelerate, so do those regarding the EC's environmental policy. This perhaps is most dramatically revealed by a recently proposed Directive on Civil Liability for Damages Caused by Waste.⁴

From an American perspective, recent EC environmental legislative proposals might appear to promise European versions of Comprehensive Environmental Response and Compensation Liability Act (CERCLA)⁵ liability and Resource Conservation Recovery Act (RCRA)⁶ regulation. The differences, however, go beyond the obvious and require an understanding of exactly what the European Economic Community is and is not.

Established by a series of treaties, the EC is more than a supranational organization. It has created a new legal order⁷ by which the Member States have yielded a certain degree of their sovereignty to the very entity they created. For example, regulations promulgated by the Council are granted direct effect in the Member States without the need for national measures for their implementation,⁸ and Council directives directly bind the Member States to take measures for complete implementation of the directives by the deadlines contained therein.⁹ Council resolutions, such as those relating to the EC's environmental policy, are without binding force. The rulings of the European Court of Justice, which have supremacy over national laws,¹⁰ serve as a vehicle for the interpretation as well as proper application and enforcement of EC legislation.¹¹

It is unfair to compare the operation of the EC institutions to the U.S. federal system because the Member States of the EC remain independent sovereign nations with their own political, social, and eco-

Pursuant to the Fourth Environmental Action Programme, which runs through 1992, the top areas of priority of the EC's environmental policy are the acceleration of the implementation of EC environmental legislation, the reinforcement of the commitment to preventive actions, the improvement in the quantity and availability of environmental information, and the creation of jobs in the environmental sector.

4. *Proposal for a Council Directive on Civil Liability for Damages Caused by Waste*, 32 O.J. EUR. COMM. (No. C 251) 3 (1989) [hereinafter *Waste Liability Directive*].

5. Comprehensive Environmental Response, Compensation and Liability Act [CERCLA], 42 U.S.C. §§ 9601-9657 (1983).

6. Resource Conservation Recovery Act [RCRA], 42 U.S.C. §§ 6901-6987 (1983).

7. See *Costa v. E.N.E.L.*, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8023 (1964).

8. EEC Treaty, *supra* note 1, art. 189, 298 U.N.T.S. at 78.

9. *Id.*

10. See *Costa v. E.N.E.L.*, *supra* note 7.

11. EEC Treaty, *supra* note 1, arts. 164-188, 298 U.N.T.S. at 73-78.

conomic agendas. The EC's legislative jurisdiction is therefore limited to measures designed to bring about the creation of the Common Market¹² and, in particular, the completion of the Internal Market by the end of 1992.¹³ As such, EC legislation is primarily directed towards implementing a system of undistorted competition, and creating a framework for the circulation of goods, persons, services, and capital.¹⁴ Though the original EC Treaty lists among its objectives the "accelerated raising of the standard of living,"¹⁵ the policies underlying EC environmental efforts also encourage the free movement of goods and services, and the creation of a system of undistorted competition.

Issued in the form of a nonbinding resolution, the First Environmental Action Programme called upon the EC to help reconcile economic growth with the increasingly imperative need to preserve the natural environment.¹⁶ It thereafter established objectives and principles as well as priorities for measures to be taken, which were subsequently amended in 1977, 1983, and 1987.¹⁷

Despite the adoption of an environmental policy in 1973, the legal basis for EC action in the environmental arena was uncertain because the original treaty made no mention of the environment.¹⁸ Because of the vague legal foundations for European environmental action, the EC utilized articles 100¹⁹ and 235²⁰ of the treaty in order to adopt environmental measures. While these two provisions differ in that article 100 may be utilized only to implement strictly economic measures and article 235

12. *Id.* art. 2, 298 U.N.T.S. at 15.

13. Single European Act, Feb. 17-28, 1986, reprinted in 25 I.L.M. 503, 510-11 (1986).

14. EEC Treaty, *supra* note 1, art. 3, 298 U.N.T.S. at 16.

15. *Id.* art. 2, 298 U.N.T.S. at 15.

16. *First Environmental Action Programme*, *supra* note 3, ¶¶ 1-2, at 5.

17. See *Second Environmental Action Programme*, *supra* note 3; *Third Environmental Action Programme*, *supra* note 3; *Fourth Environmental Action Programme*, *supra* note 3.

18. Indeed, the First Environmental Action Programme took as its basis Article 2 of the EC Treaty which states that "the Community shall have as its task . . . to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living, and closer relations between the States belonging to it." EEC Treaty, *supra* note 1, art. 2, 298 U.N.T.S. at 15.

19. EEC Treaty, *supra* note 1, art. 100, 298 U.N.T.S. at 54 (providing that: "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulations or administrative action in Member States as directly affecting the establishment or functioning of the Common Market.").

20. *Id.* art. 235, 298 U.N.T.S. at 91 (providing that: "If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.").

may have too broad an application, measures implemented pursuant to either provision require the unanimous approval of the Council. The result of this unanimity requirement led to either total impasse or legislation based on the lowest common denominator of standards. Not surprisingly, this in turn has led certain Member States to implement more stringent environmental measures, thereby indirectly creating the very obstacles to trade that the EC was designed to alleviate.

It was not until the adoption of the Single European Act that the EC's environmental policy was given a specific legal basis. Pursuant to amendments made by virtue of the Single European Act, the EC treaty now provides that action by the EC relating to the environment shall have as its objectives: "to preserve, protect, and improve the quality of the environment; to contribute towards protecting human health; [and] to ensure prudent and rational utilization of natural resources."²¹ The principles underlying this policy are that action by the EC relating to the environment should be based on the principle that preventive action should be taken, that environmental damage should be rectified at the source, and that the polluter should pay.²²

While the Single European Act has provided an explicit legal basis for EC environmental efforts, the new provisions maintain the unanimity requirement for passing such legislation.²³ Further maintaining the status quo, the new treaty provisions also provide that "protective measures adopted in common pursuant to article 130(s), shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty."²⁴

Based on the requirements of the new environmental provisions of the treaty, most measures will not be based on the new environmental provisions, but rather on article 100a which provides:

The Council shall, acting by a *qualified majority* on a proposal from the Commission in cooperation with the European Parliament and af-

21. Single European Act, *supra* note 13, art. 130r, para. 1, *reprinted in* 25 I.L.M. at 515. It is suggested that, while the exact legal value of these declarations is still unclear, they at least offer some indication as to the original intent of the negotiators to stress the broadness of the EC's environmental policy.

22. *Id.* art. 130r, para. 2, *reprinted in* 25 I.L.M. at 515.

23. *Id.* art. 130s, *reprinted in* 25 I.L.M. at 515-16 (stating that:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community. The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority.).

24. *Id.* art. 130t, *reprinted in* 25 I.L.M. at 516.

ter consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.²⁵

In spite of constitutional questions regarding the EC's jurisdiction over environmental matters, both past and present, the EC has issued legislation harmonizing environmental laws throughout the Member States over a broad spectrum of activities. The areas in which the EC has been most active are those of water pollution, air pollution, the control of chemical substances, noise reduction, industrial risk assessment, and waste management.

With respect to the aquatic environment, the EC has issued legislation setting standards for the quality of surface waters,²⁶ groundwater,²⁷ sewage treatment,²⁸ bathing water,²⁹ fresh water for the protection of fish life,³⁰ and shellfish waters.³¹ Similarly, the Commission has issued directives setting the permissible levels for the biodegradability of chemical components of detergents,³² as well as regulating the discharge of dangerous substances into EC waters. Both general³³ and specific directives, such as those pertaining to mercury,³⁴ cadmium,³⁵ and hexachlorocyclohexane have been issued.³⁶ These directives have set quality objec-

25. *Id.* art. 100a, reprinted in 25 I.L.M. at 512 (emphasis added).

26. *Council Directive Concerning the Quality Required of Surface Water Intended for the Abstraction of Drinking Water in the Member States*, 18 O.J. EUR. COMM. (No. L 194) 26 (1975).

27. *Council Directive on the Protection of Ground Water Against Pollution Caused by Certain Dangerous Substances*, 23 O.J. EUR. COMM. (No. L 20) 43 (1980).

28. *Council Decision Adopting a European Economic Community Concerted Project in the Field of Treatment and Use of Sewage Sludge*, 20 O.J. EUR. COMM. (No. L 267) 35 (1977).

29. *Council Directive Concerning the Quality of Bathing Water*, 19 O.J. EUR. COMM. (No. L 31) 1 (1976).

30. *Council Directive on the Quality of Fresh Waters Needing Protection or Improvement in Order to Support Fish Life*, 21 O.J. EUR. COMM. (No. L 222) 1 (1978).

31. *Council Directive on the Quality Required of Shellfish Waters*, 22 O.J. EUR. COMM. (No. L 281) 47 (1979).

32. *Council Directive on the Approximation of the Laws of the Member States Relating to Detergents*, 16 O.J. EUR. COMM. (No. L 347) 51 (1973).

33. *Council Directive on Pollution Caused by Dangerous Substances Discharged into the Aquatic Environment of the Community*, 19 O.J. EUR. COMM. (No. L 129) 23 (1976).

34. *Council Directive on Limit Values and Quality Objectives for Mercury Discharges by the Chlor-Alkali Electrolysis Industry*, 25 O.J. EUR. COMM. (No. L 81) 29 (1982).

35. *Council Directive on Limit Values and Quality Objectives for Cadmium Discharges*, 26 O.J. EUR. COMM. (No. L 291) 1 (1983).

36. *Council Directive on Limit Values and Quality Objectives for Discharges of Hexachlorocyclohexane*, 27 O.J. EUR. COMM. (No. L 274) 11 (1984).

tives for discharge, establishing limit values, time limits, and monitoring procedures.

In the area of air pollution, the EC enacted directives subjecting industrial plants to authorization requirements regarding emission standards,³⁷ as well as establishing standards for the production of chlorofluorocarbons,³⁸ the sulfur content of liquid fuels,³⁹ sulfur dioxide and suspended particulates,⁴⁰ the lead content of gasoline,⁴¹ and the limits on lead in the atmosphere.⁴² These directives are designed to harmonize standards throughout the EC.

Even noise pollution is subject to EC regulation, as certain construction plant equipment is subject to EC examination, verification, and certification.⁴³ EC legislation has also established limitations and standards for noise emissions from subsonic aircraft,⁴⁴ motor vehicles,⁴⁵ farm equipment, and lawnmowers.⁴⁶

The EC also has been active in the regulation of chemical substances, creating a common system for the classification, packaging, and labeling of chemicals.⁴⁷ Additionally, the regulatory structure has created a detailed notification procedure whereby manufacturers and importers of specified chemical substances are required to notify Member

37. *Council Directive on the Combatting of Air Pollution from Industrial Plants*, 27 O.J. EUR. COMM. (No. L 188) 20 (1984).

38. *Council Decision Concerning Chlorofluorocarbons in the Environment*, 23 O.J. EUR. COMM. (No. L 90) 45 (1980).

39. *Council Directive on the Approximation of the Laws of the Member States Relating to the Sulfur Content of Liquid Fuels*, 18 O.J. EUR. COMM. (No. L 307) 22 (1975).

40. *Council Directive on Air Quality Limit Values and Guide Values for Sulfur Dioxide and Suspended Particulates*, 23 O.J. EUR. COMM. (No. L 229) 30 (1980).

41. *Council Directive on the Approximation of the Laws of the Member States Concerning the Lead Content of Petrol*, 21 O.J. EUR. COMM. (No. L 197) 19 (1978).

42. *Council Directive on a Limit Value for Lead in the Air*, 25 O.J. EUR. COMM. (No. L 378) 15 (1982).

43. *Council Directive on the Approximation of the Laws of the Member States Relating to Common Provisions for Construction Plant and Equipment*, 27 O.J. EUR. COMM. (No. L 300) 111 (1984).

44. *Council Directive on the Limitation of Noise Emissions from Subsonic Aircraft*, 23 O.J. EUR. COMM. (No. L 18) 26 (1980).

45. *Council Directive on the Approximation of Provisions on the Sound Level and Exhaust Systems of Motor Vehicles*, 13 O.J. EUR. COMM. (No. L 42/16) 1 (1970); *Council Directive Amending Directive 70/157/EEC on the Approximation of Member States Laws on the Permissible Sound Level and Exhaust System of Motor Vehicles*, 27 O.J. EUR. COMM. (No. L 238) 31 (1984).

46. *Council Directive on the Approximation of the Laws of the Member States Relating to the Permissible Sound Power Level of Lawnmowers*, 27 O.J. EUR. COMM. (No. L 300) 171 (1984).

47. *Council Directive on the Approximation of Provisions on the Classification, Packaging and Labeling of Dangerous Substances*, 10 O.J. EUR. COMM. (No. L 234) (1967).

State authorities of the foreseeable risks of their products within mandatory time periods before marketing such products in the EC.⁴⁸ Provisions concerning dangerous preparations, pesticides,⁴⁹ paint, varnishes, printing ink, and adhesives⁵⁰ have been issued, setting EC-wide standards.

Parallel to these regulations are those designed for the protection of workers exposed to asbestos⁵¹ and dangerous substances,⁵² as well as the often cited Seveso Directive on Major Accident Hazards of Industrial Activities.⁵³ This directive instructs Member States to do the following: (1) appoint competent authorities to receive and examine notifications required by the directive, requesting supplementary information when necessary; (2) organize inspection or otherwise exercise control; (3) insure that manufacturers are taking the most appropriate measures to prevent and limit the consequences of major accidents; (4) insure that off-site emergency plans are drawn up for major accidents; and (5) insure that the public and other Member States are informed of the safety measures and emergency procedures to be followed in the event of an accident.⁵⁴

Perhaps the most important area of the EC environmental policy concerns waste. The EC generates two thousand million tons of wastes each year.⁵⁵ In a way, the EC's waste management policy overlaps most other areas of the EC's environmental policy, primarily those of water pollution, chemical products, and industrial hazards. This Article shall describe in closer detail EC legislation governing the handling and shipment of wastes, and the current initiative concerning civil liability for damages caused thereby.

48. *Id.*

49. *Council Directive on the Approximation of the Laws of the Member States Relating to the Classification, Packaging and Labeling of Dangerous Preparations (Pesticides)*, 21 O.J. EUR. COMM. (No. L 206) 13 (1978).

50. *Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Classification, Packaging and Labeling of Paints, Varnishes, Printing Inks, Adhesives and Similar Products*, 20 O.J. EUR. COMM. (No. L 303) 23 (1977).

51. *Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States on the Protection of the Health of Workers Exposed to Vinyl-chloride-monomer*, 21 O.J. EUR. COMM. (No. L 197) 12 (1978).

52. *Council Directive Prohibiting the Placing on the Market and Use of Plant Protection Products Containing Certain Active Substances*, 22 O.J. EUR. COMM. (No. L 33) 36 (1979).

53. *Council Directive on Major-Accident Hazards of Certain Industrial Activities*, 25 O.J. EUR. COMM. (No. L 230) 1 (1982).

54. *Id.*

55. S.P. JOHNSON & G. CORCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* 185 (International Law and Policy Series, 1989).

II. THE REGULATORY STRUCTURE OF WASTE MANAGEMENT

In response to the growing concern over the health and environmental impacts of the disposal of household and industrial refuse, the EC in 1975 began regulating waste disposal within the EC. Their first effort was the 1975 Waste Directive which provided the framework for the control of waste disposal.⁵⁶

A. The Current Structure

1. The 1975 Waste Directive

The Waste Directive broadly defined waste as any substance "which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force."⁵⁷ The directive imposed upon the Member States the duty to "establish or designate the competent authority or authorities to be responsible in a given zone, for the planning, organization, authorization, and supervision of waste disposal operations."⁵⁸ In addition, it established a prior permit requirement whereby installations that store, treat, or tip wastes on behalf of third parties will be required to specify to the competent national authority the type, quantity of wastes to be treated, general technical requirements therefor, the precautions to be taken, as well as the origin and destination of such wastes.⁵⁹

This directive serves as the basis of the EC waste management policy, giving responsibility for environmental and health protection to the Member States, and calling for the designation of national authorities to implement the directive. It is broadly worded and is designed to be supplemented by specific directives for specific wastes.⁶⁰

2. The Directive on Toxic and Dangerous Waste

The original Waste Directive was followed in 1978 by the Directive

56. *Council Directive on Waste*, 18 O.J. EUR. COMM. (No. L 194) 39 (1975) [hereinafter *Waste Directive*].

57. *Id.* art. 1a, at 39. Excluded from the scope of the directive are items such as radioactive wastes, wastes resulting from prospecting, extraction, treatment, and storage of mineral resources in the working of quarries, animal carcasses, and agricultural wastes, waste waters, gaseous effluents, and wastes covered by specific Community Rules. *Id.* art. 2, para. 2, at 40.

58. *Id.* art. 5, at 40.

59. *Id.* art. 8, at 41.

60. *Id.* art. 2, at 40. See, e.g., *Council Directive on the Disposal of Waste Oils*, 18 O.J. EUR. COMM. (No. L 194) 23 (1975); *Council Directive on the Disposal of Polychlorinated Biphenyls and Polychlorinated Terphenyls*, 19 O.J. EUR. COMM. (No. L 108) 41 (1976) [hereinafter *PCB Directive*]; *Council Recommendation Concerning the Re-Use of Waste Paper and the Use of Recycled Paper*, 24 O.J. EUR. COMM. (No. L 355) 56 (1981).

on Toxic and Dangerous Waste,⁶¹ which applies to "any waste containing or contaminated by the substances or materials listed in the Annex to this Directive of such a nature, in such quantities, or in such concentrations as to constitute a risk to health or the environment."⁶² Like the Waste Directive, the Directive on Toxic and Dangerous Waste requires the Member States to ensure that toxic and dangerous wastes are disposed of "without risk to water, air, soil, plants or animals; without causing a nuisance through noise or odours; [and] without adversely affecting the countryside or places of special interest."⁶³ Pursuant to the 1975 Waste Directive, this directive calls upon the Member States to designate national authorities responsible for toxic and dangerous waste disposal policy.⁶⁴ The directive specifically calls upon Member States to insure that dangerous and toxic wastes are separated, packaged, labeled appropriately, and deposited in a recorded site.⁶⁵

The Directive on Toxic and Dangerous Waste departs from the Waste Directive in that it allows only permitted installations to store, treat, or deposit dangerous and toxic wastes.⁶⁶ It further requires producers, holders, and disposers of toxic and dangerous wastes to keep records of the quality, nature, chemical characteristics, origins, and sites of disposal of wastes.⁶⁷ However, it leaves the supervision of toxic and dangerous waste carriers to the individual Member States.⁶⁸ The directive requires that toxic and dangerous wastes, when being transported in the course of disposal, must be accompanied by an identification form describing the nature, composition, volume, and mass of the wastes, the name and address of the producer or of the previous holders, the name and address of the next holder or of the final disposer, and the location of

61. *Council Directive on Toxic and Dangerous Waste*, 21 O.J. EUR. COMM. (No. L 84) 43 (1978) [hereinafter *Toxic and Dangerous Waste Directive*].

62. *Id.* art. 1b, at 44. The Annex to the *Toxic and Dangerous Waste Directive* contains a list of certain toxic and dangerous substances, and materials selected as requiring priority consideration, among which are arsenic, mercury, cadmium, thallium, beryllium, chromium, lead, antimony, phenols, cyanides, isocyanates, organic halogen compounds, chlorinated solvents, organic solvents, biocides, tarry materials from refining and tar residues from distilling, pharmaceutical compounds, peroxides, chlorates, perchlorates and azides-chlorates, ethers, asbestos, silenium, tellurium, aromatic polycyclic compounds, metal carbonyls, soluble copper compounds, acids, and/or basic substances used in surface treatment and finishing of metals. *Id.* Annex, at 48.

63. *Id.* art. 5, para. 1, at 44.

64. *Id.* art. 6, at 44.

65. *Id.* art. 12, at 45.

66. *Id.* art. 9, at 45.

67. *Id.* art. 7, at 45.

68. *Id.* art. 9, para. 1, at 45.

the site of final disposal.⁶⁹

3. The Transfrontier Shipment Directive

In an effort to regulate cross-border shipment of hazardous wastes, the EC adopted the Directive on the Supervision and Control in the Community of the Transfrontier Shipment of Hazardous Waste.⁷⁰ The Transfrontier Shipment Directive extends the requirements of the Toxic and Dangerous Waste Directive to the shipments of wastes across national frontiers.⁷¹ In two resolutions, the European Parliament petitioned the Council to convert the proposal for this directive into a regulation with direct effect.⁷² The Transfrontier Shipment Directive established a closed tracking system which created a compulsory system of prior notification and authorization for the transport of hazardous wastes across national frontiers. Pursuant to the directive, holders of such wastes intending to ship wastes to a Member State or through one or more Member States are required to notify the Member State of destination, origin, and transit.⁷³ Wastes cannot be shipped before the Member State of destination acknowledges receipt of the notification.⁷⁴ If the shipment is to a country outside the EC, the last Member State through which the shipment is routed must acknowledge receipt of the notification.⁷⁵

In issuing the required notification to the concerned Member States, Annex I of the directive provides a "uniform consignment note" which requires holders of wastes to provide information as to the source and composition of the wastes, including the producer's identity, the routes and insurance against damage to third parties, measures to be taken to insure safe transport in compliance with transport conditions established by the Member States concerned, and the existence of a contractual

69. *Id.* art. 14, para. 2, at 46.

70. *Council Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste*, 27 O.J. EUR. COMM. (No. L 326) 31 (1984) [hereinafter *Transfrontier Shipment Directive*] (The issuance of this Directive is due in large part to the magnified attention to this issue caused by the discovery of 41 barrels of Dioxine contaminated waste in a barn in northern France that had as its source a 1976 factory explosion in Seveso, Italy.).

71. *Id.* art. 2, para. 1(a) (The term hazardous waste includes within its scope waste covered by the *Toxic and Dangerous Waste Directive*, *supra* note 61, as well as that covered by the *PCB Directive*, *supra* note 60.).

72. See S.P. JOHNSON & G. CORCELLE, *supra* note 55, at 168.

73. *Transfrontier Shipment Directive*, *supra* note 70, art. 2, para. 1(b), at 33, art. 3, para. 1, at 33.

74. *Id.* art. 4, para. 1, at 33.

75. *Id.* art. 4, para. 2, at 33.

agreement with the consignee of wastes with the adequate technical capacity to dispose of the wastes without endangering human health or the environment.⁷⁶

Pursuant to the Transfrontier Shipment Directive, Member States of destination or transit are to acknowledge receipt of the "uniform consignment note,"⁷⁷ or object to the shipment within one month of its receipt on the basis of laws and regulations relating to environmental protection, safety, public policy, or health protection which are in accordance with the provisions of the directive.⁷⁸ Acknowledgements of shipments are entered on the consignment note and forwarded to the holder of the wastes, and copies are sent to the other concerned Member States.⁷⁹ Furthermore, the competent authorities of the Member States of dispatch and transit may, within fifteen days following the notification, impose conditions with respect to the shipment of wastes in their territory.⁸⁰ Member States of dispatch may, no later than twenty days after receipt of the notification, raise objections to the shipment on the ground that the shipment of wastes adversely affects the implementation of waste management plans made pursuant to existing EC environmental

76. *Id.* art. 3, para. 3, at 33. Note that where the wastes are stored, treated, or deposited within a Member State, the consignee must also possess a permit in accordance with the *Toxic and Dangerous Waste Directive*, *supra* note 61, art. 9, at 45.

77. *Transfrontier Shipment Directive*, *supra* note 70, Annex I, at 37-39.

78. *Id.* art. 4, paras. 2-3, at 33-34. The *Transfrontier Shipment Directive* was amended in 1986 so as to require the agreement of a non-EC State of destination before embarking upon the usual notification procedure provided for in the directive. *Council Directive Amending the Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste*, 29 O.J. EUR. COMM. (No. L 181) 13, 14 (1986). It is noteworthy that the EC has recently signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Mar. 22, 1989, U.N. Environment Programme (Agenda Item 3), UNEP Doc. UNEP/IG.80/3 (1989), reprinted in 28 I.L.M. 657 (1989) [hereinafter *Basel Convention*]. See Comm'n of Eur. Comm., *Proposal of July 26, 1990 for a Council Decision Concerning the Accession in the Name of the Community to the Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal*, COM(90) 362 final (July 26, 1990) [hereinafter *July 26 Proposal*]. Should the EC ratify this Convention, the export of hazardous wastes would be limited to certain States which lack the technical facilities, capacity, or suitable disposal sites necessary to dispose of wastes in an environmentally sound and efficient manner. *Basel Convention*, *supra*, art. 4, para. 9, reprinted in 28 I.L.M. at 663. See also Note, *Regulating the International Hazardous Waste Trade: A Proposed Global Solution*, 28 COLUM. J. TRANSNAT'L L. 801 (1990).

79. *Transfrontier Shipment Directive*, *supra* note 70, art. 4, para. 2, at 33. When an objecting Member State is satisfied that problems giving rise to its objections have been resolved, it shall immediately send an acknowledgement to the holder of the wastes with a copy to the consignee of the wastes and to the competent authorities of the other Member States concerned. *Id.* art. 4, para. 4, at 34.

80. *Id.* art. 4, para. 6, at 34.

directives.⁸¹

Once acknowledgement of the notice is received, the holder of wastes must complete the consignment note and send copies to the Member States and third countries concerned before shipment is undertaken.⁸² The consignment note must accompany each shipment, and all persons subsequently involved in the operation must complete and sign the consignment note where indicated, thereafter retaining a copy.⁸³ Upon receipt of wastes, the consignee forwards copies of the completed consignment note to the holder of the wastes, the competent authorities of the Member States concerned, and the third states concerned.⁸⁴

The Transfrontier Shipments Directive also imposes conditions requiring that wastes be properly packaged and that containers have appropriate labels printed in the languages of the Member States concerned. The labels must indicate the nature, composition, quantity of the wastes, the telephone numbers of the persons from whom instructions and advice may be obtained at all times during shipment, and instructions to be followed in the event of danger or accident.⁸⁵

B. Future Developments

In 1988 the Commission adopted a proposal for a new Council Directive that was designed to amend both the Waste Directive and the Transfrontier Shipment Directive, and to replace the Directive on Toxic and Dangerous Waste.⁸⁶ In addition to expanding the definition of

81. *Id.*

82. *Id.* art. 6, para. 1, at 34.

83. *Id.* art. 6, paras. 2-3, at 34.

84. *Id.* art. 6, para. 4, at 34.

85. *Id.* art. 8, at 35.

86. Comm'n of Eur. Comm., *Proposal for a Council Directive Amending Directive 75/442/EEC on Waste and a Proposal for a Council Directive on Hazardous Waste*, COM(88) 391 final (Aug. 5, 1988) [hereinafter *Proposed Amendments*]. The Proposed Amendments offer a more precise definition of waste which, if adopted, would clearly extend the application of the EC's waste policy. It defines waste based on the reasons for its disposal and as such lists the following: 1) production or consumption residues not otherwise specified below; 2) off-specification products; 3) products whose date for appropriate use has expired; 4) material spilled, lost, or having undergone any other mishap including any materials, equipment, etc. contaminated as a result of mishap; 5) materials contaminated or soiled as the result of planned actions (*i.e.*, residues from cleaning operations, packing materials, containers); 6) unusable parts (rejected batteries, exhaust catalysts); 7) substances which no longer perform satisfactorily (contaminated acids, contaminated solvents, exhausted tempering salts); 8) residues of industrial processes (slags, stillbottoms); 9) residues from pollution abatement processes (scrubber sludges, bag house dust, spent fibers); 10) machining/finishing residues (lathe turnings, mill scales); 11) residues from raw material extraction processing (*e.g.*, mining residues, oil fill slops); 12) adulterated materials (oils, materials contaminated by PCBs); 13) any materials, substances, or products whose use has been banned by law; 14) products for which the holder

wastes, the proposal calls upon Member States to develop public plans for the disposal of wastes, covering types, qualities, methods, authorized sites, disused tips, and sites for surveillance, all to be ultimately transmitted to the Commission for eventual harmonization.⁸⁷ It also calls for the creation of a community data bank, designed to facilitate the tracking of waste around the EC by requiring regular notice on the details of all authorized treatments.⁸⁸

The EC's close tracking system for the handling and transport of wastes is similar in some ways to the system created by the Resource Conservation and Recovery Act⁸⁹ (RCRA) in the United States. The two systems are alike with respect to the technically detailed definitions of wastes,⁹⁰ packaging, and labeling⁹¹ requirements. However, the differences between the two systems are more profound. For example, under U.S. regulations, waste generators who do not receive notice of disposal within forty-five days from the time wastes leave their control are required to notify the Environmental Protection Agency.⁹² The EC system fails to provide a centralized environmental regulatory authority; even the recently created European Environmental Agency clearly is not designed as such.⁹³ Supervision and enforcement are left to the individual Member States. The only means of EC control under the existing system is the requirement that Member States submit a report to the EC Commission every two years regarding the implementation of the directive and the compliance therewith.⁹⁴

Perhaps a more important difference between the EC and the U.S.

has no further use (e.g., agricultural, household, office, commercial, and shop discards, etc.); 15) materials, substances, or products resulting from remedial actions with respect to contaminated land; 16) any materials, substances, or products which the holder wishes to dispose of, or is required to dispose of, and which are not contained in the above categories. *Id.* Annex I, at 16.

87. *Id.* arts. 8-10, at 12-13.

88. *Id.* art. 12, at 13.

89. RCRA, 42 U.S.C. §§ 6901-6987 (1983).

90. *Id.* § 6903(5) broadly defines hazardous wastes. See also 40 C.F.R. §§ 261.21, 261.22, 261.30, 261.33 (1990) (Environmental Protection Agency's regulations listing specific hazardous wastes).

91. 40 C.F.R. § 262.31 (1990).

92. *Id.* § 262.42(a)(2).

93. *Regulation Establishing a European Environmental Agency*, 33 O.J. EUR. COMM. (No. L 120) 1 (1990). At present, it appears that the main objective of this agency would be to assist the EC, Member States, and associated third countries in protecting and improving the environment through the collection of data, the scientific assessment of threats to the environment, and forecasting environmental developments. European Environmental Commissioner Ripa Di Meana has stated that it is not the purpose of this agency to function as a regulatory body. *La Métamorphose d'un séducteur*, *Le Monde*, Jan. 16, 1990, at 12.

94. *Transfrontier Shipment Directive*, *supra* note 70, art. 13, at 35.

systems is that the EC's waste legislation is in the form of directives which require the independent Member States to create national law to implement the directives. They do not, however, create binding obligations on waste generators and handlers within the actual Member States. Several difficulties thus arise, the first being that Member State laws implementing directives will vary with regard to the applicable degree of supervision, enforcement, and interpretation thereof.⁹⁵ Second, individuals operating in violation of a directive's substantive provisions are not subject to sanction, absent implementing legislation. In addition, violations of a directive's substantive provisions in the absence of implementing legislation may not serve as evidence of fault before Member States' courts.⁹⁶ Perhaps the most important problem with the directives is that, despite the surge of interest in the environment, the directives pertaining to environmental matters have notoriously been the most poorly implemented.⁹⁷ For example, the Transfrontier Shipments Directive, which by its own terms was to be fully implemented by January 1, 1987, has not yet entered into force in Spain and Portugal, and has only been partly adopted into the national legislation of Germany and the Netherlands (ironically, two of the EC's most environmentally active Member States).⁹⁸

While the difficulties of implementation and enforcement of the EC's waste management regime are among the greatest concerns of its proponents, the most profound defect in the system is its apparent inconsistency with the 1992 programme. Since the completion of the internal market by January 1, 1993, shall effectively remove all frontiers between Members States, the tracking system elaborated in the Transfrontier Shipment Directive, whose operation is triggered by the shipment of wastes across national frontiers, shall be rendered obsolete.

95. The problem of interpretation is perhaps best illustrated by recent litigation before the European Court of Justice regarding the proper definition for "waste" and "dangerous and toxic waste." In *Prenatura di Asti v. Vessesso & Zanatti*, 1990 E. Comm. Ct. J. Rep.— (forthcoming), a ruling of March 28, 1990, the Court considered that recyclable nonferrous metals should not be excluded from the definitions of "waste" and "dangerous and toxic waste" contained in the national laws, implementing the relevant EC legislation.

96. See, e.g., *Pretore di Saló v. Persons Unknown*, 1987 E. Comm. Ct. J. Rep. 25-45, [1987-1988 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 14,489 (1987) (where the Court of Justice ruled that the violation of the substantive provisions of the *Directive on the Quality of Freshwaters Needing Protection or Improvement in Order to Protect Fish Life*, *supra* note 30, absent implementing national legislation, could neither impose liability nor create an inference of illegality or negligence before Member States national courts).

97. 1984 EUR. PARL. DEB. (No. 1-313) 80 (Apr. 4, 1984). This report of the European Parliament criticized the implementation of environmental directives and the Commission's poor enforcement record.

98. Agence Europe No. 5334, Sept. 22, 1990, at 12.

In response to the system's shortcomings, the EC Commission has proposed a regulation on the supervision and control of the transfer of waste that would apply to all wastes.⁹⁹ As a regulation, it would have direct effect within the Member States of the EC and would thereby avoid the waiting period and interpretative difficulties which derive from the use of legislation promulgated in the form of directives. The proposed regulation would further overcome difficulties posed by the definition of wastes covered by EC legislation by adapting the existing Transfrontier Shipment Directive with provisions of the Basel Convention of March 22, 1989, which was signed by the EC, as well as numerous other signatory nations.¹⁰⁰ The proposed regulation adapts the existing EC legislation concerning transfrontier shipments of wastes between Member States and beyond the EC in a manner which does not rely upon the existence of frontiers between Member States for its operation, thereby rendering it consistent with the 1992 programme's removal of all frontiers between Member States.

III. CIVIL LIABILITY AND DAMAGES CAUSED BY WASTES

Another significant difference between the EC system and the U.S. regulatory framework is the absence in the EC of provisions regarding civil liability for damages caused by wastes. Such liability was originally included in the initial proposal for the Transfrontier Shipments Directive.¹⁰¹ Article 15 of that proposal would have imposed strict liability on the producers of wastes "any time damage is caused to a third party by the waste."¹⁰² The Transfrontier Shipments Directive, however, was ultimately adopted with language merely promising that the Council would consider "the conditions for implementing civil liability of the producer in the case of damage or that of any other person who may be accountable for . . . the said damage . . ."¹⁰³ This promise was made again in 1987 in the Fourth Environmental Action Programme.¹⁰⁴

99. *Id.*

100. See Basel Convention, *supra* note 78. See also July 26 Proposal, *supra* note 78 (outlining a comprehensive definition of dangerous waste).

101. *Proposed Directive on the Supervision and Control of Transfrontier Shipment of Hazardous Wastes Within the European Community*, 26 O.J. EUR. COMM. (No. C 53) 3 (1983).

102. *Amendment to the Proposal for a Council Directive on the Supervision and Control of Transfrontier Shipment of Hazardous Wastes Within the European Community*, 26 O.J. EUR. COMM. (No. C 186) 3, 9 (1983).

103. *Transfrontier Shipment Directive*, *supra* note 70, art. 11, para. 3, at 35.

104. See *Fourth Environmental Action Programme*, *supra* note 3, para. 2.5.5 (stating that the Commission intended to consider the scope of a "better definition of responsibility in the

Keeping its promise, on September 1, 1989, the Commission issued its proposal for a Council Directive on Civil Liability for Damages Caused by Waste.¹⁰⁵ The proposed directive would harmonize the laws of the Member States so as to impose strict liability for physical and property damage caused by wastes as well as for environmental injury caused by wastes.¹⁰⁶ While many would easily draw comparisons between the new EC directive and the U.S. Superfund Law,¹⁰⁷ the EC's Waste Liability Directive is broader in the sense that it would extend to toxic tort liability as well as environmental damage.¹⁰⁸

A. Scope of the Directive

The scope of the proposed directive is quite broad, with respect to both its subject matter and the potential defendants and plaintiffs.

The proposed Waste Liability Directive borrows the definition of waste used in the Waste Directive, which, as previously stated, is expected to be significantly enlarged.¹⁰⁹ In addition, the European Parliament would include within its definition radioactive and hazardous wastes as defined by both EC and Member States' legislation arising out of the activities listed in the Basel Convention.¹¹⁰ Should the application of the proposed directive be extended to the degree requested by the European Parliament, strict liability would also be extended to damage caused by industrial activities likely to produce dangerous wastes, as

environmental field (including the possibility that the polluter should assume extended liability for damage caused by products and processes). . . ."). See also *id.* para. 5.3.6 (stating that "[w]ork on the question of civil liability and insurance in relation to the transfrontier movement of such waste will be completed and proposals will be made.").

105. *Waste Liability Directive*, *supra* note 4.

106. *Id.* art 3, at 5. The Commission decided not to restrict liability to "hazardous wastes," as it considered that such designation makes little difference to the victims thereof. It further decided to extend liability beyond transfrontier movements of wastes since the EC's emerging policy is to control wastes from the moment of its creation to its final disposal. See *Commission Proposes a System of Civil Liability for Damages Caused by Waste*, Comm. Mkt. Rep. (CCH) ¶ 95,236 (1989).

107. CERCLA, 42 U.S.C. §§ 9601-9657 (1983).

108. For a comparison between the proposed Waste Liability Directive and the U.S. CERCLA, see Freeman & McSlarrow, *The Proposed European Community Directive on Civil Liability for Waste: The Implication for U.S. Superfund Reauthorization in 1991*, 46 BUS. LAW. 1 (1990).

109. *Proposed Amendments*, *supra* note 86. The European Parliament has, however, proposed an even more extensive definition of "waste" by including those categories of products listed in the Basel Convention, *supra* note 78, Annexes I-II, reprinted in 28 I.L.M. at 678-79.

110. Parliament of the Eur. Econ. Comm., *Minutes of Proceedings on the Sitting of Wednesday 13 June 1990*, 1990-1991 PARL. EUR. DOC. (PE 142.453) amend. 13, at 65 (1990) [hereinafter *Parliamentary Amendments*].

identified by existing community law, particularly the Seveso directive.¹¹¹

The proposed directive broadly defines those persons potentially liable thereunder. The directive defines a producer as any person "whose occupational activities produce waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature and composition of this waste, until the moment when the damage or injury to environment is caused."¹¹² The proposed directive also includes within its definition of potentially liable parties any importer of wastes into the Community.¹¹³ Any person who had actual control of wastes in transit in the Community is also a potentially liable party, unless that person identifies the producer of the wastes within a reasonable time.¹¹⁴ Further, any person responsible for any installation, establishment, or undertaking where the wastes were transferred may also be held liable under the proposed directive.¹¹⁵

Perhaps the most intriguing aspect of the proposed directive's remedy provisions regarding environmental injury is the grant of a cause of action to private individuals, public bodies, and, depending upon the rights of standing before the national courts of the EC Member States, common interest groups. Based on a literal reading of the proposed directive, a private plaintiff may bring a suit to prevent an environmental injury or to obtain an injunction ordering the restoration of the environment to its natural state, even where the plaintiff has suffered only minor loss or, possibly, no direct injury at all.¹¹⁶

In addition to private suits based on environmental injury claims, the proposed directive also grants to common interest group associations the right to prohibit or seek cessation of acts giving rise to similar injuries, where this right is granted under Member State law.¹¹⁷ If this pro-

111. *Id.*

112. *Waste Liability Directive*, *supra* note 4, art. 2, para. 1(a), at 4. Note that the Parliamentary Amendments to the proposed Directive would further extend the definition of a producer to include "a person who in the course of a commercial or industrial activity or otherwise produces waste or holds waste for disposal." *Parliamentary Amendments*, *supra* note 110, amend. 13, art. 2, para. 1(a), at 65.

113. *Waste Liability Directive*, *supra* note 4, art. 2, para. 2, at 4-5.

114. *Id.* art 2, para. 2(b), at 5.

115. *Id.* art. 2, para. 2(c), at 5.

116. *Id.* art. 4, para. 1(a), (d), at 4-5. Recently, members of the European Parliament have petitioned for a resolution that would request the Commission of the European Communities to draw up a regulation enabling members of the public and those acting on their behalf to refer environmental cases to the courts. *Report Drawn up on Behalf of the Committee on Legal Affairs and Citizen's Rights on the Proposal from the Commission to the Council for a Directive on Civil Liability for Damage Caused by Waste*, PARL. EUR. DOC. A 3-126/90/Part B, Annex II, at 37 (May 29, 1990).

117. *Waste Liability Directive*, *supra* note 4, art. 4, para. 4, at 5.

posal was immediately implemented, such a cause of action would be barred in the Federal Republic of Germany, but would be allowed in the Netherlands and Luxembourg, and, when joined with criminal proceedings, in Italy and France.¹¹⁸

Because environmental injuries concern society, the right to bring suit for the prohibition, cessation, restoration of the environment, and reimbursement for the expenditures arising from measures to compensate for environmental damage is granted by the proposed directive to public authorities located within the Member States.¹¹⁹ It is this provision of the proposed directive which is most similar to that of existing U.S. law; it gives Member State authorities the right to seek cleanup costs as well as reimbursement for measures undertaken in efforts to prevent environmental injury.¹²⁰ It is notable that the proposed directive would deny to the public authorities of interested Member States the right to bring suit for property damages. Presumably, the liability of waste producers with respect to state-owned properties would be governed by provisions of the relevant national law of the concerned Member State.

B. Liability

The proposed directive would impose joint and several liability where "two or more producers are liable for the same damage or the same injury to the environment."¹²¹ Based on the proposed directive's broad definition of what constitutes a producer, such liability could be imposed as between successive handlers of wastes. This would significantly improve the position of plaintiffs, providing them a choice of defendants from the entire chain of those handling wastes, or any other party exercising control over wastes from the moment of its generation to its ultimate disposal. Thus, everyone who has handled wastes from its creation to its proper disposal retains liability for it,¹²² so that all of these parties have the incentive to ensure that it is ultimately disposed of properly. Further, although the liability of a producer may not be reduced by a showing of the fault of a third party,¹²³ the proposed directive softens the harshness of the liability regime by allowing the producer to contract

118. See *Explanatory Memorandum Accompanying the Proposal for a Council Directive on Civil Liability for Damages Caused by Waste*, COM(89) 282 final (Sept. 15, 1989) [hereinafter *Explanatory Memorandum*].

119. *Waste Liability Directive*, *supra* note 4, art. 4, para. 3, at 5.

120. Cf. CERCLA, 42 U.S.C. § 9607 (1983).

121. *Waste Liability Directive*, *supra* note 4, art. 5, at 5.

122. *Explanatory Memorandum*, *supra* note 118, arts. 2, 5, at 3.

123. *Waste Liability Directive*, *supra* note 4, art. 7, para. 1, at 5.

with carriers or operators for indemnification.¹²⁴

Under the EC's proposed legislative scheme, two forms of recovery are made available to affected plaintiffs. Plaintiffs may recover for damage which is defined as resulting from death, physical injury, or property damage.¹²⁵ In addition, plaintiffs may bring suit for injury to the environment, which is defined as "a significant and persistent interference in the environment caused by a modification of the physical, chemical or biological conditions of water, soil or air," insofar as these are not considered to be property damage as defined by the proposed directive.¹²⁶ While suits brought for personal injury or property damage shall not be subject to liability ceilings, the proposed directive does allow for divergencies among Member States with respect to the availability of damages relating to nonmaterial injuries such as "pain and suffering."¹²⁷

The proposed directive gives plaintiffs a significant array of remedies, allowing them to obtain:

- a) the prohibition or cessation of the act causing the damage or injury to the environment;
- b) the reimbursement of expenditure arising from measures to prevent the damage or injury to the environment;
- c) the reimbursement of expenditure arising from measures to compensate for damage [caused to property];
- d) the restoration of the environment to its state immediately prior to the occurrence of injury to the environment or the reimbursement of

124. *Explanatory Memorandum*, *supra* note 118, art. 5, at 3. Under the Parliamentary Amendments to the proposed *Waste Liability Directive*, liability may be shifted among the handlers of waste as long as it is transferred to an authorized party. *Parliamentary Amendments*, *supra* note 110, amend. 15, art. 3, para. 2, at 70. The Parliamentary Amendments, however, do not provide manufacturers the same possibility of shifting blame for damage or environmental injury caused by industrial activities. *Id.* amend. 15, art. 3, para. 3, at 70.

125. *Waste Liability Directive*, *supra* note 4, art. 2, para. 1(c), at 5.

126. *Id.* art. 2, para. 1(d), at 4.

127. *Id.* art. 4, para. 5, at 5. Note, however, that the proposed amendments would allow Member States [to] fix a limit on the liability of any person for claims arising from any one incident, which shall be no lower than:

a) as regards a carrier other than a carrier by air:

- ECU 11.5 million for damage

- ECU 8 million for impairment of the environment

b) as regards any other person who may be liable:

- ECU 70 million for damage

- ECU 50 million for impairment of the environment, which figure shall be increased to ECU 100 million in respect of impairment of the environment caused by radioactive waste. Where sums provided for under one head of compensation, either for damage or for impairment are insufficient to meet claims, unused sums under the other head may be set against the unpaid balance.

Parliamentary Amendments, *supra* note 110, amend. 24, art. 11, para. 2(a)-(b), at 76.

expenditure incurred in connection with measures taken to this end;
and
e) indemnification for the damage.¹²⁸

The proposed directive contains a balancing of hardships test for suits brought for the purpose of restoring the environment. Plaintiffs may seek such restoration or reimbursement of expenditures incurred to this end, except when the costs substantially exceed the benefits arising for the environment from such restoration, and measures other than the restoration of the environment may be undertaken at a substantially lower cost.¹²⁹

The proposed directive offers few effective defenses to those subject to liability under its provisions. The sole circumstance by which a defendant may seek exoneration from the imposition of liability as provided by the proposed directive is upon a showing that "the damage or injury to the environment results from *force majeure* as defined in Community law."¹³⁰ As the concept of *force majeure* is rather unknown within the EC legal system, the scope and application of this defense remains unclear. The Parliament's proposed amendments to this provision seem to provide a hint, stating "[n]o liability shall attach to any person if he proves that in the absence of fault on his part: . . . b) the damage or impairment of the environment resulted from an act of war, hostilities, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character."¹³¹

The proposed directive also provides that contributory negligence is a defense, stating that "the liability of the producer may be reduced or disallowed when having regard to all the circumstances, the damage is caused both by the waste and the fault of the injured party or of any person for whom the injured party is responsible."¹³² Although this would allow defendants to argue that the damage derives from the fault of the injured party, it would bar reduction of defendant's liability when the acts or omissions of a third party contributed to the damage.¹³³ However, while contractual provisions excluding or limiting liability with respect to the injured person would be barred,¹³⁴ contractual arrangements of indemnity with carriers or operators may be used by these producers

128. *Waste Liability Directive*, *supra* note 4, art. 4, para. 1(a)-(e), at 5.

129. *Id.* art. 4, para. 2, at 5.

130. *Id.* art. 6, para. 1, at 5.

131. *Parliamentary Amendments*, *supra* note 110, amend. 18, art. 6, para. 1, at 74.

132. *Waste Liability Directive*, *supra* note 4, art. 7, para. 2, at 5-6.

133. *Id.* art. 7, para. 1, at 5.

134. *Id.* art. 8, at 6.

to offset liability.¹³⁵

It is worth noting that article 12 of the proposed directive states that it would not affect the rights provided by other international conventions on civil liability. Pursuant to this provision, liability could therefore be offset by utilizing the damage limitation provisions contained in the U.N. Convention on Civil Liability for Damage Caused During the Carriage of Dangerous Goods by Road and Inland Navigation Vessels.¹³⁶ Based on this Convention, the liability of a road or rail carrier for claims arising from any occurrence giving rise to loss or damage caused by contamination to the environment, or for personal injury or damage to property, are subject to limitation.¹³⁷ Since liability may be limited under this Convention, waste carriers may be afforded a means of escaping the full burden of liability that the proposal mandates.

The proposed directive includes a statute of repose and a statute of limitations, thereby barring actions initiated after three years from the date when the plaintiff became aware or should have become aware of the damage or the injury to the environment, and of the identity of the producer.¹³⁸ The omission of any mention of the effect of subsequent discoveries as to the dangerous properties of waste, coupled with the express denial of the issuance of a public permit, could easily render a pro-

135. *Explanatory Memorandum*, *supra* note 118, art. 5, at 3.

136. See U.N. Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, *opened for signature* Feb. 1, 1990, art. 9, *reprinted in* INTERNATIONAL TRANSPORT TREATIES IV-81, IV-85 (Supp. 14 1990) [hereinafter *Unidroit Convention*].

137. Article 9 states in pertinent part that:

1. The liability of the road carrier and of the rail carrier under this Convention for claims arising from any one incident shall be limited as follows:

(a) with respect to claims for loss of life or personal injury: 18 million units of account;

(b) with respect to any other claim: 12 million units of account.

2. The liability of the carrier by inland navigation vessel under this Convention for claims arising from any one incident shall be limited as follows:

(a) with respect to claims for loss of life or personal injury: 8 million units of account;

(b) with respect to any other claim: 7 million units of account.

3. Where the sums provided for in ¶ 1(a) and ¶ 2(a) of this article are insufficient to pay the claims mentioned therein in full, the sums provided for in ¶ 1(b) and ¶ 2(b) shall be available for payment of the unpaid balance of claims under ¶ 1(a) and ¶ 2(a). Such unpaid balance shall rank ratably with claims mentioned under ¶ 1(b) and ¶ 2(b). [The unit of account referred to is the special drawing right as defined by the International Monetary Fund.].

Id. art. 9, paras. 1-3, *reprinted in* INTERNATIONAL TRANSPORT TREATIES, at IV-85.

138. *Waste Liability Directive*, *supra* note 4, art. 9, para. 1, at 6. Note that the law of the individual Member States shall govern the suspension and interpretation of the limitation periods. *Id.* art. 9, para. 2, at 6.

ducer subject to liability under the proposed directive for damages caused by waste long after it was disposed of in a manner considered safe at the time of its original disposal. The proposed directive offsets this prospect by extinguishing all causes of action that are not brought within thirty years from the date on which the incident giving rise to the damage or injury to the environment occurred.¹³⁹

While the proposed directive does not presently provide for retroactive effect, waste producers should nonetheless take notice of the proposal's January 1991 implementation deadline. In light of the accelerated pace of implementation of measures towards completion of the internal market by 1992, the proposal's deadline may not be as readily dismissed as was often the case with proposed EC environmental legislation.

IV. CONCLUSION

Recently, the European Parliament recommended amendments to the proposed Waste Liability Directive, calling for a mandatory insurance scheme¹⁴⁰ and for the creation of a European Fund for Compensation for damage caused by wastes.¹⁴¹ The fund would be financed by waste producers.¹⁴² In addition, the Parliament has also proposed additions to the proposed directive that would pass liability to the insurers of waste producers in the event of the waste producers' winding up, liquidation, or insolvency.¹⁴³

Although the proposal for a directive on civil liability for damages caused by wastes may be viewed as the offspring of the 1985 Directive on Liability for Defective Products,¹⁴⁴ perhaps it is best to consider it in the context of the EC directives on wastes that preceded it. In this latter context, one can view the genesis of a grander trend: the birth of an

139. *Id.* art. 10, at 6. The parliamentary proposal would amend this time period by providing for a 10 year limitation period with respect to property damage, and a 20 year period for environmental injury claims, while maintaining the 30 year period only with regard to environmental injury caused by nuclear waste. See *Report Drawn up by the Committee on Legal Affairs and Citizen's Rights on the Proposal From the Commission to the Council for a Directive on Civil Liability for Damage Caused by Waste*, PARL. EUR. DOC. A 3-0126/90/Part A, amend. 23, at 18 (May 29, 1990).

140. *Parliamentary Amendments*, *supra* note 110.

141. *Id.* amend. 24, art. 11, para. 6, at 77. (This provision would be designed to provide compensation when those liable under the directive cannot be identified or when the persons liable are incapable of providing full compensation for the damage and/or injury caused.)

142. *Id.*

143. *Id.* amend. 27, art. 13a, at 78.

144. *Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, 28 O.J. EUR. COMM. (No. L 210) 29 (1985).

operative EC environmental policy. Prior to the recently proposed directive, EC waste management efforts had prompted at least one commentator to liken the regulatory structure to an "elaborate façade."¹⁴⁵ Indeed, a closed tracking system for waste transport, without a centralized authority for its governance or the promise of a consistent system of liability for its enforcement, was perhaps a mere façade.

In this context, the significance of the proposed Waste Liability Directive is subtle. On its face, it does not purport to create a centralized authority or an American-style environmental protection agency designed to monitor the enforcement of waste management directives. In its current state, the proposal does, however, carry the potential for what could prove to be a European private attorney general system. By extending the scope of liability to include what are considered toxic tort suits, which are governed by individual state law in the United States, the threat of private citizens' suits may operate in a manner to force waste generators, handlers, and transporters into compliance with regulatory norms in a more efficient and cost-effective manner than the EC Commission or the Environmental Protection Agency could ever dream.

In 1992 the environmental policy of the EC shall celebrate either its twentieth anniversary or, perhaps, the emergence from its infancy.

145. Smith, *Regulation and Liability Involving Hazardous Substances: Developments in the European Community*, 1986 PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS FOR INT'L BUS. 7-1, 7-7.

