Annex VII - Analysis of non-contractual liability for RU under EU law

This annex examines the non-contractual liability in case of a railway accident which is harmonised at European level.

Relevant legislation

Contractual liability relating to damage to passengers or to goods themselves is governed by the 1980 Convention on the International Transport by Rail (COTIF-CIV/ CIM) and Regulation 1371/2007 which repeat most of the provisions of CIV.

No similar rule exists as to non-contractual liability which would apply in case of damages arising out of carriage of dangerous goods by rail.[1]

However a European Directive governs the liability for costs arising from environmental damage. The 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 ("Environmental Liability Directive") establishes a framework of environmental liability based on the "polluter-pays" principle.

The Environmental Liability Directive applies to environmental damage caused by any of the occupational activities listed in Annex III to the Directive, and to any imminent threat of such damage occurring by reason of any of those activities.

Therefore it is important to assess what is seen as an environmental damage. Environmental damage is defined as

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

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

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[1] *Relationship between the crtd and other international liability instruments*, economic commission for Europe, Inland transport committee, July 2003.

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;
(c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.
Furthermore one has to look at Annex III to the Directive. This annex holds, amongst others, activities such as waste management operations, including transport, and transport by rail of dangerous goods or polluting goods as defined in the Annex to Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail.[2]

This latter Directive has been repealed as from 30 June 2009 by the Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods.[3] The consolidated version of the Environmental Liability Directive[4] maintains its reference however to the old 96/49/EC Directive.

It is important to mention that according to its article 4, the Environmental Liability Directive does not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in its Annex IV, including any future amendments thereof, which is in force in the Member State concerned.

Amongst others, the Directive lists in its Annex IV the Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels ("CRTD").[5] This latter convention has not yet entered into force.[6]

As soon as the CRTD enters into force, the Environmental Liability Directive will no longer apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of the CRTD. This will only be the case provided that the CRTD is in force in the member state concerned. Apparently, for the moment Germany is the only Member State of the EU to have signed the CRTD. This means that for the

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[2] [1996] OJ L 235/25. Directive as last amended by Commission Directive 2003/29/EC ([2003] OJ L 90/47).
[3] [2008] OJ L 260/13.
[4] Text available at:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0035:20090625:NL:PDF>
[5] The CRTD Convention retains "the carrier's" liability (as the owner of the means of transport) for damage caused both by the carrier and by the goods carried. The CRTD explicitly excludes contractual liability, therefore there is no overlap between the COTIF /liability regimes and the CRTD and the latter could fill the gap in the international liability regime for transport of dangerous goods by rail.
[6] Text available at: <http://www.unece.org/trans/danger/publi/crtd/legalinst_55_TDG_CRTD.html>

moment the Environmental Liability Directive is applicable to determine liability in case of environmental damage which is caused in case of transfer of dangerous goods by railway.

Scope

This Directive only relates to damage caused to the environment and not to persons or properties.

This Directive concerns in particular non-contractual liability for environmental damage within the EU.

This means that individual national laws will be applicable as to non-contractual liability for any damage, other than Environmental Damage.

Should damage be caused to third parties in person or any of their property then this Environmental Liability Directive - containing strict liability - will not be applicable.

The Directive is also only applicable as far as the environmental damage is caused by an occupational activity.

“Occupational activity” is defined as any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character.

The present annex will only focus on the liability regime relating to the occupational activities listed in Annex III of the Environmental Liability Directive and which imply inter alia the transport by rail of dangerous goods (as meant in the text to which that Annex III of the Directive refers).

The Environmental Liability Directive provides clearly that the ”operator” will take any necessary preventive measures where environmental damage has not yet occurred but there is an imminent threat of such damage occurring. The operator will take the necessary remedial measures where environmental damage has occurred.

According to article 2, 6° of the Environmental Liability Directive, ”operator” means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.

Applied to the railway sector, the operator is the operator of the transport by rail of dangerous goods, hence the RU.

Liability provisions

The Environmental Liability Directive provides for unlimited liability of the operator and for obligations of the competent authorities of the Member States regarding preventive or remedial measures. The following analysis only focuses on remedial measures, which are in the scope of the study.

The Directive imposes immediate actions upon the operator having caused the damage.

According to article 8 of the Environmental Liability Directive, “the operator” will bear the costs for the preventive and remedial actions taken (this is a liability without fault - strict liability).

However, an operator will not be required to bear the cost of preventive or remedial actions taken pursuant to the Directive when he can prove that the environmental damage or imminent threat of such damage:

> (a) was caused by a third party (which could be for instance the IM) and occurred despite the fact that appropriate safety measures were in place; or
> (b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities. In such cases member states will take the appropriate measures to enable the operator to recover the costs incurred.

Still according to Article 8, the Member States may allow the operator not to bear the cost of remedial actions taken pursuant to the Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

> (a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III to the Directive, as applied at the date of the emission or event;
> (b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

Hence, the polluter pays principle as applied in the Environmental Liability Directive implies that the operator will in principle have to bear the costs of actions taken pursuant to the Directive, unless he

can rely on an exemption as provided in the Directive. As stated by the Court of Justice in a judgement of 9 March 2010:[7]

"*Articles 3(1), 4(5) and 11(2) of Directive 2004/35 must therefore be interpreted as meaning that, when deciding to impose remedial measures on operators whose activities fall within Annex III to the directive, the competent authority is not required to establish fault, negligence or intent on the part of operators whose activities are held to be responsible for the environmental damage. On the other hand, that authority must, first, carry out a prior investigation into the origin of the pollution found, and has a discretion as to the procedures, means to be employed and length of such an investigation. Second, the competent authority is required to establish, in accordance with national rules on evidence, a causal link between the activities of the operators at whom the remedial measures are directed and the pollution*".

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

The Directive provides that an operator can be obliged by the competent authorities to take remedial actions. If the operator refuses to take actions, then the competent authorities are entitled to take any appropriate measures. The authorities may initiate cost recovery proceedings against the operator who has caused the damage or the imminent threat of damage within five years from the date on which the measures in question have been completed by the authorities or from the date on which the liable operator has been identified, whichever is later. Thus, if the damage only materializes 30 years after the event, which eventually caused it, the operator may still be held liable.

[7] Case C-378/08, *ERG e.a.*, para 65, not yet published in the ECR.