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The Untapped Potential of Horizontal Private Enforcement within EC Environmental Law

Josephine A.W. van Zeben

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The Untapped Potential of Horizontal Private Enforcement Within European Environmental Law

JOSEPHINE A.W. VAN ZEBEN*

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INTRODUCTION

Since the 1970s, the influence and authority of the European Community ("EC") regarding environmental policy has rapidly increased.[1] Greater public awareness combined with the growing visibility of the consequences of environmental problems, such as acid rain, water pollution and climate change, have resulted in a vast body of European environmental law. Internationally, the EC has tried to position itself as a frontrunner in the area of environmental-protection policy.[2] Regrettably, regulation in the area of environmental protection continues

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1. LUDWIG KRAMER, EC ENVIRONMENTAL LAW 4-5 (6th ed. 2007).

2. *See, e.g.*, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 20 20 by 2020*, at 2, COM (2008) 30 final (Jan. 23, 2008) (describing European climate change and energy policy towards the Copenhagen negotiations).

to be only partially effective, especially in terms of enforcement, both public and private. To some extent, this may be attributed to the nature of environmental problems themselves, but the situation is aggravated by the fragmented condition of the European *acquis communautaire,*[3] and the institutional structure of the European Union (EU). Since the mid-1980s, the potential of private regulation and enforcement through tort law as an alternative to public enforcement has increasingly been acknowledged, both within traditional legal discourse,[4] as well as in law and economics literature.[5]

European legislation is not easily described in terms of public versus private law action. Traditionally, public bodies have enforced EC environmental law, with the European legal system leaving little room for private participation at the enforcement level. Enforcement of EC environmental law is primarily a "vertical" process between the European member state and the European citizen or company. The primary role for private parties is through so-called "state liability" actions.[6] These "state liability" actions address the behavior of member states regarding the implementation or enforcement of European legislation and hence focus on the failings of the public legislator and enforcer rather than on the violations of the private offender.

The main reason for this limited role for private enforcement is that most of the legal rules within EC environmental law are laid out in directives.[7] Directives impose levels of minimum harmonization on member states by setting environmental standards that are subsequently enforced by the member states' authorities on individuals.[8] They leave a margin of discretion for member states regarding

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3. The *acquis communautaire* is the body of common rights and obligations that bind all Member States of the European Union. It includes the content of the treaties, secondary legislation, and acts adopted under the second and third pillars of the EU. Europa, Glossary, http://europa.eu/scadplus/glossary/community_acquis_en.htm (last visited Jan. 26, 2010).

4. Many have argued that these traditional regulatory tools have been found wanting in providing the desired results. *See*, *e.g.*, ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 35-39 (Oxford University Press1999); JOANNE SCOTT, EC ENVIRONMENTAL LAW 34 (Addison Wesley Longman Inc. 1998); Maria Lee, *From Private to Public: The Multiple Roles of Environmental Liability*, 7 EUR. PUB. LAW 375, 380 (2001).

5. *See* Steven Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 364 (1984) [hereinafter Shavell, *Liability for Harm*]; Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271, 271 (1984); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 1 (1974); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 1 (1975).

6. *See* KRÄMER, *supra* note 1, at 441 (overview of state liability actions and their merits and shortcomings).

7. *See* Seventh International Conference on Environmental Compliance and Enforcement, Marrakech, Morocco, Apr. 9-15, 2005, Georges Kremlis & Jan Dusìk, *The Challenge of the Implementation of the Environmental* Acquis Communautaire *in the new member states*, 264.

8. The legal basis and consequence of the adoption of directives may be found in the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts art. 249, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter EC Treaty] ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of forms and methods"). The legal basis for European competence regarding environmental problems

the form and method of implementation so long as the directive's desired result is achieved. As such, directives are not the "strongest" of legislative tools at the disposal of the European legislator; regulations are far more powerful because they are binding on member states, both in terms of the desired result and the form and method by which the desired result is to be achieved.[9]

With the expansion of the European Union to twenty-seven member states, it has become more difficult to reach political consensus among the member states; thus, directives are expected to be adopted even more frequently to avoid the possibility of political stalemate.[10] Environmental law is typically such an area where many laws are adopted by means of directives because they allow member states with diverging views to reach consensus on a minimum level of protection. Moreover, they allow for the divergence in environmental and economic situations within member states to be taken into account. In other words, a "one size fits all" solution is typically not desirable for environmental problems, which means that environmental *regulations*, with their more stringent requirements of implementation and application, are few and far between. Examples of regulations nevertheless exist and importantly include REACH[11] on the use of chemicals and Regulation 1013/2006[12] on the shipment of waste.[13]

Within this legal setting, the European doctrine of direct effect, as developed by the European Court of Justice in its jurisprudence,[14] does not allow private parties to use European legislation as set out in directives against another private party in a national court. Thus, the possibility of horizontal private enforcement – actions between private parties in national courts – of European environmental law appears to be limited.[15] This limitation is particularly true for the "pure" forms of horizontal private enforcement; the *Wells* case,[16] however, has created some opportunities for more indirect forms of horizontal private enforcement.[17]

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is in EC Treaty arts. 174-76. *Id.* arts. 174-76.

9. *Id.* art. 249 ("A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.").

10. *See generally* Jon Birger Skjærseth & Jørgen Wettestad, *Is EU enlargement bad for environmental policy? Confronting gloomy expectations with evidence*, 7 J. INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 263 (2007).

11. *See generally* Commission Regulation 1907/06, Regulation concerning the Registration, Evaluation, Authorization and Restriction of Chemicals, 2006 O.J. (L 396) 1.

12. *See generally* Commission Regulation 1013/06, Regulation on the shipment of waste, 2006 O.J. (L 190) 1.

13. Another telling feature of these regulations is that they often concern areas of law that have international obligations for the European Community and her Member States and/or that they concern trade related issues, an important example being product requirements.

14. *See* discussion *infra* Part II.

15. *See*, *e.g.*, Richard Macrory, *Environmental Citizenship and the Law: Repairing the European Road*, 8 J. ENVTL. L. 219, 227-28 (1996) (Private actions may at one point reach the Community Courts through the process of preliminary rulings – EC Treaty, Article 234. However, the first, and usually the last, port of call remains the national court.).

16. Case C-201/02, Queen v. Sec'y of State for Transp. (*Wells*), 2004 E.C.R. I-723, paras. 55-58.

17. *See* discussion of The Wells doctrine *infra* Part II.A.

Nevertheless, the past twenty years have witnessed an increased awareness of European and national legislators regarding the potential contribution of individuals and environmental interest groups to the enforcement process of EC environmental law. The Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters of 1998 [the "Aarhus Convention"] and the 2004 Environmental Liability Directive both strengthened the role and rights of private parties regarding environmental protection and decision-making.[18] Despite these promising political trends, the academic discussion concerning the public and private enforcement of laws has not yet materialized into real improvements regarding horizontal private enforcement of EC environmental law.

This article sets out to review the current potential of horizontal private enforcement within the European Community and to discuss whether horizontal private enforcement has the potential to remedy some of the existing shortcomings of public enforcement of environmental law. In doing so, Section I will highlight the existing problems with public enforcement of environmental laws, and Section II through IV will discuss the available horizontal private-enforcement alternatives. In the final Section, some institutional and legal changes will be proposed to add to the workability of the existing horizontal private-enforcement mechanisms.

I. MODES OF PUBLIC REGULATION WITHIN EC ENVIRONMENTAL LAW

> *"[T]here is the clearest possible distinction between the apparent normative simplicity of environmental issues and the appalling complexity of the law required to realise environmental objectives."*[19]

Environmental damage is often labelled a "negative externality"[20] of production or consumption that is left unchecked because of the so-called "tragedy of the commons."[21] It is often unclear what the long-term environmental effects of

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18. United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, arts. 1, 3, 4, 5, 6, 7, 8, 9, June 25, 1998, 2161 U.N.T.S. 450 [hereinafter Aarhus Convention]); Council Directive 2004/35, Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, art. 12, 2004 O.J. (L 143) 56.

19. SCOTT, *supra* note 3, at 2.

20. In economics, externalities refer to the costs (or benefits) created by an activity, which do not directly impact person performing the activity. This means that the cost, or market price, of the activity will not reflect the full costs or benefits it creates because the person performing it is either not fully aware of the externalities or does not have to bear the costs. In the case of a marketable good, this will lead to either over- or underproduction of a certain good or service. The problem of externalities is especially salient regarding environmentally-costly activities. Production processes that cause greenhouse gas emissions create large negative externalities, which seldom manifest themselves near the place where the activity takes place. *See generally,* Josephine A.W. van Zeben, *(De)centralized Law-making in the EU ETS*, 3 CARBON & CLIMATE L. REV. 340, 346-47 (2009).

21. The "tragedy of the commons" describes a situation where multiple individuals acting independently who solely, and rationally, consult their own self-interest will destroy or deplete a shared limited resource even when it is clear that it is not in anyone's long term interest for this to happen. *See* Garrett Hardin, *The Tragedy of*

certain behavior will be and who (or what) is the source of the damage. This lack of accountability makes it difficult through traditional means of public regulation, such as tort law, to punish those who caused the damage. Public regulation of the "environment" as a good represents an alternative method of addressing this problem.[22] The lack of causal information and the uncertainty regarding apportionment of blame makes a strong case for public regulation; these weak points would only be augmented if the problem were privately regulated because private parties, as a rule, have fewer resources to allocate to information gathering and fewer incentives to protect those resources that they do not own.[23]

Within EC environmental regulation, command-and-control regulation has long been the most common form of environmental regulation.[24] This form of regulation often depends on enforcement by public bodies, leaving little to no room for private enforcement, particularly horizontal private enforcement. Recently, regulation through self-regulation and market-based instruments also has been more widely used in EC environmental policy; the European Union Emission Trading Scheme is the perfect illustration of a market-based mechanism employed to combat climate change through the reduction of greenhouse gas emissions.[25] These mechanisms continue to be implemented by public regulators but differ in terms of enforcement strategies.

The discussion of regulatory strategies below will focus on the enforcement problems typical for each system. However, some, if not most, of these problems are created by decisions made under the design of a regulatory tool long before enforcement is necessary. In *Understanding Regulation,* Baldwin and Cave distinguish five criteria for "good" regulation – legislative mandate, accountability, due process, sufficient expertise, and efficiency.[26] Though not the primary

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the Commons, 162 SCIENCE 1243, 1243 (1968).

22. For the purposes of this paper, public regulation of society will be understood as the exercise of power in order to restrict an unwanted activity and/or the enabling of desired behavior. For a discussion of different definitions of public regulation, *see* BALDWIN & CAVE, *supra* note 3, at 4.

23. *See* Shavell, *Liability for Harm*, *supra* note 4, at 369-70.

24. *See* SCOTT, *supra* note 3, at 24.

25. Whether the distinction between command-and-control-regulation and economic incentive mechanisms still holds true has been contested but these mechanisms will be treated as distinct models for the purposes of this paper. *See* David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 296 (1998). *See generally* Council Directive 2003/87, Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Direction 96/61/EC, 2003 O.J. (L 275) 32 (EC); Van Zeben, *supra* note 18, at 340 (discussing the issue of emissions trading).

26. A short overview of these criteria is as follows: *legislative authority* is the legislator acting under the correct or sufficient mandate regarding this issue; *accountability* includes the procedures to hold the legislator accountable (democratically) for his decisions; *due process* refers both to the treatment of regulated parties as well as to the participation of affected parties in regulatory decisions and policy processes; *sufficient expertise* is when the regulator has sufficient technical knowledge to exercise judgement on complex and conflicting interests without being subject to regulatory capture; dynamic efficiency addresses whether the system allow for a flexible response to certain issues and allocative efficiency: is this the optimal level of regulation considering the allocation of costs and benefits. For a complete description of these terms, *see* BALDWIN & CAVE, *supra* note

focus of this article, some of these concepts may be referred to in order to highlight the structural problems with these regulatory tools.[27]

A. REGULATORY STRATEGIES[28]

Command-and-Control Regulation

Command-and-control regulation ("C&C" or "traditional regulation") may be defined as "the establishment by government of standards, duties, and prohibitions addressed to those engaged in potentially polluting activities, and recourse to criminal, civil and administrative penalties (and the threat of such penalties) as a response to non-compliance (or anticipated non-compliance)."[29] C&C has been widely used by European and national regulators since the 1970s[30] and exists in numerous variations, including: obligation of notification, authorization, prohibition, and obligation to act.[31] Over the past decades, traditional regulation has increasingly been subject to critique, and some argue it has fallen into disrepute.[32] The main points of contestation are claims of excessive rigidity that discourages innovation, lack of incentives for continuous environmental improvement, and the fact that technology-based regulations involve inordinate complexity and delay.[33] The academic debate on this issue illustrates the potential weaknesses of this regulatory tool.[34]

In cases of extremely detailed and overly prescriptive standards, dynamic efficiency[35] may suffer and reduce incentives for technical innovation or other cost effective responses.[36] This may lead to a situation where the regulated parties do only that which is absolutely necessary to comply with the set

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3, at 78-81.

27. In cases where the results of regulatory models applied to environmental issues are not yet clear, "general" regulatory problems of the regulatory tool will be addressed.

28. Although the regulatory strategies below are sometimes combined to obtain optimal results, they will be discussed separately in this article. The interaction between these modes of regulation and problems linked to external conditions, such as regulatory competition, policy learning, and economic and technical development, form their own distinct area of research and fall outside the scope of this article. *See* Mark Thatcher, *Analysing Regulatory Reform in Europe*, 9 J. EUR. PUB. POL'Y 859, 864-70 (2002).

29. Peter Cane, *Using Tort Law to Enforce Environmental Regulations?*, 41 WASHBURN L.J. 427, 450-51 (2002).

30. Lee, *supra* note 3, at 375.

31. For a description of these instruments, *see* KRAMER, *supra* note 1, at 65-69.

32. *See*, *e.g.*, JANE HOLDER & MARIA LEE, ENVIRONMENTAL PROTECTION, LAW AND POLICY: TEXTS AND MATERIALS 417 (2d ed. 2007); SCOTT, *supra* note 3, at 34; Lee, *supra* note 3, at 380.

33. For an in-depth discussion of these critiques, *see* Driesen, *supra* note 23, at 295-311.

34. *See* literature referred to in *supra* note 3.

35. Dynamic efficiency describes the potential of the regulatory system to encourage desirable process and product innovation and to produce flexible responses to changes in demand. *See* BALDWIN & CAVE, *supra* note 3, at 81.

36. SCOTT, *supra* note 3, at 36-37.

standards.[37] Because of the high level of expertise needed to set these standards, the system is also sensitive to the problem of regulatory capture, where regulators (and thus regulation) are manipulated through information dissymmetry to pursue the regulated enterprises' interests rather than the public interest.[38] Moreover, C&C regulation based on technological conformity can be very burdensome for private parties to implement, which can lead to over-enforcement; stringent enforcement of legislation may then lead to a general decrease in innovation and production.[39] Paradoxically, enforcement may often be difficult and costly, which, depending on the prioritization of time and funds, can lead to under-regulation.[40] In contrast, the lack of incentives due to lack of dynamic efficiency will increase the risk of non-compliance.[41] Additional challenges include the increasing complexity of regulatory networks[42] and the growing need to differentiate and prioritize between certain violators,[43] all of which make maintaining the level of enforcement needed to deter environmental pollution difficult.

Self-Regulation

Self-regulation may be seen as a "self-administered" form of C&C. In environmental regulation, where problems confronting the regulator are particularly complex, self-regulation may have certain advantages over traditional regulation due to better access to information (regulation is shaped by sectorial experts) and the potential of rapid adjustment of the rules.[44] The use of self-regulation, which is shaped by the industry itself, leads to lower costs for the government and, potentially, higher levels of commitment by the regulated parties because they are following their "own" rules. However, because regula-

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37. *Id.* at 36.

38. *See* BALDWIN & CAVE, *supra* note 3, at 36.

39. *See* Christoph Demmke, *Towards Effective Environmental Regulation: Innovative Approaches in Implementing and Enforcing European Environmental Law and Policy* 17 (Jean Monnet Program, Working Paper 5/01, 2001).

40. An interesting example of the use of available administrative capacity in relation to environmental law may be found in the case of the Netherlands and its "allowing policy." *See* J.W. VAN DE GRONDEN, THE ENFORCEMENT OF EC ENVIRONMENTAL LAW BY DECENTRALIZED AUTHORITIES 5 (1998).

41. *See* BALDWIN & CAVE, *supra* note 3, at 81 (describing the role and nature of dynamic efficiency).

42. *See* Francis Jacobs, *The Role of the European Court of Justice in the Protection of the Environment*, 18 J. ENVTL. L. 185, 200-01 (2006); *see, e.g.*, VAN DE GRONDEN, *supra* note 38; *see generally* Claudio M. Radaelli, *Governing European Regulation: The Challenges Ahead* (Iain L. Fraser trans., European University Institute, RSC Policy Paper No 98/3, 1998).

43. *See Commission Report of the Group of Independent Experts on Legislative and Administrative Simplification* (*Molitor Report*), at 18-20, COM (95) 288 final/2 (June 21,1995) (recognizing the difference between small to medium businesses and large companies in relation to capacity for compliance); *see also* Council Resolution 96/C 224/03, Legislative and Administrative Simplification in the Field of the Internal Market, 1996 O.J. (C 224) 5, 6 (suggestions were made and implemented to take some of the burden off small to medium enterprises called "SMEs").

44. *See* BALDWIN & CAVE, *supra* note 3, at 40.

tion derives from within the regulated industry or sector, outsiders will be led to question the extent to which the adopted rules are actually in the public's, or the environment's, interest. Moreover, the expertise of the self-regulator usually does not extend to general environmental policy, which means that the wider implications of the regulation may be ignored, and policies from different industries might undermine each other.[45] In terms of enforcement, self-regulation can produce successful results because enforcement does not depend on the budget considerations of the public authority.[46] At the same time, bias in favor of the regulated, who have created their own rules, may complicate enforcement.

Incentive-Based Regimes and Tradable Permits

Incentive-based regimes and tradable permits are two tools for economic regulation that are based on the premise that behavior can be influenced by imposing economic costs or conferring economic benefits. Within the framework of EC environmental law, economic incentives are becoming increasingly popular and are thought to hold great potential.[47]

In incentive-based regimes, the potential violator (the polluter) is induced "to behave in accordance with the public interest by the regulator, who imposes negative or positive taxes or deploys grants or subsidies."[48] Relevant key advantages of these mechanisms for environmental problems include more flexibility for the regulated party (in other words, the potential for dynamic efficiency) and incentives for regulated companies to reduce harmful conduct as much as possible rather than as much as needed (the so-called "incentive to zero").[49] Regarding enforcement, however, problems of predictability and timing are likely to occur since it may not be possible to foresee the exact effects, and effects may be delayed until the incentives or taxes are incorporated into the structure of the regulated sector. This delay may be especially problematic for environmental issues that require immediate action.[50]

Tradable permits have become an especially relevant form of economic regulation within EC environmental law.[51] The advantages of tradable permits in

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45. *See* BALDWIN & CAVE, *supra* note 3, at 127, 129.

46. *See* Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 461-62 (2007).

47. Already in 1990, the "Working Group of Experts" suggested that a closer look be given to economic mechanisms. The following specific tools were suggested: environmental charges and taxes, tradable emission permits, deposit-refund systems, enforcement incentives, financial aid (subsidies), industry agreements, and environmental liability. *See Report of the Working Group of Experts from the Member States on the Use of Economic and Fiscal Instruments in EC Environmental Policy*, 14 B.C. INT'L & COMP. L. REV. 447, 470-72 (1991). A key example is the European Union Emissions Trading Scheme. *See* European Union, Emissions Trading System, July 5, 2009, http://ec.europa.eu/environment/climat/emission.htm.

48. BALDWIN & CAVE, *supra* note 3, at 41-42.

49. *Id.* at 42.

50. *Id.* at 43.

51. For a general discussion on the introduction of tradable permits in environmental regulation, *see*

regulating environmental issues are similar to that of incentive-based systems insofar as there continues to be an "incentive to zero" potential for dynamic efficiency and possible optimization of cost-allocation.[52] Much will depend on the market; if the market value of permits decreases, so does the incentive to abstain from harmful behavior.[53] Moreover, the need to supervise non-permit-holders, or enforce against permit-holders who exceed the terms of their permit, does not stop, and thus the pressure on the regulator continues to exist. It also has been argued that the institutional distance between the European legislator and the national regulator may lead to relatively higher enforcement costs because the legislator may not have insight into the practical reality of the enforcer.[54] Combined with inadequate public administrative capacity,[55] this institutional distance may lead to less stringent enforcement.[56]

B. PUBLIC ENFORCEMENT FAILINGS

Public enforcement is often crucial in order to secure and maintain the protection of public interests. In the discussion above, the weak and strong points of several different types of regulation have been set out. Issues concerning regulatory capture, a lack of incentives for regulated parties, and situations of over- and under- enforcement are most problematic because they undermine the general goals of the environmental legislation. A more general problem that makes environmental protection even more difficult is the issue of detection: environmental problems or environmental law violations may easily go undetected or unsolved in areas where the public enforcer is not present or may not have jurisdiction due to a transboundary situation. Whether some of these problems can be solved by allowing for horizontal private enforcement of EC environmental laws will be discussed in the following three sections.

II. PRIVATE ENFORCEMENT OF EC LAW

The potential for horizontal private enforcement of European environmental law is dependent on whether one can invoke European environmental law when

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KRÄMER, *supra* note 1, at 73-74, 340-42. The current European Union Emission Trading Scheme has generally come into existence through the adoption of Council Directive 2003/87, Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Direction 96/61/EC, *supra* note 23, at 34.

52. *See* BALDWIN & CAVE, *supra* note 3, at 47.

53. BALDWIN & CAVE, *supra* note 3, at 48.

54. *See* Paul Seabright, *Centralized and Decentralized Regulation in the European Union*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 214 (Peter Newman ed., 1998) (discussing the effects of institutional distance – centralization v. decentralization – on the functioning of institutions within multilevel governance structures, specifically the European Union).

55. Demmke, *supra* note 37, at 17.

56. Lee, *supra* note 3, at 378.

bringing a case before a national judge. Traditionally, there have been three main mechanisms by which EC environmental law can be brought before national courts: direct effect, consistent interpretation, and state liability[57] The next section will focus on the two methods of *horizontal* private enforcement: direct effect and consistent interpretation. State liability exclusively addresses the vertical relationship between the individual and the member state and thus is outside the scope of this article. The doctrines of direct effect and consistent interpretation are inherent to the European legal model and thus also will influence the effectiveness of the more recently developed mechanisms – the Aarhus Convention and the Environmental Liability Directive – that will be discussed in Sections III and IV.

A. DIRECT EFFECT

In 1963, the European Court of Justice ("ECJ" or "Court") ruled, "Independently of the legislation of member states, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."[58] Through this body of case law, the doctrine of direct effect was established, which states that EC law can confer rights on individuals that can be enforced before national courts. Since 1963, the conditions for EC law to have a direct effect have been refined, and arguably relaxed,[59] through the Court's jurisprudence and may now be summarized as follows: provisions of EC law are directly effective if they are (a) unconditional and (b) sufficiently precise.[60] The direct effect of primary EC law has been accepted by the Court in respect to articles 25, 28, 29, 30 (freedom of movement of goods); 81, 82 (competition); 88(3) (state aid); and 90 (internal taxation) of the EC Treaty.[61]

In *Defrenne v. SABENA*, the Court further refined its doctrine of direct effect by distinguishing two forms of direct effect: vertical and horizontal.[62] This distinc-

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57. JAN H. JANS & HANS H.B. VEDDER, EUROPEAN ENVIRONMENTAL LAW 167 (3d ed. 2008).

58. Case 26/62, N.V. Algemene Transp. v. Netherlands Inland Revenue Admin. (*Van Gend & Loos*), 1963 E.C.R. 1, 12.

59. *See* JANS & VEDDER, *supra* note 55, at 168.

60. Case C-236/92, Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia, 1994 E.C.R. I-483, para. 14.

61. JANS & VEDDER, *supra* note 55, at 170.

62. Case 43/75, Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (*Sabena*), 1976 E.C.R. 455, 457 (holding Belgium airline in breach of the "equal work for equal pay" provision in art. 119 of the EEC Treaty – now art. 141 of the EC Treaty – after a female flight attendant claimed she was paid less than male flight attendants who did the same work). After *Sabena*, the Court allowed for the direct effects of several other Treaty articles, both vertical and horizontal, whereas *Van Gend & Loos* only ever referred to vertical direct effect. More specifically, the Court held that the fact that certain Treaty Articles are addressed to Member States only "does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down." Case 43/75, *Sabena*, at 475. The direct effectiveness was later confirmed by the case of *Van Duyn*. *See* Case 41/74, Van Duyn v, Home Office, 1974 E.C.R. 1337, 1 C.M.L.R. I

tion is based on the question against whom the right is being enforced: the state (or one of its organs[63]) or an individual, respectively. In 2001, the Court's judgment in *Courage v. Crehan* created a new momentum for horizontal direct effect actions by stressing that certain EC provisions are not only enforceable against member states, but also against other private parties.[64] This so-called horizontal direct effect of EC law traditionally is restricted to certain provisions of the EC Treaty and certain regulations, to the exclusion of directives.[65] Because most environmental legislation is adopted through the form of directives, this differentiation usually excludes horizontal direct effect of EC environmental law.

Direct Effect of Environmental Directives

There are several difficulties specific to the fulfillment of the vertical direct effect criteria (*e.g.*, "unconditional" and "sufficiently precise") regarding environmental laws. First, the majority of EC legislation on environmental matters is adopted in the form of directives.[66] It has been observed that environmental directives increasingly have become vague and conditional,[67] which makes them more difficult to enforce because they are not sufficiently precise.[68] Second, the interests protected by environmental directives are often diffuse in character,[69] and in comparison with, for instance, financial and employment rights, it is often less clear whether rights are being conferred on individuals.[70] Thus, a view has emerged that individuals may rely upon environmental provisions, which are unconditional and sufficiently precise, without needing to show a substantive entitlement,[71] a view that is implicitly shared by the Court in the *Kraaijeveld* and *Difesa della Cava* (a.k.a. *Lombardia Waste*) cases.[72]

(1975). On the development of the direct effect of directives generally, *see* Carla A. Varner, *The effectiveness of European Community Law with specific regard to directives: the critical step not taken by the European Court of Justice*, 22 MICH. J. INT'L L. 457 (2000).

63. *See* Case C-188/89, Foster v. British Gas plc, 1990 E.C.R. I-3313, paras. 1, 24.

64. *See* Case C-453/99, Courage Ltd. v. Crehan, 2001 E.C.R. I-6297, paras. 25, 27. This point was already stressed in Case 26/62, *Van Gend & Loos*, at 12, *supra* note 56 ("The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.").

65. This issue will be addressed in more detail below. On this topic, *see* Pal Wennerås, EC Environmental Law in National and Community Courts (Sept. 2006) (unpublished Ph.D. dissertation, Universiteit van Amsterdam) (on file with author) (published 2006).

66. The adoption of directives is meant to take away subsidiarity concerns. *See* Jane Holder, *A Dead End for Direct Effect?: Prospects for Enforcement of European Community Environmental Law by Individuals*, 8 J. ENVTL. L. 313, 324 (1996); Wennerås, *supra* note 65.

67. Wennerås, *supra* note 63.

68. *See* Holder, *supra* note 64, at 324.

69. This view is also supported by Prechal & Hancher as discussed in JANS & VEDDER, *supra* note 55, at 170-71.

70. Holder, *supra* note 64, at 325.

71. *See* JANS & VEDDER, *supra* note 55, at 169.

72. Case C-72/95, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland

Horizontal Direct Effect of Environmental Directives

When the *Faccini Dori* case[73] was submitted for judgment in the 1990s, the ECJ was faced with a dispute between two private parties based on a directive.[74] The judgment stated that, in this situation, there was no direct effect of the directive because neither party was directly bound by the norms included in the directive.[75] In other words, "individuals do not act unlawfully when they act in breach of standards set by environmental directives if these standards have not been transposed into national legislation."[76] Despite alternative theories[77] and arguments in favor of horizontal direct effect,[78] the Court adheres to a strict interpretation of the nature of directives, as defined in Article 249 of the EC Treaty.[79] The introduction of horizontal direct effect is still considered too great

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(*Kraaijveld*), 1996 E.C.R. I-5403, para. 47. In *Kraaijveld*, the question was raised whether certain works involving dykes should be subject to a prior environmental impact assessment in light of the Environmental Impact Assessment Directive. The Dutch Council of State held that the Directive had no direct effect since it left too much discretion in its implementation; the ECJ, however, said that the discretion was limited by the obligation to subject projects likely to have significant effect on the environment to an impact assessment under article 2(1) of the Directive. As such the case was referred back to the national courts that had to review the decision in light of the Directive and as such giving it direct effect. *Id.*; *see also* Case C-236/92, Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia, *supra* note 58, paras. 18 (holding that Article 40 of the Waste Directive 75/442 did not confer rights upon individuals that national courts must safeguard where individuals had protested against the decision to create a landfill site). In the latter case, the fact that directives that have the protection of the environment as a primary purpose and as such do not confer rights onto individuals was "largely overlooked" by the ECJ. Rather, the Court's tests for direct effect were simply applied with little recognition of the distinct character of environmental directives. *See* Holder, *supra* note 64, at 325.

73. Case C-91/92, Faccini Dori v. Recreb Srl, 1994 E.C.R. I-3325.

74. Council Directive 85/577/EEC, 1985 O.J. (L 372) 31 (EC).

75. Case C-91/92, Faccini Dori v. Recreb Srl, *supra* note 71; *see also* Case C-106/89, Marleasing, SA v. La Comercial Internacional de Alimentacion, SA, 1990 E.C.R. I-4135, para. 6 (confirming the doctrine of consistent interpretation through holding that although there was no direct effect of directives, national legislation should be interpreted in light of the wording and purpose of the directive); Case 152/84, Marshall v. Southampton & South-West Hampshire Area Health Auth., 1986 E.C.R. 723, para. 48 (holding that directives do not produce horizontal or third-party effects in the sense that, in the absence of national implementation measures, they directly result in obligations for private individuals).

76. To rule otherwise would undermine legal certainty. *See* JANS & VEDDER, *supra* note 55, at 190.

77. *See, e.g.*, Wennerås, *supra* note 65. Another difficulty may present itself regarding the definition of "horizontal direct effect" when one considers the nature of the parties involved. Especially, the differentiation between public and private parties can be troublesome because the concept of "emanation of the state" is interpreted broadly, which can impose inequitably heavy burdens on bodies that are de facto private in their practices and structure.

78. *See* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 284 (4th ed. 2008).

79. Article 249 of the EC Treaty reads as follows: "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force." EC Treaty, *supra* note 7, art. 249. It may be emphasized that the distinction between regulations and directives is closely connected to the principle of subsidiarity and the relative competencies of the European

an interference with member states' domestic systems.[80] Therefore, for the foreseeable future, the introduction of horizontal direct effect for directives does not appear to be a feasible option. Further, although the ECJ in theory could issue a ruling to this effect, it would be politically unacceptable. The Court's position and membership of some countries to the European Community would come under extreme pressure. As such, the theory seems unlikely to become practice without an overall institutional change instigated by the member states through legislative action.

Horizontal Side Effects & Incidental Horizontal Direct Effect

Although the European courts do not accept horizontal direct effect of directives, this does not mean there can never be "horizontal side effects" of vertical actions. For instance, a third party may question a decision from a competent authority regarding the grant of a permit, after which the permit-holder (a second private party) could lose his permit.[81] Despite the "horizontal" effects of invoking vertical direct effect in these cases, the ECJ has accepted this usage of vertical direct effect in the *Wells* case[82] and confirmed it in the *Waddenzee* case.[83] The key distinction made in this doctrine – referred to as the doctrine of "mere adverse consequences" – is that the adverse effects for the third party (*e.g.*, permit-holder) do not stem from the directive but from the failings of the authorities to fulfil their obligations under the directive.[84] In other words, there are no "new" obligations imposed on the individual directly on the basis of the directive. The exact dividing line between actions that constitute "adverse consequences" and the creation of new obligations is not yet clear.[85]

In a new generation of cases, starting with *Unilever*[86] and *CIA Security*,[87] the

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Community in certain areas. Therefore, the distinction between regulations and directives goes far deeper than only a formal distinction. *See* David O.A. Edward, *Direct Effect – Myth, Mess or Mystery?*, *in* DIRECT EFFECT: RETHINKING A CLASSIC OF EC LEGAL DOCTRINE 8 (Jolande M. Prinssen & Annette Schrauwen eds., 2002).

80. James Marson, *Access to Justice: A Deconstructionist Approach to Horizontal Direct Effect*, 4 WEB J. OF CURRENT LEGAL ISSUES 3 (2004).

81. *See* JANS & VEDDER, *supra* note 55, at 191.

82. Case C-201/02, Wells, *supra* note 15, paras. 2, 61 (overruling UK court's decision that held that Mrs. Wells could not invoke Directive 85/337 or insist on an impact assessment for a mining permit and thus holding that individuals may invoke provisions of a directive against a member state even if there are adverse repercussions to a third party).

83. Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij, 2004 E.C.R. I-7405, para. 66 (holding relevant provisons under Birds and Habitat Directives had direct effect and assessments should be carried out after NGOs protested against permits issued in the Waddenzee area that had not been preceeded by appropriate assessments under the relevant directives).

84. *See* JANS & VEDDER, *supra* note 55, at 192-93.

85. JANS & VEDDER, *supra* note 55, at 193; *see also* Wennerås, *supra* note 65.

86. Case C-443/98, Unilever Italia SpA v. Central Food SpA, 2000 E.C.R. I-7535, para. 51, 52 (holding that technical requirements under Directive 83/189, which had not been correctly implemented by the Italian government and as such influenced a contract between two private parties, cannot impose either rights or duties on individuals).

Court has allowed parties to rely on directives to set aside conflicting national law, a phenomenon that has been referred to as "incidental" or "indirect" horizontal direct effect.[88] Also, in cases such as *Decker,*[89] *Ruiz Bernaldez,*[90] *Panagis Pafitis,*[91] and *Unilever v. Smithkline Beecham*,[92] national law was set aside on the basis that the national law conflicted with a directive, a requirement that has been in place since *Simmenthal*.[93] The Court has explained these rulings as relying on procedural provisions of a directive, invoked to exclude national provisions that leave a void that is subsequently filled by other national rules, not provisions of the directive.[94] These cases suggest that directives may be applied horizontally insofar as they set aside a particular national rule because the setting aside of a national rule does not lead to the imposition of substantive obligations on individuals based on a directive.[95] Rather, this alteration remedies a procedural error on the side of the member state in relation to the implementation of a Community directive. This setting aside of conflicting national law is different from the powers the Court holds under the doctrine of consistent interpretation, which is explained in more detail below.

B. CONSISTENT INTERPRETATION

The doctrine of consistent interpretation, as formed by the Court's jurispru-

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87. Case C-194/94, CIA Sec. Int'l, SA v. Signalson SA, 1996 E.C.R. I-2201, paras. 37, 42 (also holding that national courts must decline to apply any national technical regulation that had not been notified in accordance with Directive 83/189 and cannot enforce these regulations against individuals).

88. *See* Wennerås, *supra* note 65.

89. Case C-177/88, Dekker v. Stichting Vormingscentrum voor Jong Volwassenen Plus, 1990 E.C.R. I-3941, paras. 25-26 (setting aside national law as conflicting with the Equal Treatment Directive after women were dismissed on account of pregnancy, which amounted to discrimination).

90. Case C-129/94, Ruiz Bernaldez, 1996 E.C.R. I-1829, paras. 20, 24 (holding that where motor vehicle insurer restricted its liability for cases where the insured was intoxicated to go against Directive 72/166 on insurance against civil liability and setting aside the national law).

91. Case C-441/93, Pafatis v. Trapeza Kentrikis Ellados, A.E., 1996 E.C.R. I-1347, paras. 40, 60 (holding that national law aimed at limiting measures available to shareholders of public limited companies to prevent abusive use of rights was counter to Directive 77/91 on the coordination of safeguards required of public limited companies in respect of their formation and the maintenance and alteration of their capital and setting aside national law).

92. Case C-77/97, Osterreichische Unilever GmbH v. Smithkline Beecham, Markenartikel GmbH, 1999 E.C.R. I-431, para. 37 (holding national laws regarding the advertisement of toothpaste to be in breach of Directive 76/768 on the labelling of cosmetic products and setting aside national laws).

93. Case 35/76, Simmenthal, SpA v. Ministero delle Finanze Italiano, 1976 E.C.R. 1871, paras. 7, 10, 14, 20 (holding that the direct applicability of Community law means that its rules must be fully and uniformly applied in all Member States from the date of their entry into force and for so long as they continue in force). Directly applicable provisions are a direct source of rights and duties for all those affected thereby, whether Member States or individuals. Thus, in accordance with the principle of the precedence of Community law, European measures overrule national law once they have entered into force and preclude the adoption of new national legislation if they would be incompatible with Community provisions. *See id.* Summary points 2, 3.

94. *See* Case C-443/98, *supra* note 84, at 45-51.

95. *See* Wennerås, *supra* note 65.

dence,[96] is another safeguard to ensure that national rules do not contravene EC law. In a case of consistent interpretation, the national law is interpreted in line with the European law on a certain topic, but the Court does not go as far as to replace one national law with a different national law. When applying and interpreting national legislation, national courts must make sure that this legislation is in conformity with EC provisions on the topic, including those set out in directives.[97] The Court's duty to "read" the national law in an EC friendly manner is extensive but not unlimited.[98] Boundaries have been established by "general principles of law . . . in particular the principles of legal certainty"[99] and the prohibition on *contra legem* interpretations.[100] Because the duty of consistent interpretation befalls the courts in all cases – both vertical *and* horizontal actions – it can be especially relevant to horizontal private actions.[101] Moreover, in the *Lombardia Waste* case, the Court stated:

> [C]ontrary to the position where a directive has direct effect – the possibility of relying on [the Directive] is not limited merely to actions brought against the State or agencies thereof since the national Court applies its domestic law, which is thus interpreted in a manner such as to make it conform with the requirements of Community law.[102]

This pronouncement has prompted several authors to take the view that, in such cases, "indirect horizontal effect" is recognized by the Court.[103] In other words, there may be indirect horizontal effects of the doctrine of consistent interpretation.[104] In relation to horizontal private enforcement, this doctrine seems promising because it would allow individuals to bring actions before a national court regarding issues that have been regulated on a European level by means of directives. The doctrine of consistent interpretation would remedy any violation of European law by a private party through the corrected application of national law.

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96. *See, e.g.,* Joined Cases C-397-403/01, Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, 2004 E.C.R. I-8835, paras. 113-16; Case C-106/89, Marleasing, SA v. La Comercial Internacional de Alimentacion, SA, *supra* note 73, paras. 8, 13; Case C-80/86, Kolpinghuis Nijmegen BV, 1987 E.C.R. I-3969, paras. 12, 14.

97. JANS & VEDDER, *supra* note 55, at 198.

98. *See* Joined Cases C-397/01 to C-403/01, Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV, *supra* note 94, para. 116.

99. Case C-80/86, Kolpinghuis Nijmegen BV, *supra* note 94, para. 13.

100. The term *contra legem* is used to describe a decision of a court or tribunal that goes against the law governing the issue in question ("against the law"). *See* Case C-105/03, Maria Pupino, 2005 E.C.R. I-5285, para. 47.

101. Case C-106/89, Marleasing, SA v. La Comercial Internacional de Alimentacion, SA, *supra* note 73, *as quoted in* JANS & VEDDER, *supra* note 55, at 198.

102. Case C-236/92, Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia, *supra* note 58, para. 28.

103. *Id.*

104. The term 'indirect horizontal effects' is inspired by JANS & VEDDER, *supra* note 55, at 198.

It must be emphasized that the level of uncertainty that individuals face when dealing with national legislation that conflicts with European directives is considerable, despite the prohibition on *contra legem*[105] interpretations. Advocate General Jacobs has gone as far as to state that this uncertainty is in fact less acceptable than granting full fledged horizontal direct effect to directives.[106] There are others, however, who feel that a certain level of uncertainty is acceptable in order for national rules to be construed consistently with Community rules.[107] Therefore, in terms of legal certainty, it remains to be seen whether consistent interpretation would be a desirable method of affecting change relating to horizontal private enforcement possibilities.

C. IMPLICATIONS FOR HORIZONTAL PRIVATE ENFORCEMENT

The European legal system is an international legal system with certain prerogatives, which are normally attributed to national legal systems. One of these features is the enforceability of European laws by European citizens, just as national laws are enforced by a national subject before a national court – the so-called "direct effect doctrine."[108] Some EC Treaty provisions and certain regulations are even enforceable between European citizens.[109] Nevertheless, there are certain areas of law, such as EC environmental law, to which these privileges generally do not extend because of the form in which these laws are enacted. Some recognition has been given to the impact of directives on horizontal relationships through the development of "incidental horizontal direct effect."[110] In addition, the doctrine of consistent interpretation ensures that national laws must be in line with European guidelines, a guarantee that extends to horizontal situations. Still, there is no clear horizontal private enforcement possibility for directives on the basis of the direct effect or consistent interpretation doctrine. Thus, the Achilles heel of EC environmental law seems to be the predominance of directive-based legislation in this area.

III. THE AARHUS CONVENTION

In February 2005, the European member states and the European Union signed

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105. The term *contra legem* is used to describe a decision of a court or tribunal that goes against the law governing the issue in question. *See* Case C-105/03, Pupino, 2005 E.C.R. I-5285, para. 47.

106. Gerrit Betlem, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, 22 OXFORD J. OF LEGAL STUD. 397, 402 (2002) (construing the opinion of Advocate General Jacobs in Case C-316/93, Vaneetveld v. Le Foyer, 1994 E.C.R. I-763).

107. *See* Betlem, *supra* note 103, at 402 (citing Aidan O'Neil at the Presentation at Conference "Enforcing Community Law before national courts: ten years of Francovich," May 14, 2001)

108. *See supra* Part II.A.

109. Articles 81 and 82 of the EC Treaty are examples. EC Treaty, *supra* note 7, arts. 81, 82.

110. *See* Case C-443/98, Unilever Italia SpA v. Central Food SpA, *supra* note 84; Case C-194/94, CIA Sec. Int'l, SA v. Signalson SA, *supra* note 85.

and ratified the Aarhus Convention.[111] With this act, the parties accepted an international obligation to provide citizens, including environmental organizations, with procedural rights, information rights, and access to justice in relation to environmental matters.[112] The ratification of the Aarhus Convention is expected to improve the enforceability of environmental rules by private parties.[113] In relation to the focus of this article – horizontal private enforcement – the most important provisions of the Aarhus Convention are those regarding access to justice, specifically Article 9(3). Article 9(3) stipulates that:

> [E]ach party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.[114]

This section will consider to what extent the provisions regarding access to justice have been incorporated into the European legal order and what these provisions mean for the possibility of horizontal private enforcement of EC environmental law.

A. THE AARHUS CONVENTION AT EC LEVEL

Three Pillars

The Aarhus Convention may be divided into three pillars, all of which must be incorporated within the European legislative framework for the international obligations of the European Union and its member states to be fulfilled. The first two pillars – access to information and public participation – are addressed in Directive 2003/4/EC and Directive 2003/35/EC respectively, which already have been adopted and implemented.[115] The implementation of the third pillar of the Convention – access to justice – is subject to continuing developments as will be described below.

Within the Aarhus Convention, this third pillar is formed by Article 9. Article

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111. Council Decision 2005/370, 2005 O.J. (L 124) 1 (EC) (ratifying United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450 [hereinafter Aarhus Convention]). Ireland has not yet ratified. *See* United Nations Treaty Collection, Status of Treaty Ratification, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en.

112. Aarhus Convention, *supra* note 108, arts. 4, 6, 9.

113. Andrea Keessen, *Reducing the Judicial Deficit in Multilevel Environmental Regulation: the Example of Plant Protection Products*, 16 EUR. ENVTL. L. REV. 26, 31 (2007).

114. Aarhus Convention, *supra* note 108, art. 9, para. 3.

115. Council Directive 2003/4, On Public Access to Environmental Information and repealing Council Directive 90/313/EEC, 2003 O.J. (L 41) 26 (EC); Council Directive 2003/35, Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment and Amending with regard to public participation and access to justice, 2003 O.J. (L 156) 17 (EC).

9(3) establishes the right to challenge acts and omissions by private parties and public authorities.[116] In order to give this provision some teeth, Articles 9(4) and (5) establish the provision of "adequate and effective remedies"[117] for the enforcement of this right as well as impose a duty to "remove or reduce financial and other barriers to access to justice."[118] In relation to the "public authorities" mentioned in Article 9(3), Regulation 1367/2006 has been adopted, which secures the Convention's application to Community institutions and bodies.[119]

However, access to justice on a member state level in actions against private parties – also expressly called for in Article 9(3) – has not yet been addressed by any of the directives or regulations currently adopted. Thus, there is, as of yet, no European level legislation on how the access to administrative or judicial procedures "to challenge acts and omissions by private persons"[120] may be secured. There is a 2003 proposal, Directive on Access to Justice in Environmental Matters[121] ("Draft Directive"), which was presented to the Parliament for a first reading, and the consequent amendments suggested by the Parliament have been commented on by the Council.[122] Since these comments, however, there has been very little progress regarding the adoption of this Directive,[123] which has led some to suggest that the proposal has now become obsolete.[124] Nevertheless, this Draft Directive remains the only blueprint for possible European legislation on this topic and will therefore be discussed briefly below.

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116. Aarhus Convention, *supra* note 108, art. 9, para. 3 ("In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.").

117. *See* Aarhus Convention, *supra* note 108, art. 9, para. 4 (including as remedies injunctive relief and fair and equitable options that may not be prohibitively expensive).

118. *Id.* art. 9, para. 5.

119. Council Regulation 1367/2006, 2006 O.J. (L 264) 13 (EC). Private enforcement against European institutions is beyond the scope of this article, but for good critiques of this subject, *see* Jan Jans, *Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies*, *in* REFLECTIONS ON 30 YEARS OF EU ENVIRONMENTAL LAW; A HIGH LEVEL OF PROTECTION? 477 (Richard Macrory ed., 2006); Teall Crossen & Veronique Niessen, *NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?*, 16 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 332 (2007).

120. Aarhus Convention, *supra* note 108, art. 9, para. 3.

121. *Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, COM (2003) 624 final, 2003/0246(COD) (Oct. 24, 2003) [hereinafter Proposal on Access to Justice in Environmental Matters].

122. European Parliament, *Report on the Proposal for a European Parliament and Council Directive on Access to Justice in Environmental Matters*, EUR. PARL. DOC. A5-0189 (2004).

123. The European Commission, Monitoring of the decision-making process between institutions, http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=186297#362997 (last visited Jan. 22, 2010).

124. KRÄMER, *supra* note 1, at 160.

The Draft Directive on Access to Justice

Within the legislative process of the Draft Directive, the Commission tried to pre-empt some of the concerns and objections that member states may put forward regarding the invasion of their national procedural "privacy."[125] The Commission submitted that the high level of differentiation of procedural provisions between the member states and the transboundary dimension of environmental problems made Community level legislation necessary.[126] Moreover, by enacting the proposal as a directive rather than a regulation, the Commission felt any proportionality and subsidiarity concerns of member states should disappear.[127] As far as the substantive issues were concerned, the Commission identified the following key obstacles to the private enforcement of EC environmental law: lack of (financial) incentives for private parties, lack of legal standing (and thus access) of affected parties, and shortcomings of public enforcers because of limited resources and (lack of) political prioritization.[128]

In regards to the horizontal private enforcement element incorporated into Article 9(3) of the Aarhus Convention – the possibility of reviewing private acts or omissions – the explanatory memorandum to the Draft Directive does not provide much explanation.[129] From the NGOs' comments, it becomes clear that acts and omissions by private parties were not even discussed in the second working paper, a change that was welcomed by the industry representatives for whom review of private acts and omissions were considered the main concern.[130] In the explanatory memorandum, the Commission does call upon member states to "establish the appropriate criteria to meet the obligations under [A]rticle 9(3)"[131] but also emphasizes the grave subsidiarity implications if there was to be interference with national provisions in the area of horizontal private action.[132] In the end, the Commission compromized by creating Article 3: "Member States shall ensure that members of the public, where they meet the criteria laid down in national law, have access to environmental proceedings in order to challenge acts and omissions by private persons which are in breach of environmental law."[133] Article 3 is meant to "reflect the obligation of the Aarhus [sic] Convention [under Article 9(3)] without prejudging the detailed provisions to be laid down by Member States."[134] Despite the *prima facie* opportunity that this article could

125. *See id.*

126. Proposal on Access to Justice in Environmental Matters, *supra* note 118, Explanatory Memorandum § 1.

127. *See id.* Explanatory Memorandum § 3.

128. *Id.* Explanatory Memorandum § 1.

129. *See id.*

130. *Id.* Explanatory Memorandum § 5.

131. *Id.* Explanatory Memorandum § 3.6.

132. *Id.* Explanatory Memorandum § 6.

133. Proposal on Access to Justice in Environmental Matters, *supra* note 118, at 19, 12.

134. *Id.*

provide in terms of horizontal private action, the effectiveness of this article will depend entirely on the criteria that member states impose regarding legal standing. The article also continues to leave significant room for differentiation among member states; this room for differentiation undermines the Commission's earlier position regarding the need for European legislation because of the high level of procedural differentiation.

Not unexpectedly, most member states were violently opposed to awarding privileged legal standing to groups that would normally not have had standing unless they had demonstrated the impairment of a right or sufficient interest.[135] The Commission therefore decided to remove the controversial provisions relating to privileged legal standing of groups without legal personality and local and regional authorities,[136] but did provide for guaranteed access to justice for NGOs without the obligation to prove impairment of a right or sufficient interest. The Commission considered this provision crucial to act in accordance with the Aarhus Convention.[137] However, the NGO push for the inclusion of an *actio popularis* to ensure general legal standing without restrictions[138] was unsuccessful, because an *actio popularis* is not explicitly required by the Aarhus Convention and is for the member states to impose if they so wish.[139]

Articles 4 and 5 of the Draft Directive address legal standing of members of the public and qualified entities, respectively. As a result of the aforementioned debate, the provisions themselves appear promising, but the definitions and criteria mentioned in both articles are to be defined by the member states. This may well lead to different interpretations in different member states. Depending on the final result, these differing interpretations could negatively influence the effectiveness of Article 3 in some member states.

B. IMPLICATIONS FOR HORIZONTAL PRIVATE ENFORCEMENT

If the Draft Directive were to be enacted as it stands, its value as an instrument for horizontal private enforcement would depend completely on the national interpretation of the definitions in Articles 3, 4, and 5 of the Draft Directive.[140] Because the member states are bound by the Aarhus Convention, both individu-

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135. These groups include: groups without legal personality, local and regional authorities, and NGOs, Comments of some member states may be found among the consultation reports *available at* http://ec.europa.eu/environment/legal/liability/pdf/wrkdoc_comments.pdf. Notably, not all member states were negative. The Netherlands for instance stated that they supported open access to the courts for NGOs and that it considered the proposal of the Commission a derogation of the existing rights available under Dutch law and insufficiently taking account of the Aarhus obligations. Dutch comments on working paper, at 5/5, § 2.3.

136. *See* Proposal on Access to Justice in Environmental Matters, *supra* note 118, Explanatory Memorandum § 5.

137. *See id.*

138. *Id.* Explanatory Memorandum § 5.2.

139. *Id.* Explanatory Memorandum § 5.2.

140. Proposal on Access to Justice in Environmental Matters, *supra* note 118, arts. 3, 4, 5.

ally and as members of the European Union, there are European and international pressures to fulfill the obligation to allow for actions both against national authorities and against private parties equally.[141] Moreover, these obligations will be reviewed in light of the normative standards in Articles 9(4) and 9(5) – adequate, fair, equitable, timely, and solutions.[142]

It has been argued that at present, there is no access to national and European courts for environmental organizations and citizens on the basis of the EC Treaty, Regulation 1367/2006, or the proposed Directive in a way that is in conformity with Article 9(3) of the Convention[143] and would withstand review by the Aarhus Convention Compliance Committee.[144] This comment refers to both horizontal and vertical private enforcement of EC environmental law. Yet, the situation for horizontal private enforcement may be worse still due to the continuing lack of European legislation and the status of the Draft Directive. Others believe that change through the Aarhus Convention may come via the European courts, as application of Article 9(3) of the Aarhus Convention may lead to case law that improve national access to justice by including stricter review of national rules that restrict access to courts.[145]

The stale political situation surrounding the Draft Directive appears to hold little promise for improved private enforcement. Moreover, access to the courts is a prerequisite for, rather than a form of, horizontal private enforcement. It must be remembered that once the parties reach the courts, the restrictions of direct effect and consistent interpretation continue to apply.[146]

IV. THE ENVIRONMENTAL LIABILITY DIRECTIVE[147]

In 2000, seven years after the publication of the Green Paper on Remedying

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141. European pressures are by means of the supremacy of EC law and the fact that directives must be implemented under a certain deadline (as stipulated in the directives themselves), and international pressures come through review by the Aarhus Convention Compliance Committee.

142. "In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible." Aarhus Convention, *supra* note 108, art. 9, para. 4.

143. *See* KRÄMER, *supra* note 1, at 160, 162.

144. The Committee is empowered under Article 15 of the Aarhus Convention to review a party's compliance if (i) a submission about compliance is made by a Party about by another Party; (ii) a Party makes a submission concerning its own compliance; (iii) the secretariat makes a referral to the Committee; (iv) members of the public make communications concerning a Party's compliance with the convention. Moreover, the Committee may examine compliance issues on its own initiative and make recommendations. United Nations Economic Commission for Europe [UNECE], Aarhus Convention, Compliance Committee, http://www.unece.org/env/pp/ccBackground.htm (last visited Jan. 22, 2010) (providing an overview of the Compliance Committee and a record of its meetings and reports as well as the specific practices of the Compliance Committee, including the modus operandi document that sets out the working methods of the Committee).

145. *See* Wennerås, *supra* note 65.

146. *See* discussion *supra* Part II.A-B.

147. Council Directive 2004/35, *supra* note 18.

Environmental Damage ("Green Paper"),[148] the White Paper on Environmental Liability ("White Paper")[149] was introduced. Both the Green and the White Paper had created a sphere of optimism about the prospects of a European civil liability regime for environmental damage. However, the 2004 Directive on Environmental Liability ("Directive" or "ELD") did not make this promise a reality. Rather, the Directive excluded "any role whatever for civil liability as a tool of private enforcement by private actors against polluters."[150] This section will look into the legal and political developments which led to the enactment of the Directive and what the final form of the Directive means for the possibilities of horizontal private enforcement within European Environmental Law.

A. THE GREEN AND WHITE PAPERS

In the Green Paper, the Commission presents its reasons for pursuing a European system of civil liability for environmental damage: public demand for systems of accountability and compensation, the pledge of the Council of Ministers to take action in the Fifth and Sixth Environmental Action Plans,[151] international developments[152] (and arguably, pressure), and the fact that the current situation of fragmentation could lead to distortion of competition within the European common market.[153] Empowerment of the individual was not mentioned as an explicit priority except for a brief reference to public pressure. Nevertheless, if one considers the text of the Green Paper carefully, it becomes clear that improved legal standing of private parties was envisaged[154] and that the civil liability regime was aimed at improving the environmental protection programme[155] and at creating "shared responsibility."[156]

The later White Paper shifts the focus to the environment as a "public good"[157] and takes into account international developments such as the Lugano Conven-

148. *Commission Green Paper on Remedying Environmental Damage*, COM (93) 47 final (May 14, 1993).

149. *Commission White Paper on Environmental Liability*, COM (2000) 66 final (Feb. 9, 2000).

150. Gerrit Betlem, *Torts, a European Ius Commune and the Private Enforcement of Community Law*, 64 CAMBRIDGE L.J. 126, 127 (2005).

151. Decision No. 1600/2002/EC, Laying down the Sixth Community Action Programme, Preambles 3, 4, 10, 11, 2002 O.J. (L 242) 1.

152. One such development is the Convention of 21 June 1993 on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 I.L.M. 1228 (not in force), *available at* http://curia.europa.eu/common/recdoc/convention/en/c-textes/_lug-textes.htm [hereinafter Lugano Convention]; *see, e.g.*, Aarhus Convention, *supra* note 108.

153. *Commission Green Paper on Remedying Environmental Damage*, *supra* note 144, at 4-5.

154. *See Commission Green Paper on Remedying Environmental Damage*, *supra* note 144, at 11, 23-24.

155. *Id.*

156. A principle explicitly prioritized in the Fifth Environmental Action Programme. Lee, *supra* note 3, at 380.

157. *Commission White Paper on Environmental Liability, supra* note 145, at 2.

tion[158] and the Aarhus Convention.[159] Despite that the Lugano Convention never came into force,[160] these two Conventions led the Commission to state:

> [S]ince the protection of the environment is a public interest, the State . . . has the first responsibility to act . . . [h]owever, there are limits to the availability of public resources for this, and there is a growing acknowledgement that the public at large should feel responsible for the environment and should . . . be able to act on its behalf.[161]

Reference was also made to the possible introduction of a "two-tier" approach, which would place primary responsibility with the member states (the first tier) and allow public interest groups to act if the State does not act properly or at all (second tier)[162]; the paper also references general conditions relating to the involvement of interest groups.[163] The introduction of the two-tier model thus moved the focus away from a horizontal private enforcement model.

Shortly thereafter, in July 2001,[164] the Commission issued a Working Paper[165] and a final round of consultations was held. Concerns during this consultation round varied depending on the relative position of the interest groups. Examples of the concerns raised include: the danger of "paying twice," distortion of existing national and international liability regimes, jeopardizing existing and future investments, and the possibility for "broad" interpretation of concepts within the Directive.[166] The Commission was forced to compromise on certain issues in the final Directive, resulting in many areas where member states may exercise a significant amount of discretion regarding the implementation of the Directive.[167]

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158. Lugano Convention, *supra* note 148.

159. Aarhus Convention, *supra* note 108. The Lugano Convention referred specifically to legal standing given to environmental NGOs in Article 18, whereas the Aarhus Convention extended this to members of the public in Article 9, para. 3. Aarhus Convention, *supra* note 108, art. 9, para. 3; Lugano Convention, *supra* note 148, art. 18.

160. *See* Council of Europe, Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=1&CL=ENG&NT=&NU=150 (last visited Jan. 22, 2010).

161. *Commission White Paper on Environmental Liability, supra* note 145, para. 4.7.

162. *Id*. para. 4.7.1.

163. *Id.* Only those fulfilling "objective" criteria may act in "urgent cases". *Id.* paras. 4.7.3, 4.7.2.

164. Lucas Bergkamp, *Implementation of the environmental liability directive in EU member states*, 6 ERA-FORUM 389, 389 (2005).

165. Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage, July 2001, *available at* http://ec.europa.eu/environment/legal/liability/pdf/consultation_en.pdf.

166. For the full consultation reports, *see* Comments on Working Document on the Prevention and Restoration of Significant Environmental Damage (Environmental Liability), *available at* http://ec.europa.eu/environment/legal/liability/consultation.htm (last visited Jan. 26, 2010) (follow "submissions and comments" link on the webpage cited to access the comments).

167. Gerd Winter et al., *Weighing up the EC Environmental Liability Directive*, 20 J. OF ENVTL. L. 163, 191

B. THE ENVIRONMENTAL LIABILITY DIRECTIVE

The deadline for transposition of the Directive was April 30th, 2007.[168] Not all of the member states have made this deadline, and of those who have, the governments either have gone well beyond the minimum standards of implementation or have done all within their discretionary powers to limit their obligations.[169] Two major issues within the Directive in terms of private enforcement – type of environmental damage covered and enforcement possibilities – will be discussed along with examples of some of the member states' implementation strategies.

The Directive covers environmental damage independent of where the property rights to the damaged property lie.[170] However, the scope of the Directive as defined in Article 3(3), read in conjunction with Article 2(1) and Preamble 14, makes clear that additional damage to personal property is excluded from the protection offered by the Directive,[171] which means there are no reparation duties in a horizontal sense[172] on the basis that such damage already would be covered by member states' national liability regimes.[173] As a consequence, in cases where there is damage to private property related to environmental damage, the owner of the property is only a party insofar as he or she may be consulted over the form of the remedial measures,[174] whereas the competent public authority is the one who holds the polluter liable for remedial measures.[175] These provisions, combined with Article 3(3), which states that the "Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage,"[176] and Article 16(2), which sees to the prevention of so called "double recovery,"[177] ensure that "traditional" private damage is excluded from the scope of the Directive and removes a very important incentive for private parties to invest in, using the limited enforcement mechanisms of Articles 12 and 13. As a consequence, the private enforcement of this liability regime will most likely depend on environmental interest groups, which

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(2008).

168. Directive 2004/35, *supra* note 18, art. 19, para. 1.

169. *See infra* Part IV.C.

170. Directive 2004/35, *supra* note 18, art. 3, para. 1.

171. *Id.* art. 3, para. 3, art. 2, para. 1, preamble 14.

172. Winter et al., *supra* note 165, at 168.

173. Emanuela Orlando, *Environmental Liability: The European Approach – The 35.2004 EC Directive, in* THE FUTURE OF ENVIRONMENTAL LAW: INTERNATIONAL AND EUROPEAN PERSPECTIVES 85 (EUI Working Group on Environmental Law ed., 2006).

174. Directive 2004/35, *supra* note 18, art. 7, para. 4, art. 12, para. 1.

175. *Id.* art. 6, para. 2.

176. *Id.* art. 6, para. 2, art. 3, para. 3.

177. *See* EDWARD H.P. BRANS, LIABILITY FOR DAMAGE TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE AND DAMAGE ASSESSMENT 293, 300 (2001) (presenting examples from European member state regulators preventing the occurence of double recovery).

also face difficulties, primarily in relation to standing rights,[178] due to the high costs of litigation and evidence collection and the exclusion of recovery for private damage (although these groups arguably would be excluded from recovering these damages because of lack of property rights).

Nevertheless, the two-tier system of enforcement established by the Directive does envisage a role for public interest groups within the second tier of enforcement, which is subsidiary to the governmental first tier.[179] The "competent public authority" in the first tier is empowered to take remedial measures if the operator (polluter) does not act, and to recover the costs related to these measures from the operator.[180] This has created a system that does not include a right of direct access to the courts in order to enforce the environmental provisions. Rather, NGOs, or other private parties may ask the Court for a judicial review of the competent authority's decision.[181] Such review is only possible when natural or legal persons "affected or likely to be affected by environmental damage," or which "hav[e] a sufficient interest," or "alleg[e] the impairment of a right,"[182] have submitted observations and asked the competent authority to take action. Within this system, the burden of proof lies heavily on the party asking for governmental action, a large hurdle to overcome because of the high costs of collecting evidence. Extended participatory rights should be granted to civil society representatives and directly interested parties to achieve deterrence as well as to provide remedies.[183]

C. IMPLICATIONS FOR HORIZONTAL PRIVATE ENFORCEMENT

The liability regime established by the Environmental Liability Directive may best be described as a public regulation regime with private enforcement elements where the public authority is the actual enforcer and private parties may only influence these authorities *ex post*. The primary articles relating to private enforcement – Articles 12 and 13 – enable vertical rather than horizontal actions that do not address nor remedy private enforcement problems such as: the lack of standing of interest groups, the exclusion of compensation for private damage, and the high costs of proceedings and collection of evidence.[184] There are two problems connected to Articles 12 and 13 of which the effects are not yet clear – extent of standing rights and interaction with the doctrines of direct effect and

178. *See* Directive 2004/35, *supra* note 18, arts. 12, para. 1(a)-(c).

179. *White Paper, supra* note 145, para. 4.7.1.

180. Directive 2004/35, *supra* note 18, art. 6, para. 3, art. 8, para. 2.

181. This decision may also come from a different "independent and impartial public body competent to review." *Id.* art. 13, para. 1.

182. *Id.* art. 12, para. 1, (a)-(c).

183. *See also* ALESSANDRA ARCURI, GOVERNING THE RISKS OF ULTRA-HAZARDOUS ACTIVITIES: CHALLENGES FOR CONTEMPORARY LEGAL SYSTEMS 201 (2005).

184. Directive 2004/35, *supra* note 18, arts. 12, 13.

consistent interpretation. Much will depend on the member states' implementation and the development of the European Court of Justice's jurisprudence.

With respect to the standing rights of individuals and the implementation of the Directive into member states' national laws, results thus far vary. Germany has implemented a form of standing rights, which only allows access to the courts when the breached legal provision protects individuals; Poland and Spain, on the other hand, have gone beyond the minimum required in the Directive, especially concerning the protected areas and standing rights.[185]

The second issue is the interaction of the Environmental Liability Directive with the doctrine of direct effect. Although Article 12 of the Directive fulfils the criteria for direct effect, the doctrine of "adverse consequences"[186] may preclude third parties from relying on Article 12 to force public authorities to enforce obligations under, for instance, Article 5(1) of the Directive when these have not yet been transposed into national law. The so-called *Wells* doctrine seems to exclude actions under Article 12, which has the effect of enforcing obligations on individuals because, in the absence of national implementation legislation, this would be a direct obligation for individuals originating from the Directive rather than a "mere repercussion."[187] The Court has not yet drawn a clear line between "adverse consequences" and "creating obligations to individuals."[188] Based on the precedence established by *Wells*, it seems unlikely that "horizontal" actions under Article 12 would be possible. At present, the Directive may best be considered a framework for later political debate[189] and a challenge for the European Court of Justice.[190]

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185. Winter et al., *supra* note 165, at 179-83.

186. *See* discussion *supra* Part II.A.

187. *See* JANS & VEDDER, *supra* note 55, at 193; Winter et al., *supra* note 165, at 188.

188. JANS & VEDDER, *supra* note 55, at 50-51, 193.

189. Pål Wenneras illustrates this point by referring to the admission of a Commission official involved in the drafting process of the Directive who said that "the most important thing was to get *a Directive* adopted, and hope to fix it through later amendments" (emphasis added). *See* Pål Wenneras, *A Progressive Interpretation of the Environmental Liability Directive in Conformity with EC Law*, *in* AANSPRAKELIJKHEID VOOR SCHADE AAN DE NATUUR 150 (R. Mellenbergh & R. Uylenburg eds., 2005).

190. Because the Directive was recently enacted, there have been no cases regarding actions under Directive 2004/35/EC directly. "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2007. They shall forthwith inform the Commission thereof. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States." Directive 2004/35, *supra* note 18, art. 19, para. 1. References to the Directive have been made by the Advocate General in his Opinion in Case C-188/07, *Commune de Mesquer v. Total France SA*, 2008 O.J. (C 188) 7, para. 90 and several cases regarding the delayed and late transposition of the Directive into national law (for instance against Belgium, France, Luxembourg, Finland, and Greece). Other cases are concerned with the use of impact assessments. Court of Justice of the European Union, curia.europa.eu (last visited Jan. 11, 2010).

V. CURRENT POSSIBILITIES FOR HORIZONTAL PRIVATE ENFORCEMENT

This article focused on the three European mechanisms – direct effect and consistent interpretation, the Aarhus Convention, and the Environmental Liability Directive – that, *prima facie*, appeared to be the most viable routes to horizontal private enforcement. With respect to the doctrines of direct effect and consistent interpretation, environmental laws are adopted through the form of directives, which is the primary obstacle to a clear horizontal direct effect option. This problem is only partially remedied by consistent interpretation, which has its own weaknesses, for instance, in relation to legal certainty.

With regard to the two "new" mechanisms – the Aarhus Convention and the Environmental Liability Directive – there are mixed results. On a European level, the implementation of the Aarhus Convention provisions on access to justice is hindered by the principle of subsidiarity (and arguably lack of political will), which stand in the way of the adoption of any directive on access to justice that would provide further possibilities for horizontal private enforcement. In relation to the Environmental Liability Directive, the Commission seems to have severely limited its ambitions during the legislative process, which led to a Directive that has more similarities with public command-and-control mechanisms than with a civil liability regime.[191] Problems relating to reluctant implementation, legal standing, and the interaction with the doctrines of direct effect and consistent interpretation further limit the effects of the Directive.

The above discussion leads to the tentative conclusion that there is, at present, limited availability of horizontal private enforcement mechanisms. The "new" mechanisms, such as the Aarhus Convention and the Environmental Liability Directive, will have to coexist with existing enforcement mechanisms and the European legal structure, which restricts their effect. Aside from these technical obstacles, the author submits that neither the Commission nor the member states are currently willing to allow for a truly independent horizontal private enforcement mechanism within EC environmental law. On a European level, this view is reflected in the continuous lack of powerful legislation in the area. Some of the provisions in the Aarhus-based legislation and the Environmental Liability Directive may benefit from judicial interpretation by the European Court of Justice.

VI. CONCLUSION

This article set out to review the potential of horizontal private enforcement in EC environmental law in light of existing problems with public enforcement. The premise on which this article was based was that horizontal private enforcement

191. Directive 2004/35, *supra* note 18, arts. 12, 13 (regarding the 'private enforcement' section of the Directive).

of EC environmental law could be a positive development for environmental protection within the European Union. It became clear that the three common forms of public regulation in the area of EC environmental law that were discussed – command-and-control, self-regulation, and market-based incentives – face certain enforcement problems. These enforcement problems are most commonly connected to a lack of incentives on the side of the enforcer and/or the enforced, which are caused by a variety of reasons, including a lack of dynamic efficiency, regulatory capture through information problems, political prioritization of governmental funds, and general unpredictability of the environmental and economic effects of regulation.[192]

Nevertheless, it must be recognized that public enforcement can have a strong *ex ante* deterrent effect[193]; this is especially important in the case of environmental harms because these harms can lead to irreparable damage that cannot be negated by later monetary restitution. Yet, the low likelihood of enforcement and high administrative costs diminish this *ex ante* preventive effect, in which case, the threat of a viable horizontal private enforcement mechanism *ex post* could contribute to maintaining a greater preventive effect.[194] Although this article advocates the development of strong horizontal private enforcement mechanisms, a system of purely private (or public) enforcement mechanisms cannot be justified in the environmental realm because of the need for preventive, rather than remedial, actions in this area.

There are several key changes that would lead to the improved position of private parties within European environmental protection and could improve the effectiveness of environmental protection laws. The author therefore proposes the following: further research into the complementary functions of private and public enforcement for the different areas of environmental protection that fall within the competencies of the European Community; differentiation between legislation depending on the scale of the environmental problem (in the case of local problems, private enforcement is more likely to take place and is more desirable because of the specialized knowledge of local individuals, whereas public enforcement is more likely to be effective in the case of transboundary issues that require cooperation between different international institutions); in areas of environmental regulation where private enforcement appears to be desirable, laws should be adopted by means of regulations – something that would have the added benefit of lowering the implementation costs of directives

192. The extent to which these problems applied to each of the regulatory mechanisms differed; for a more detailed overview, *see supra* Part I.

193. *See* Shavell, *Liability for Harm*, *supra* note 4, at 369-70.

194. Regarding the specific situations within which a private or public enforcement system may be preferable, the following factors may play a role: information regarding the risks of the activity; the likelihood of the private party being able to pay for the harm which he has caused (and the likelihood of other forms of redress being needed, such as imprisonment); likelihood of enforcement; and the magnitude of the administrative costs of regulation. *See* Shavell, *Liability for Harm*, *supra* note 4, at 367-68.

for member states; and, finally, improve the standing of interest groups so that those European laws that already are applicable can be enforced.

If these changes were to come about, there is no indication that the European courts would be instantly flooded by applications from concerned citizens; it will continue to be difficult and demanding to be environmentally vigilant, as it requires expert knowledge of the law and scientific evidence, which is costly and difficult to attain. It could, however, give those with serious concerns an opportunity to address environmental wrongdoings and help the European Union achieve the high level of environmental protection for which it claims to strive.