Introduction

Oil is the most transported commodity worldwide, more than any other commodity. In 1998, the total crude oil and refined products transported by sea amounted to more than 2,000 million tonnes which in weight terms represented 40 per cent of the total cargoes shipped by sea. ¹ The EU oil trade is the largest in the world, with crude oil imports representing about 27 per cent of the total world trade, while US imports amount to 25 per cent of the world total. Of the total oil trade with the European Union 90 per cent is carried out by sea transportation.²

The European Union, by virtue of its geographical location, its history, its enlargement and the trend of globalization, is still very dependent on maritime business. Over 90 per cent of its external trade and some 43 per cent of its internal trade goes by sea.³ However, the coasts in Europe, in particular the Atlantic and Mediterranean seaboards, are extremely vulnerable to pollution risks. Hence it is of crucial interest for the European Union to protect the European waters from the risks of pollution. It is specified in the well-known Article 175 of the EUTreaty that environmental protection is one of the basic aims of the European Union.⁴ The ultimate goal is that all activities in different industrial sectors in the EU shall be carried out in such a way that they will not harm the environment and will promote sustainable development.

The maritime business is an international business and marine pollution has no respect for borders between countries, so many of the pollution problems cannot be tackled effectively without joint action of the Member States at the Community level and even cooperation among countries outside the EU at the international level. The European Union thus not only has a vital interest in the prevention of and compensation for oil pollution damage under the Community framework, but also an interest in taking action in this respect.⁵

Marine shipping itself is associated with a number of environmental concerns. As a power-based activity, the utilization of energy may pollute water, air and terrestrial environments. Moreover, accidents are common in the shipping sector and may lead to the release of cargo adversely affecting the environment, such as oil spills. The offshore nature of marine shipping makes it difficult to enforce legislation, and illegal activities like the discharge of oil or other chemicals might not be easily detected. The legal rules concerning the marine environment must therefore be able to take into account not only the extent of the damage, but also the cause of the damage. This often means not only traditional damage to property and personal injury, but also damage to the environment per se.

International conventions with respect to oil pollution can be distinguished between on the one hand measures aiming at prevention ex ante and on the other hand measures aiming at compensation ex post. The prevention of marine pollution is subject inter alia to the SOLAS⁶ and MARPOL⁷ Conventions. Compensation is mainly regulated under the regime built up by the CLC⁴ and/or Fund⁸ Convention.

Prevention measures mainly focus on the technical requirements such as ship structure standards and safety standards, which should be enforced by the contracting states. The liability system on the other hand is not only meant to compensate the victims, but can also be designed

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¹ EUROSTAT and CECD/IEA statistics, Journal de la Marine Marchande.
⁴ Environmental policy was built into the Treaty by the Single European Act of 1987 and its scope was extended by the Treaty on European Union 1997.
in such a way that it will give incentives to the actors to take preventive measures to avoid pollution.

In this article we will specifically focus on the EU approach to compensation for oil pollution damage. We will show how originally Europe relied largely on the existence of the international conventions and hence had no particular initiatives of its own in the domain of oil pollution. Later, especially after Europe was confronted by the major oil spill by the Amoco Cadiz in France in 1978, the Commission took several initiatives aimed in the first place at the prevention of oil spills. In a second phase Europe also realized that the compensation mechanism as it was designed by the international conventions can in some cases be largely insufficient in respect of the consequences of major spills. More particularly, after the more recent Erika (1999) and Prestige (2002) incidents the Commission put forward various initiatives, not only to increase maritime safety, but also aimed at awarding greater compensation for victims of oil pollution. Interestingly the Commission’s view of the inadequacy of the international regime led to its proposal for a European compensation system of its own; and at the same time, the Commission lobbied the organization competent to revise the international conventions (namely the International Maritime Organization, (IMO)) to provide higher compensation through the international regime. The story so far is, as we will show below, that Europe’s activity in this domain may have triggered an important change in the international regime.

First we will sketch the basic community framework on maritime safety as it has emerged since 1978, indicating that safety was a primary concern, with compensation receiving less attention. Then we will turn to recent developments concerning civil liability and compensation for marine oil pollution by addressing the reaction of the Commission to the Erika and Prestige spills, and by discussing progress at international level. Meanwhile, of course, Europe has also been busy developing an environmental liability directive, which was published in April 2004. During the debates on this directive the relationship between the international regime concerning oil pollution and the environmental liability directive was an important point. We finish with a few concluding remarks.

**Basic Community framework on maritime safety**

Often there is more than one institution involved in case of an oil spill, which might include inter alia the transport and the energy sectors. The way the European Union dealt with this issue until the 1990s was to set up a Community-wide action program, to call on Member States to take action, or to carry out studies. Until the incident with the Erika in 1999 it was only the issue of civil liability for oil pollution that concerned the European Commission. Until then the Commission had basically relied upon the existing international framework to provide compensation. The Erika case, however, revealed the inadequacies of that regime.

As far as civil liability for oil pollution is concerned, there is still no particular Community legislation as such. The regime is still based on the international conventions as implemented by the national legislation of Member States. However, there are some sources of law under the EU framework where provisions can be found that are relevant for oil pollution as well. One source is the Environmental Liability Directive in general. Other sources concern those on maritime safety (from the point of view of the transport sector) and marine pollution in particular.

Although the aim of this article is primarily to examine the EU liability regimes on marine oil pollution, it still seems useful to look at the basic framework of the European Union on maritime safety and its development, and to examine how the liability issue evolved within that framework until it received the full attention of the Commission that it has today. This approach can also contribute to a clearer view on the relationship between the international oil pollution conventions and Community law concerning (liability for) marine oil pollution.

**The first set of actions, 1978–1992**

There was no common maritime policy on marine pollution when the European (Economic) Community was originally formed in 1957. This was apparently not a priority issue at the time. However, when shipping nations like Denmark, Ireland and the United Kingdom joined in 1973, the need for such a common policy increased. These countries with a long shipping history have made a common maritime safety policy a necessity for the Community. After some serious oil spills in the late 1970s, the EU started to focus more on the safety of maritime transportation and on the protection of the marine environment against pollution. The Commission presented a series of communications on this issue, and the Council adopted a Resolution in 1978 which formed the basis for Community maritime safety policy.

**The start of Community action: the 1978 Resolution**

In response to the oil spill caused by the Amoco Cadiz which sank off the coast of Brittany on 16 March 1978, the Council adopted a Resolution to set up an action program on the control and reduction of pollution. It resulted in several
studies including reports on the importance of civil liability and in several proposals from the Commission.\textsuperscript{10} However, only a few concrete decisions\textsuperscript{11} were taken at Community level despite the fact that the need for specific actions to improve maritime safety emerged clearly from the resolution of 1978.

In the preamble to the resolution, it is specified that the prevention and control of marine pollution is an important objective of this action program and protection of marine waters is a priority task. The actions taken by the Community since 1978 have enabled co-operation between Member States to develop and these actions were considered the basis for such co-operation.\textsuperscript{12}

**The 1990 Resolution**

In 1990, another resolution\textsuperscript{14} was adopted to urge the Member States to ratify the international conventions, namely the SOLAS and the MARPOL Conventions, which set up the international regimes on the prevention of oil pollution.\textsuperscript{15}

It can be concluded that during this period, the emphasis of the EU marine environment policies was on protecting the marine environment directly via preventive measures. The stress of EU marine environment policy was mainly on maritime safety and the importance of civil liability as a mechanism to deter oil pollution did not receive sufficient attention, remaining merely at a theoretical stage. The EU apparently relied on Member States joining the international regimes on oil pollution.

**The second set of actions: 1993–2000**

**The 1993 Communication**

Although several legislative decisions had already been taken during the period 1978–1992, the real start of maritime safety policy is considered to be 1993, when the Commission Communication ‘Common Policy on Safe Seas’ was adopted.\textsuperscript{16} In the Communication, the Commission analyzed the current situation of maritime safety in Europe and outlined a framework for a common maritime policy. The basic principles of the policy included the implementation of existing international rules, the uniform enforcement of international rules by the Port States and reinforcement of the EU’s role as the driving force for rule-making at the international level. An action program is attached to the Communication which has highlighted the main decisions to be taken to improve maritime safety in Europe and to improve protection of the European coasts. Several important legislative Acts were proposed and adopted in the following five years implementing a detailed action program attached to the Communication. They remain the core of the EU’s maritime safety policy today.\textsuperscript{17}

The Commission adopted between 1993 and 2002 more than ten different proposals based on the action program, and all of them have been adopted by the Council, the last one in December 2001.\textsuperscript{18}

**The 2000 Decision: the legal basis for Community action**

At present, the role of Europe in responding to marine pollution has its legal basis in a Decision of 20 December 2000, in which the European Parliament and the Council set up a Community framework for co-operation for the period 1 January 2000 to 31 December 2006 in respect of accidental or deliberate marine pollution.\textsuperscript{19} The Decision states that such a framework will develop co-operation more

\textsuperscript{10} Council Resolution of 26 June 1978 setting up an action program of the European Communities on the control and reduction of pollution caused by hydrocarbons discharged at sea [1978] OJ C162, 8 July 1978, p. 1. 4. This resolution was later supplemented to deal also with other harmful substances.


\textsuperscript{13} Decision 2850/2000, 28 December 2000.


\textsuperscript{15} As stated in the Resolution, Member States shall endeavour to provide themselves with an adequate and efficient maritime administration which is capable of ensuring strict compliance with the technical rules on safety at sea and the prevention of marine pollution by ships fixing their flags, in accordance with the provisions of the relevant international conventions, in particular the SOLAS and the MARPOL Conventions.

\textsuperscript{16} COM(93)66 final, 24 February 1993.

\textsuperscript{17} The website of DG Transport of the European Union provides more detail on the measures taken: [http://europa.eu.int/commission/transport/maritime/safety/index_en.htm](http://europa.eu.int/commission/transport/maritime/safety/index_en.htm).

\textsuperscript{18} Ibid.

efficiently and that the Community framework established should be based on the experience gained in the field of marine pollution since 1978. In the second paragraph of Article 1 of the Decision, it was specified that this framework was also intended to 'provide for compensation for damage in accordance with the polluter-pays principle'.

**Post-Erika: 2000 Erika I and II packages**

After the Erika disaster on 12 December 1999, the EU has considerably reinforced its legislative arsenal in order to protect European waters better against the risks of accidental oil spills. Two sets of legislative proposals were tabled in March and December 2000 respectively by the Commission, the so-called Erika I package and Erika II package.21

The Erika I package has addressed serious gaps in EU maritime safety legislation highlighted by the Erika disaster. It has strengthened the existing rules on port state control and classification societies, and it has also set up a timetable for the phasing-out of single hull oil tankers. The Commission developed criteria to examine the existing international compensation system. It held that despite some shortcomings of the system, it should still serve as the basis for future measures. Also, the Commission stressed the need to set up a general EU environmental liability regime concerning new areas of liability which are not yet harmonized at European level.22 The Commission referred explicitly to the White Paper on Environmental Liability,23 from which the European Environmental Liability Directive derived.

The Erika II package has, on the other hand, presented additional measures designed to bring about a radical improvement in maritime safety in EU waters. In addition to the creation of a European Maritime Safety Agency and the establishment of an information system to improve monitoring of traffic in EU waters, there is an important proposal under the Erika II package, which has subsequently resulted in a radical change in the international rules. This is the proposal to set up a European Fund (‘the COPE Fund’) with an updated ceiling of €1 billion (instead of €200 million under the international conventions). We will come back to these important proposals below.

**Post-Prestige: the 2002 Communication and 2003 Proposal**

When the Prestige sank off the Spanish coast on 19 November 2002, the Commission again reacted very quickly. It had already adopted a Communication on improving safety at sea on 3 December 200224 whereby the measures in Erika I and II packages were to be strengthened. Interestingly this Communication focused specially on updating existing international rules on compensation and civil liability. In May 2003, with the adoption of a Supplementary Protocol to the international regime (see below), the Commission proposed urging the Member States to join the updated international regime. This was supported by the Parliament in January 2004.25 It will be discussed in further detail below.

**Civil liability and compensation for marine oil pollution: recent developments**

The issue of civil liability and compensation for oil pollution is mainly regulated by international conventions developed within the framework of the IMO, namely the CLC Convention of 1969 and the Fund Convention of 1971, which was revised in 199226 and more recently in May 2003.27 The 1992 Protocols entered into force in 1996 and all EU Member States with a coastline are parties to the

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24 Communication on Improving Safety at Sea in Response to the Prestige Accident, 3 December 2002.
25 Note 44.
26 Under the 1992 Protocols, the maximum amount of compensation payable from the Fund for a single incident, including the limit established under the 1992 CLC Protocol, is 135 million SDR (about US$173 million). However, if three States contributing to the Fund receive more than 600 million tonnes of oil per annum, the maximum amount is raised to 200 million SDR (about US$256 million).
27 On 18 October 2000, another amendment was adopted, the 2000 Amendments, which entered into force on 1 November 2003 (under the tacit acceptance procedure). The amendments raised the maximum amount of compensation payable from the IOPC Fund for a single incident, including the limit established under the 2000 CLC amendments, to 203 million SDR (US$280 million), up from 135 million SDR (US$173 million). However, if three States contributing to the Fund receive more than 600 million tonnes of oil per annum, the maximum amount is raised to 300,740,000 SDR (US$386 million), up from 200 million SDR (US$256 million).
28 We are not going to comment on the international regime here, since we prefer to focus on recent developments at the European level. For general comments see inter alia D Abeasis 'IMO and Liability for Oil Pollution from Ships: A Retrospective' (1983) LMCQ 45-46; EHP Brian's Liability for Damage to Public Natural Resource: Standing, Damage and Damage Assessment (Kluwer Law International 2001) 311-364; E Gold, Handbook on Marine Pollution (Gard 1985) 44-47; and Z. Oya Özcevîr Liability for Oil Pollution and Collisions (ILO'S London Press 1998) 211-18.
There is no Community legislation as such to address civil liability for oil pollution.

There are, moreover, loopholes in the international conventions which left a considerable amount of discretion to the flag states. Different domestic law within the European Union may cause difficulties in the problem-solving and hence delays in compensation. The Commission thus considered it necessary for the Community to get involved in the issue. What reasons does the Commission give for EU action?

This finding of the Commission, incidentally, also corresponds with criticisms in the literature where it has been held that there are three major shortcomings in the current scope of the international regime: (1) the amounts of limitation are too low; (2) there is exclusive channelling of the liability to the tanker owner (excluding liability of others); and (3) an over-narrow definition of environmental damage.

Post-Erika

As mentioned above, in the early years of the EU marine environmental policy, ie until the 1990s, the Community liability system was not fully developed, and the issue of civil liability for oil pollution remained at an initial stage of development. It was not until after the Erika incident in 1999 that civil liability and compensation of oil spill victims received special attention from the Community and this issue was put at the top of the Commission’s agenda.

Erika I proposals

In the Erika I package, the Commission developed three criteria to examine whether the existing liability and compensation system is wholly satisfactory. It then critically reviewed the international regime according to these criteria. The first criterion is prompt compensation. The CLC and the Fund regime, according to the Commission, have been able to handle most of the cases promptly without extensive and lengthy judicial procedure. The second criterion was whether there was a sufficiently high compensation limit. The limit set by the CLC and the Fund Convention was considered not high enough to cover any potential disaster. Hence, victims of serious oil spills remain inadequately compensated. The third criterion was the dissuasive effect of the regime. In this respect, the CLC and the Fund regime were also considered unsatisfactory due to the fact that the limitation of shipowner was almost unbreakable and cargo owners on the other hand had no individual responsibility at all. No parties in oil transport activity would have sufficient incentive to give up the practice of deliberately employing vessels that were in very poor condition.

On the basis of these considerations, the adequacy of the international regime for oil pollution, as laid down in the CLC and the Fund Convention of 1992, was consequently questioned by the Commission again in Erika II package from an EU perspective, especially as far as the limitation of liability and the definition of pollution damage were concerned.

Erika II proposals

As was already noted in the Erika I package, the compensation limits set up by the international conventions are not sufficient in case of compensation for major oil spills. The Commission decided therefore to create a European mechanism which will ensure adequate and prompt compensation without delay. Moreover, in the Erika II package, the Commission raised the issue that the scope of application of the international conventions in the sense of pollution damage covered should be extended, and that the balance of responsibilities of all parties involved should be re-examined. Let us address each of these important issues separately.

Limitation of liability

The main issue of debate and divergence between the EU and the international regime is limitation of liability. The Commission considered that, in the case of recent high-profile European oil spills, where the compensation claims came close to the limitation, there were always unacceptably long delays in payment. According to the Commission, the main reason for this was not the deficiency of the compensation procedure as such, but rather the insufficient limits of compensation which caused uncertainty as to the final costs of an oil spill.

28 COM(2000)142 final, 21 March 2000, 33. According to the statistics from the IOPC Fund, as of 1 March 2004, all the current EU Member States, with the exceptions of Austria and Luxembourg (which are the only two EU countries with no coastline), are contracting States of the 1992 CLC and the Fund Conventions. Luxembourg is a contracting State to the 1969 CLC Convention, while Austria has not joined any of the international conventions.
29 For a summary of this criticism on the international conventions see EHP Brans (n 27) 344–60 and M Faure and H Wang ‘The International Regimes for the Compensation of Oil-pollution Damage: Are They Effective? (2001) RECLE 242–53.
The CLC convention provides that these limits can be increased. According to a specific amendment procedure,\(^3\) the maximum increase under this procedure depends on a number of factors.\(^4\) However, this procedure would still not allow for an increase of more than 50 per cent of the existing limit. The first decisions to approve this increase were taken by the IMO in October 2000 and the amendments would (if adopted) apply from 1 November 2003.

The amounts of compensation under the 2000 amendments, which have raised the limitation of liability in the 1992 Protocols are as follows:

- for a ship not exceeding 5000 Gross Tonnage, the liability is limited to 4.51 million SDR (under 1992 Protocols, it was 3 million SDR);
- for a ship between 5000 to 14000 Gross Tonnage, liability is limited to 4.51 million SDR plus 631 SDR for each additional gross tonne over 5000 (under the 1992 Protocols, it was 3 million SDR plus 420 SDR for each additional gross tonne over 5000);
- for a ship over 14000 tonnage, liability is limited to 89.77 million SDR (under the 1992 Protocols, it was 59.7 million SDR).

As a result of these changes in 2000 the amounts were therefore to be raised substantially (to approximately US$ 115 million), but these amendments only entered into force in November 2003. This may seem impressive, but the *Erika* incident in 1999 had already cast doubts on whether this amount would be sufficient to cover these large losses and even before the 2000 Protocols had entered into force (in 2003) the *Prestige* incident in 2002 came as if to prove that the changes did not provide a satisfactory solution in case of disaster oil spills. Hence, the European Commission judged that in addition to these 2000 Protocols new steps were necessary.

In the explanatory memorandum to the *Erika II* proposals the Commission considered that a 50 per cent increase in the existing limits (which would provide some €300 million in total) was insufficient to guarantee adequate protection for victims in case of major oil spills in Europe both now and in the future. The Commission took the view that all oil spills should be adequately and promptly compensated, although statistics show that some ten out of 100 oil spills dealt with by the Fund raised serious doubts on the adequacy of the limits. Moreover, the international procedures needed to achieve concrete results in increasing the limit would be lengthy. Therefore, the Commission proposed in the *Erika II* package to complement the then existing international regime by creating a European supplementary Fund, the so-called COPE Fund,\(^5\) in order to compensate better oil pollution victims in Europe. The compensation under the COPE Fund would be based on the same principles as the current international fund system, but the financial limits would be raised to €1 billion, which the Commission considered to be an adequate amount.

Although the Commission criticized the international regime of CLC and the Fund for not being able to provide sufficient compensation to the victims of the *Erika* spillage,\(^6\) the efficiency of the proposed regional fund is doubtful. The COPE Fund was designed by the Commission to speed up the compensation. However, it was to be applied only to those not fully compensated under the international regime. The question was raised whether this was optimal since in this model the victim has to wait for a decision under the international mechanism. This proposed COPE Fund was also rejected by the oil industry, as they would be the contributor to such a fund which, in their view, would increase their liability to an unreasonable extent.

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33 Article 15 of the 1992 Protocol to the CLC Convention and Art. 33 of the 1992 Protocol to the Fund Convention provide for the procedures for amendments. According to Art. 15 of the CLC Convention 1992, under the title Amendments of Limitation Amounts, at least one quarter of the contracting States need to propose amending the limits of liability, and the amendments must be adopted by a two-thirds majority of the contracting States present and voting in the Legal Committee, subject to procedural requirements. Any amendment made under these Articles will enter into force at the earliest 36 months after its adoption by the IMO Legal Committee.

34 Article 15(5) of CLC 1992 reads: ‘When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incident and in particular the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance. It shall also take into account the relationship between the limits in Article V, paragraph 1, of the 1969 Liability Convention as amended by this Protocol and those in Article 4, paragraph 4, of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.’ Article 15(6)(b) of CLC 1992 reads: ‘No limit may be increased so as to exceed an amount which corresponds to the limit laid down in the 1969 Liability Convention as amended by this Protocol increased by 6 per cent per year calculated on a compound basis from 15 January 1993.’

35 The Fund for Compensation for Oil Pollution in European waters, referred to as the COPE Fund.

36 In a Commission Memo of 2000, ‘Erika, two years on’, the Commission found that people worst affected by the *Erika* spillage working in maritime or other related sectors (eg tourism) had not been fully compensated for their losses. The Commission considered that the international scheme was to be blamed for not covering full costs of an incident of this scale.
Hence, the Council preferred to refer the discussion to the competent international body, namely the IMO, in order to obtain a similar agreement, but one which can be applied worldwide.\(^7\) A Protocol to the Fund Convention, modeled on this European COPE Fund, was later established and adopted by the IMO in May 2003. Therefore there was no longer any need for a special ‘European’ COPE Fund for oil pollution, although the EU Proposal to set up such a fund may have influenced the international decision-making by the IMO. Indeed, the new amount available in the IOPC Fund is probably not by accident almost the amount that was proposed in the European COPE Fund (€1 billion). After this change to the Fund Convention (which was what Europe wanted) the Member States were urged in a Proposal in September 2003 to ratify such amendment as soon as possible. This will be discussed further below in dealing with Community reactions to the Prestige accident.

**Definition of pollution damage**

The adequacy of the compensation regime will not only be evaluated in terms of the amount of compensation, but also, as the Commission suggested, in terms of the types of damage that are covered by the regime. The Commission took the view that if the range of damage were to be extended, the amounts available for compensation should be raised accordingly. Hence, the substantial rise in financial limits is further justified by the expanding definition of the damage to be covered.

The international regime established under the CLC and Fund Convention covered pollution damage, including preventive measures and to a limited extent environmental damage per se for accidents occurring in the coastal waters of the States (up to 200 miles). The Commission considered that the introduction of rules at Community level in this respect would enhance the implementation of the polluter-pays principle and would thus be in line with the White Paper, which aims to extend the definition of pollution damage.\(^8\) Therefore below we will specifically address the relationship between the EU directive on environmental liability and the international oil pollution regime, especially as far as the definition of ‘pollution damage’ is concerned.

**Responsibilities and liabilities**

The Commission stated that an adequate liability and compensation system should reflect a fair balance between the parties involved in the activities, so stakeholders are given incentives to take preventive measures. However, the shipowner’s right to limit his liability was almost unbreakable, and his liability was solely calculated on the basis of the size of the ship, without taking account of other relevant factors, like the nature of the cargo carried and the amount of oil spilled. The Commission thus suggested that the threshold for loss of limitation rights should be lowered, and that proof of gross negligence on the part of the shipowner should trigger unlimited liability. In the Commission’s view such a measure would produce both preventive and punitive effects. We will discuss this further below.

**Post-Prestige: the 2002 Communication and the 2003 proposal**

When the Prestige sank off the Spanish coast on 19 November 2002, the Commission was very quick to react. It adopted a Communication on improving safety at sea on 3 December 2002\(^9\) strengthening the measures in the Erika I and II packages. Interestingly enough this Communication focused in particular on updating existing international rules on compensation and civil liability.

**The 2002 Communication**

In this Communication the Commission asks the Member States to work with determination within the IMO with a view to rapid implementation by the IOPC Fund of an additional compensation scheme for the victims of oil spills up to the increased limit of €1 billion. It was very likely at the time that in case of failure of the proposal at international level, the EU would have to address the question within the EU framework, like the model of the US system.\(^10\) One should not forget that the Commission already had its plan ready for the introduction of a European COPE Fund. After the Prestige accident the Council took an even firmer position on the need for an improved compensation arrangement, and this was confirmed at the European Summit on 21 March 2003.\(^41\)

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\(^7\) The Transport Council in December 2000 adopted conclusions on the need to achieve improvements to the existing international regime, including 'a substantial increase in liability and compensation ceilings'.

\(^8\) The White Paper on Environmental Liability proposed bringing together damage to biodiversity and damage in the form of contamination of sites under the heading of 'environmental damage'.

\(^9\) Communication on Improving Safety at Sea in Response to the Prestige Accident, of 3 December 2002.

\(^10\) In the context of the 1990 Oil Pollution Act (OPA 1990), the United States has decided not to join the international arrangement, but has set up its own system with a compensation fund of US $1 billion.

\(^41\) Brussels European Council of 20 and 21 March 2003. The Presidency Conclusions called inter alia for the following: ‘in terms of compensation for the victims of pollution, including...’
The 2003 proposal

It was, therefore, probably thanks to the EU that a new Protocol to the Fund Convention was introduced at the London Diplomatic Conference of 12–16 May 2003, establishing a supplementary fund with 750 SDR (at the time of adoption this corresponded to approximately €920 million or US$ 1,000 million). The creation of this new fund will of course substantially improve compensation to pollution victims, by comparison with the previous situation.

Article 21 of the Supplementary Fund Convention stipulates that it will enter into force three months after eight States, representing a total of at least 450 million tonnes of contributing oil, have become contracting parties to it. The Commission raised the concern that membership of the supplementary fund might be restricted as there seemed to be no current need for all the States of the 1992 Protocols to join an improved system. However, action by EU Member States alone will be sufficient to bring the Supplementary Fund Protocol into operation. In the hope of bringing the updated regime into operation before the end of 2003, the Commission proposed on 8 September 2003 that the Council take a decision urging Member States to ratify the Supplementary Fund Convention as soon as possible.

The current Member States of the European Union, with the exception of Austria and Luxemburg, are contracting parties to the 1992 Protocols, and they are authorized to sign, ratify or accede to the 2003 Protocol by the end of 2003. As for Austria and Luxemburg, it is considered to be in the interest of the European Community that these two countries to accede to the CLC and the Fund Conventions, whereby the issue of jurisdiction and enforcement of judgments would be facilitated.

Environmental liability vs oil pollution conventions

The European Union has adopted more than 200 directives and resolutions on environmental law. However, initially, most of these legal instruments did not apply to oil pollution damage since this was considered to be properly regulated under the international conventions. With recent developments (after the Erika and the Prestige incidents) and years of experience with the international regime, it has become clear that there are gaps and shortcomings in the international regime, which made it necessary to set up a European regime to deal with these loopholes.

EU marine environment legislation was criticized for being over-reliant on the international legislation. However, there was originally not enough focus on developing policies and legislations designed specifically for the EU marine environment. It was even suggested that the EU should begin to develop its own European policies applicable to the international shipping sector and to establish a role as giving a lead on maritime safety and marine environment protection.
In this respect, the Directive on Environmental Liability, which was finalized in February 2004, might be of great value for the development of civil liability for oil pollution damage, and for the discussion of the interaction between the European environmental liability regime and the international regime.49

Background to the environmental liability directive

The idea of a European mechanism on environmental liability dates back to the 1980s.50 Among all the drafts since that time, there are at least two that merit attention: the Green Paper in 1993 and the White Paper in 2000. They were not only the basis for further rounds of discussions, but also some essential elements in these documents were developed and are reflected in the final Environmental Liability Directive on 21 April 2004.

The Green Paper on RemedyNG Environmental Damage51 did not provide any particular solution to the problem of environmental damage, but simply addressed the issues and reviewed experience at national and international levels.52 It considered the usefulness of civil liability as a means of dealing with responsibility for environmental restoration, and the allocation of these responsibilities. The Green Paper envisaged an integrated environmental liability regime in which civil liability was complemented by joint compensation mechanisms. The polluter-pays principle was confirmed and the question of insolvency was raised.

Several independent studies were subsequently commissioned to investigate inter alia the economic implications of environmental liability systems. As a result of the studies the Commission formulated a policy proposal in the White Paper on Environmental Liability.53 The aim of the White Paper was to set out a structure for an effective environmental liability regime implementing the polluter-pays principle. The White Paper favored the imposition of strict liability for 'traditional damage' (ie damage to health or property caused by dangerous and potentially dangerous activities) and 'environmental damage' (including both contamination of sites and biodiversity damage) from dangerous and potentially dangerous activities, and fault-based liability for biodiversity damage attributable to non-dangerous activities. As for financial insurance, this was not considered to be an obligation, but its role as a useful tool in the case of environmental damage compensation was recognized.54

The Directive on Environmental Liability

The Commission’s thinking on European environmental liability continued to evolve.55 Based on studies of different systems like the US Superfund and reports on EU Member States’ national environmental liability laws, the Commission proposed in 2002 a Directive on Environmental Liability.56 The purpose of the proposal was to establish a regulatory framework to establish environmental liability with regard to the prevention and remedying of environmental damage in accordance with the polluter-pays principle. It proposed a strict liability regime for listed dangerous activities, and a fault liability regime for non-listed activities.

As the studies have shown, although most Member States have liability rules concerning environmental liability, they are often incomplete, especially as far as biodiversity damage is concerned. The Commission thus justified legislation at Community level based on this argument. Again, we are not going to comment on this directive in any detail at this stage. Detailed comments will undoubtedly follow in this journal. Since the focus of our article is oil pollution damage, we are, after a brief presentation of the directive, focusing on the relationship between the directive and the international regime for oil pollution damage.

50 For a detailed discussion, see C Clarke 'The Proposed FC Liability Directive: Half-way through co-decision', RECIEL 12 (3) 2001.
51 COM(93)47 final, Communication from the Commission to the Council and Parliament and the Economic and Social Committee, Green Paper on Remedying Environmental Damage, 14 May 1993. This has triggered extensive consultation and has been the basis for several rounds of research studies and debate through to today.
52 For more detail see Clarke (n 50) 354-68.
54 Of course we are not going to discuss the White Paper on Environmental Liability in detail in this article. It was, moreover, already been extensively commented on in this journal. See inter alia M Faure 'The White Paper on Environmental Liability: efficiency and insurability analysis' [2001] 4 Env. Liability 188 201 and M Hawke and P Hargreaves' Environmental funds, compensation and liability,' [2001] Env. Liability 39-47.
Private law vs public law

The Commission held that the experience of national law in most EU Member States showed that civil liability alone would not be sufficient for cost recovery and injunctive relief in case of biodiversity damage. In the legal systems of the various Member States the role of public law is gradually being recognised, but in what situations and to what extent the public authority can and should intervene, particularly in case of biodiversity damage, is to a large extent still the subject of debate. The directive centers on the state's liability to intervene not only to restore but also to prevent environmental damage. It is considered a landmark change in the emphasis of EU environmental policy from civil liability in private law to public law.

The directive recognizes the right of a competent authority to take appropriate action. Authorities can even carry out the prevention and restoration work themselves and seek to recover the costs from the liable party. Where the polluter-pays principle cannot be implemented (eg in case of orphan damage where the polluter cannot be identified or is insolvent), it is left to the Member State to ensure that the necessary preventive or restorative measures are carried out. This, according to the Commission, was to ensure that the goals of prevention and restoration were met in accordance with the polluter pays principle. However, the Commission failed to justify why such an administrative approach was more appropriate than the civil liability regime. The Commission considered that the issue is not whether the liability regime is desirable, but rather if it is desirable for it to be implemented at EC level. That might explain why the Commission did not provide any further justification for this approach.

Relationship with international conventions

Oil spills can cause damage not only to property or persons, but also to the environment per se. Oil may adversely affect the marine environment in different ways. Take, for instance, toxicity which might cause damage to biodiversity, and the physical smothering might damage the natural resource habitats. The so-called traditional damage is regulated under the CLC and the IOPC Fund Conventions, while compensation for environmental damage under these conventions is limited to the cost of reasonable restoration measures. This includes preventive measures when there is threat of such damage.

An interesting question is, of course, what the relationship is between the recent directive and the international conventions. The original proposal explicitly specified that it would not be applicable to 'environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation is regulated by any of the following agreements', and the CLC and IOPC Fund 1992 were explicitly listed in the inapplicable scope. Thus in order to preserve the smooth functioning of the international regime and to avoid duplication, the Commission proposed that the environmental liability regime should not apply to damage covered by the international regime set up by the CLC and the Fund Conventions.

At the time of proposal in January 2002, the Commission already envisaged that recent and future developments at international level on traditional damage would require the proposed regime to be reassessed under the updated international scheme, if the Community still wished to adhere to the international civil liability instrument supplementing international environmental agreement. Such explicit provisions might avoid overlapping regimes and forum shopping, increase co-ordination between various instruments, reduce legal complexity and promote legal certainty.

In the explanatory memorandum to the proposal for a directive of 23 January 2002 the Commission argues that since most Member States are parties to these oil pollution conventions this has the advantage of ensuring global or regional harmonization. However, the Commission stresses that 'as far as those conventions display shortcomings, the Community should, in accordance with its task of promoting measures at international level to deal with regional or world-wide pollution problems try to improve the existing international arrangements'. The Commission moreover refers explicitly to the review of the operation of the IOPC funds which is undertaken under the auspices of the IMO. It states that once this review is complete, 'the Community will have to determine if the results achieved in that context are satisfactory or not; in the latter case, consideration should be given to a specific Community initiative on that subject'.

In the first reading of the Proposal by the European Parliament on 14 May 2003, the Parliament accepted an

57 C Clarke n 52.
58 N Hasle and P Hargreaves, n 54.
59 T Bergkamp (n 55) 294-314.
60 The very limited definition of pollution damage in the CLC Protocol 1992 has been criticized inter alia by FHP Bruns, in 27.
important amendment. It held that the scope of the directive should be extended after a five-year transitional period to include a large number of areas currently not included, inter alia, oil pollution, provided that these international conventions have not been ratified by the end of the five-year period by the EC and/or the Member States. This issue led to much discussion in the Council. The proposal to introduce exceptions in an Article had already led to much debate. It was proposed that the Convention on Limitation of Liability for Maritime Claims (‘LLMC’) and the Convention on Limitation of Liability in Inland Navigation (‘CLLI’) should be included among the exceptions in Article 4 of the proposal. The Portuguese and Spanish delegates held this to be

‘a retrograde step in terms of making polluters truly liable. The recent oil spills on European coasts have clearly demonstrated the inadequacy of an antiquated legal regime ill-suited to preventing and remedying environmental damage. It is wholly undesirable to reduce the effectiveness of that legal regime even further.’

Spain and Portugal were clearly worried about allowing limits on liability given their recent experience with the Prestige. Notwithstanding the convincing arguments of these countries they were apparently overruled in the common position which was adopted by the Council on 18 September 2003 and which included an exception in Article 4(3), that the directive should be without prejudice to the right of the operator to limit his liability. The addition of this new paragraph taking into account international instruments on liability for maritime and inland navigation to allow shipowners to limit liability under national legislation was considered in the statement of the Council’s reasons as a ‘major innovation introduced by the Council’.

Note, however, that the structure of the exception had changed. Where in the original proposal environmental damage regulated by CLC and by the Fund Convention had been excluded from the scope of the directive in Article 3, in the Common Position the exception is included in Article 4(2), where it is held that the directive shall not apply to liability or compensation which falls within the scope of any international convention listed in Annex IV. The CLC and the Fund Convention are again to be found in Annex IV.

In the second reading by the European Parliament on 17 December 2003, the Parliament asked the Commission to consider ‘the relationship between shipowners’ liability and oil receivers’ contribution’, when drafting the report on the functioning of the directive in years to come. This was aimed at making the allocation of financial compensation with regard to liability more balanced. The motivation for this amendment was that in 2003 (see above) the supplementary fund would make additional compensation available to victims of oil pollution from oil tankers up to 750 million SDR. The amendment holds:

This fund is to be financed by oil receivers in participating countries. The ship owners are therefore de facto less liable than they used to be. The existing relationship between ship owners’ liability and oil receivers’ contribution will thus be distorted, as a ship owners’ contribution to the fund is disproportionately low. In order to shift the responsibility to the ship owners, the allocation of financial compensation with regard to liability should be more balanced. Therefore a review of the developments in this relationship is desirable to guarantee a fair an proportionate allocation of responsibility between ship owners and oil receivers.

Moreover, another amendment was suggested to delete the above-mentioned Article 4(3) of the Common Position, allowing shipowners to limit their liability under national legislation. During the sitting of the European Parliament of Wednesday 17 December 2003 both amendments were accepted. The precise consequence of the deletion of Article 4(3) from the Common Position is not too clear. It rules out the possibility of the operator limiting his liability on the basis of conventions on liability for maritime and inland navigation, but, on the other hand, as far as the damage falls within the scope of the CLC and the Fund Conventions, they are still excluded from the Environmental Liability Directive on the basis of Article 4(2) of the Common Position. Hence, it is not clear whether the deletion of the amendment by the Parliament would completely satisfy the worries of Spain and Portugal.

The second amendment seems more modest in the sense that it only asked the Commission on the occasion of a review to take into account the relationship between shipowners’ liability and oil receivers’ contribution.

However, since the Parliament and the Council now had a different opinion, there was an institutional conflict that

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65 Amendment 27, art 18, para 3, point (a).
had to be resolved through the so-called Conciliation Procedure. An important issue, following the amendments accepted by Parliament, was how the Environmental Liability Directive would affect the international conventions.

At the Coreper conference on 14 January 2004, it was considered by several delegations not to be appropriate to interfere with an international compensation system which is not yet fully in place, and hence it was suggested to await the outcome of the discussions at international level first. This was accepted by the Commission in its Opinion on 26 January 2004. The Commission accepts fully the specification that on the occasion of the review the relationship between the shipowners’ liability and oil receivers’ contributions should be taken into account. However, the Commission cannot accept the proposal to exclude the right of operators to limit their liability in accordance with national legislation implementing international conventions on limitation of liability. The Commission holds that this amendment would significantly disrupt the overall balance of the Common Position.

On 19 February 2004, the Conciliation Committee reached an agreement. The Council agreed to the Parliament’s proposal that the Commission report on the functioning of the Directive should also examine the issue of the relationship between shipowners’ liability and oil receivers’ contributions, with the addition that due regard should also be paid to any relevant study undertaken by the International Oil Pollution Compensation Funds. Although there were different opinions on the duration of the period for the review at least it will take some time before the improved international regime comes into force and the effects of the directive can be examined. The report of the European Parliament concerning the joint text approved by the conciliating committee holds that the compromise reached concerning the limitation of liability in accordance with international conventions foresees that this right of limitation shall in principle be maintained but that the Commission shall review the application of the relevant provision, including any appropriate proposals for amendment in a report. This report has to be submitted to Parliament and the Council ten years after the entry into force of the directive. The Parliament’s report states that the Commission shall also pay particular attention to the differences between the liability levels in the Member States.

This overview of the coming into being of the Environmental Liability Directive and more particularly its relationship to the international conventions has shown that both the Parliament and some members in the Council (notably Spain and Portugal) were well aware of the fact that the limitation of liability of operators may indeed substantially reduce their exposure to liability. The end effect is that, as was already agreed in the Common Position, environmental damage is excluded from the scope of the Environmental Liability Directive in so far as it falls within the scope of the CLC Convention and the Fund Convention. However, the literature has regularly stressed that the definition of ‘pollution damage’ in these conventions is limited to ‘impairment of the environment other than the loss of profit from such impairment, limited to the cost of reasonable measures of reinstatement actually undertaken or to be undertaken’. This rather vague and undefined notion has been largely criticized in the literature. However, one could thus hold that environmental damage as it is far more broadly defined in the Environmental Liability Directive is to a large extent not covered by the CLC and the Fund Convention. They limit the compensation to the costs of reasonable measures of reinstatement, whereas the damage definition in the directive is much broader. Hence, one could probably still hold that for environmental damage not covered under the CLC and the Fund Convention (damage other than reasonable restoration costs) the much broader regime of the Environmental Liability Directive might still apply. In that sense the Environmental Liability Directive can have implications for the issue of oil pollution as well. However,

68 England held a strong view that the Community law was not the appropriate place to interfere with an international compensation system not yet fully in place, and more experience with the compensation fund for oil pollution damage was needed before the Community could legislate on the matter. Denmark, the Netherlands and Ireland agreed. The Netherlands noticed that the relationship between the shipowners’ liability and oil receivers’ contribution was at that time still studied in the context of the Fund Convention, therefore, it was suggested that the Community should await the results at international level. However, these delegations signaled that they would not stand in the way of an overall agreement because of this amendment.

69 The Supplementary Fund adopted on 16 May 2003, but has not yet entered into force.

70 Opinion of the Commission of 26 January 2004 (2002/0021(COD)).

71 The Supplementary Fund adopted in May 2003 is not yet in force, although the Community has urged its Member States to ratify the Protocol in order to bring it into force as soon as possible. No actual result will come out before June 2004, which is the stipulated deadline for the Member States to join the Supplementary Fund Protocol 2001.


73 CLC Protocol 1997, art 6(a).

74 EIB Loans in (72) 14+ 60.
the right of operators to limit their liability in accordance with other conventions has, notwithstanding protests from Parliament, Portugal and Spain, been upheld. Probably the review of the directive ten years after its entry into force will provide scope for a more fundamental rethink of the implications of the liability for environmental damage.

Concluding remarks

The issue of oil pollution damage has led to much public debate. Already after the first major oil spills (particularly with the Torrey Canyon) international conventions have come into being within the framework of the IMO, on the one hand aimed at preventing oil pollution damage and on the other hand aimed at providing compensation for the victims. These conventions themselves have very often been changed, an important feature of them being the limitation of the liability of the tanker owner. Whereas originally only tanker owners were liable for oil pollution damage within the framework of the CLC convention, later the oil transporting companies also contributed to compensation via the IOPC Fund, thus providing some balance in the contribution of tanker owners and oil companies in this compensation. However, every new incident seemed to be larger, leading to more damage and thus necessitating new amendments.

Europe to a large extent witnessed this development first at the international level without taking much action itself. Only after Europe itself increasingly fell victim to major oil spills (first with the Amoco Cadiz in 1978) were initiatives taken to prevent oil pollution damage. The incidents with the Erika and the Prestige led to an awareness that the international regime might be unsatisfactory. Europe did not want to wait any longer for the slow mechanisms of the IMO and took the initiative itself for a European COPE Fund which would provide compensation equal to that available under the American oil pollution Act (US$1 billion). In addition to taking these initiatives of its own, Europe also actively lobbied the IMO to increase the limits. In the light of the concrete proposal to set up a separate European fund, this European lobby within the IMO was apparently successful since the IMO adopted supplementary funding in May 2003 for SDR750 million, which at the time was the amount of the proposed European fund.

The supplementary fund has not yet entered into force. Only one country (Denmark) has so far ratified the Supplementary Funding Convention. However, the Commission is again urging Member States to ratify it by June 2004. If all European Member States were to ratify the convention, a sufficient number of states and tonnage would be available to enable the Supplementary Funding Convention to enter into force.

These developments show that the threat of a separate regional (European) regime which would come into being as a result of dissatisfaction with the IMO regimes apparently had the necessary effect of leading to rapid changes at IMO level. This is not to say, however, that the international oil pollution regime today is without its critics. The coming into being of the Environmental Liability Directive has shown once more the major weakness of this international regime, namely the limitation of liability of the tanker owner. The proposed (but rejected) amendments of Parliament and the interventions of Spain and Portugal to attempt to abolish these limitations also have their importance for the debate on limitation of liability within the CLC Convention (although this proposed amendment referred to other conventions). Although the amounts available in the IOPC Fund will be increased substantially once the Supplementary Funding Convention has entered into force, one may still wonder why the liability of the tanker owner should be limited at all. One may indeed question why those who create and expose others to specific risks should be allowed to limit their liability and so should not bear the full costs of their activity. Let us hope that the European Commission continues its activity within the IMO which may eventually lead to a more fundamental revision of the limitation of liability of the tanker owner.