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INTRODUCTION TO EUROPEAN ENVIRONMENTAL LAW

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1. INTRODUCTION

At the start of the European Economic Community in 1957 there was no such thing as a European environmental policy. Only since the sixties the environment became to be considered as an interest worth protecting in various Member States. Mostly as a result of some major environmental incidents various environmental statutes came into being in the different Member States of the EC. At the European level the first environmental measure "Avant la lettre" was adopted in 1967, the directive concerning the packaging and labelling of dangerous substances. This directive was followed in 1970 by a directive concerning the noise produced by motor vehicles. These incidental directives did, although they had some bearing on the environment, of course not constitute a real European environmental policy. One should indeed not forget that environmental concerns did not play a prominent role in the adoption of the just mentioned directives. The main reason for the aforementioned directives was to avoid trade barriers that would hinder international trade if the Member States would adopt a wide variety of all kinds of national environmental legislation. The goal of these first "environmental" directives was therefore the harmonisation of marketing conditions. After all, the EEC was an European Economic Community. Economic concerns played initially a more important role than environmental problems.

A real common environmental policy was first discussed in October 1972 at the Paris conference of state and government leaders of the European Community. The Community started to realise the importance of a transboundary approach towards environmental problems and the fact that environmental problems are often linked with the (economic) market integration that the Community strived for. In Paris the conference concluded that "economic expansion is not an end in itself. Its firm aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as standards of living. As befits the genius of Europe, particular attention will be given to protecting the environment, so that progress may really be put at the service of mankind."

With this important statement environmental protection was to be considered as one of the goals of a "steady and balanced expansion" as mentioned in article 2 of the EEC Treaty. Indeed, the 1972 Paris conference interpreted this notion of expansion not only in a quantitative, but also in a qualitative sense. Economic progress was no longer seen as a goal in itself. From then on more attention should be given to the quality of life and the human environment.

A real community environmental policy was developed when the first environmental action programme was adopted on 22 November 1973. This action programme contained goals and general principles of community environ-

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mental policy as well as a programme of this environmental policy with respect to specific community actions that had to be taken within the next five years. After the 1973 environmental action programme every five years a new programme followed. Recently the 5th environmental action programme4 has been adopted, titled "Towards sustainable development", in which an integrated approach towards environmental problems at the European level is proposed.

2. THE PROTECTION OF THE ENVIRONMENT IN THE EEC TREATY

Until 1987 the word environment was not even specifically mentioned in the EEC Treaty. Nonetheless, a large number of regulatory measures had already been taken with respect to the environment since 1967. Most of these measures in fact had two goals. Firstly, these measures aimed at removing restraints on the creation of the common market that could appear through differences in national environmental laws. Indeed, if two Member States would require different safety levels for e.g. motor vehicles, this would simply mean that the producer of motor vehicles incurs costs because he will have to adapt the cars he sells to the safety standards in the state to which he wants to export his product. These costs are obviously higher than when the safety standards for cars would be equal within the whole community. Removing trade barriers that could create market distortions through the harmonisation of national legislation was therefore one goal of community policy. Secondly, the EC also aimed at regulating transboundary aspects of environmental pollution and environmental protection at the European level. Many aspects of environmental pollution are in essence transboundary. It makes therefore obviously more sense to regulate these kinds of problems at the European level instead of regulating this in different national environmental laws. The general instrument of European Community action with respect to the environment was therefore harmonisation, being the co-ordination of national environmental laws of the various Member States.

Since European environmental policy came into being the Community now has taken approximately 445 regulatory measures with respect to the environment. Most of these regulatory measures are directives. There are about 200 directives related to environmental protection. The essence of a directive is that its result is binding on each Member State, but the Member States are free to choose the form and methods of national legislation to implement the goals of the directives5. One can therefore consider an EC directive as a binding order to the national authorities of the Member States to change or adopt national legislation to tackle a certain problem, often even in a specified way, to a specified result. One will therefore often not recognise EC directives in national legislation, since they are (sometimes unrecognisably) implemented in the national environmental law of the Member States. A large part of the

5 See article 189 EEC treaty.
national water protection statutes in the Member States of the EC is for instance based on the implementation of European environmental directives like, *inter alia*, the directive 76/464 of 4 May 1976 concerning the pollution caused by certain dangerous substances in the aquatic environment⁶.

As we already mentioned, originally the EC had no formal competence to issue regulatory measures with respect to the environment. The competence to issue environmental legislation was therefore initially a prerogative of the Member States. Nevertheless we noticed that already since the 1970's the EC issued an increasing amount of environmental legislation, since the EC interpreted its goals that broadly that it also encompassed the quality of economic development and human existence. This early EC environmental legislation was based on article 100 and/or article 235 of the EEC Treaty. Article 100 allowed for European measures to harmonise national legislation in order to remove or prevent barriers for the internal market. The instrument used for this harmonisation goal was the directive. Article 235 to the contrary was the legal basis for issuing legislation with a "pure" environmental goal. Indeed, as we indicated above since 1972 the protection of the environment was also considered to be one of the goals of the Community. Therefore the Community considered itself to have powers to issue regulatory measures to protect the environment even if they did not primarily aim at facilitating the economic goal of the creation of the common market. The competence of the Community to issue regulatory measures to protect the environment was however initially only based on a broad interpretation of the goals as laid down in the Treaty. Although the European Court of Justice (ECJ) confirmed this broad interpretation in 1985 by stating that environmental protection is one of the Community's essential objectives⁷, only since 1987 an explicit legal basis for Community action with respect to the environment was created with the entering into force of the Single European Act. To this end a new environmental section was added to the EEC Treaty which consisted of the articles 130r-130t.

This environmental section that was added to the EEC Treaty by the 1987 Single European Act started with a general provision concerning the principles and goals of European environmental policy; these were laid down in article 130r. Here one can find principles of environmental policy that had been issued through the various environmental action programmes, such as the precautionary principle, the polluter pays principle, the prevention at the source principle and two new principles, being the integration principle and the subsidiarity principle. Since the entering into force of the well-known Treaty of Maastricht (Treaty on the European Union) on the first of November 1993 the provisions with respect to the environment have again been changed and environmental concerns can now be found at various places in the EC Treaty. One can for instance point at the new article 2 which includes among the new tasks of the Community the "sustainable and non-inflationary growth of the environment" and at the new article 3, which states that the activities of the Community shall include, *inter alia*, "a policy in the sphere of the environment". In


addition, with the entering into force of the Treaty of Maastricht it was added
to article 130r that the "Community policy on the environment shall aim at a
high level of protection taking into account the diversity of situations in the
various regions of the Community". The subsidiarity principle that had been
introduced with the Single European Act in 1987 was removed from article
130r and turned into a general principle of Community Action in the second
paragraph of article 3b.

3. THE LEGAL BASIS FOR COMMUNITY ACTION WITH
RESPECT TO THE ENVIRONMENT

The first paragraph of article 3b of the new EC Treaty states that "The Com-
community shall act within the limits of the powers conferred upon it by this
Treaty and of the objectives assigned to it". Therefore, every time the Com-
unity takes action to protect the environment a specific legal basis to do so is
required. Since the entering into force of the Single European Act in 1987
legal action to protect the environment has mainly been based on the articles
100a and 130s.

Until 1987 the general rule was that any legal measure of the Community had
to be adopted by a unanimous vote of the Member States. The introduction of
the new article 100a by the Single European Act created an important change
in the decision making process. With the introduction of article 100a the una-
nimity rule was changed to a qualified majority rule\(^8\) as far as the creation of
the internal market was concerned. This qualified majority rule for harmoni-
sation measures was introduced to accelerate the creation of the common mar-
ket which had to be realised by 1993. The Treaty of Maastricht strengthened
the role of the European parliament, \textit{inter alia}, by changing the decision mak-
ing procedure of article 100a into the co-decision procedure\(^9\), which entails a
right of veto for the parliament.

Environmental concerns are mentioned explicitly in the harmonisation article
100a. According to the third section of article 100a the Commission will in its
proposals concerning environmental protection take as a base a high level of
protection. Article 100a, section 4 provides that a Member State can apply
national provisions on grounds of major needs relating to the protection of the
environment, even though a certain area has been harmonised through Com-
unity action\(^10\). Although environmental concerns are now explicitly men-
tioned in the new harmonisation article 100a, a measure taken on the basis of
article 100a still aims in the first place at the creation of the common market
through the harmonisation of legal rules. Article 100a is therefore not suited
for a "pure" environmental Community measure, nor was its predecessor,
article 100. To this goal the Single European Act introduced article 130s. This

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\(^8\) Article 148 of the EEC Treaty.
\(^9\) See the new article 189b EC Treaty.
\(^10\) On the interpretation of this section see: ECJ 17 May 1994, France v Commission.
new provision in fact takes over the role that article 235 had before the introduction of the Single European Act. Until the Treaty of Maastricht was adopted, measures taken under article 130s still required a unanimous voting. The qualified majority rule that had been introduced with the Single European Act in 1987 only applied for legal action taken under article 100a. The decision-making process for legal action taken under article 130s has however also been changed since the Treaty of Maastricht. The decision-making is now based on a qualified majority vote according to the co-operation procedure as laid down in article 189c of the Treaty. Like under 100a section 4, a Member State still has the possibility to adopt more stringent national legislation than the EC measures adopted on the basis of 130s. The legal basis for such action can be found in article 130t. However, these further reaching national measures have to be consistent with the provisions of the Treaty, more specifically the articles 30-36, 92 and 94.

As we have seen, the decision-making procedures laid down in articles 100a and 130s before their changes by the Treaty of Maastricht were substantially different. Article 100a, required recourse to the cooperation procedure, whereas article 130s required the Council to act unanimously after merely consulting the European Parliament. However, as we have said before, many environmental directives serve two goals, namely both the internal market and the environment. The ECJ however ruled that the "use of both provisions as a joint legal basis would divest the cooperation procedure of its very substance". Because of this incompatibility of decision-making procedures the ECJ decided in the Titanium Dioxide Case that harmonisation measures that have as a combined goal both the protection of the environment and the establishment and functioning of the internal market should be taken on the basis of article 100a. However, once a directive has as its 'objet principal' the protection of the environment, and the effect on the internal market is only a necessary or inevitable consequence of the regulation of this 'objet principal', its legal basis should be article 130s. It can be argued that the changes by the Treaty of Maastricht in the decision-making procedures have not removed the incompatibility of the two articles.

4. THE COMMON MARKET AND THE ENVIRONMENT

Member States are not completely free to adopt the national environmental regulations they would want. After national environmental laws have been harmonised through directives, the national Member States lose their powers to take independent legal action with respect to an area that has been harmonised. In principle the Member State still has the possibility to issue ad-

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11 There are however some important exceptions to the qualified majority rule that can be found in sections 2 and 3 of article 130s


14 ECJ 31 March 1971, Commission v Council, Case 22/70, ECR [1971], p.263
ditional legal measures, provided that the area concerned has not been regulated by a directive in an exhaustive manner. If the latter would be the case the Member States even lose their power to issue additional regulations, outside of the measures of discretion allowed for by the directive. In addition, we already indicated that a Member State that issues environmental regulations always has to take into account the relevant prohibitions as laid down in the provisions of the EEC Treaty. In this respect, we can more particularly refer to the provisions from art. 30 with respect to quantitative restraints on imports and articles 92 and 95 with respect to financial instruments such as subsidies that would be used by the Member States and that might distort competition.

4.1 Free Movement of Goods v. Environmental Protection

According to the provisions of article 30 and following of the Treaty all quantitative import restrictions and measures having equivalent effect are prohibited. Therefore, a Member State cannot blindly restrict or prohibit the importation of a certain (polluting) product. First it should be examined whether such a prohibition or restriction is in accordance with article 30. The interpretation of the notion equivalent effect seems to be most problematic in this respect. In the well-known Dassonville case the European Court of Justice decided that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions". Hence, every potential import hindrance, with or without distinction to domestic or imported products, falls in principle under this prohibition. In this respect one can for instance think of a general national prohibition to use a certain polluting compound (such as asbestos) or introducing a maximum admissible concentration of a certain compound in products. In both cases these national rules can potentially have the same effect as formal restrictions on imports if for instance all national products already comply with the standard, but imported products have to be adapted to this standard. As this could potentially raise the costs of import it would hinder trade; therefore they also fall under the prohibition of article 30. This broad prohibition of import restrictions as interpreted in the Dassonville case would mean that the goal of the realisation of the common internal market is considered that important that also products that are harmful to the environment can cross the national borders of the Member States without any limitation.

There is however an important exception that can be found in article 36 of the Treaty. This exception allows Member States to restrict intracommunity trade if the measures taken are justified "on grounds of ...the protection of health and life of humans, animals or plants". These measures "shall not, however,  

17 The ECJ has recently limited the scope of Dassonville importantly in some of its recent decisions. See ECJ 24 November 1993, Keck and Mithourd, Joined Cases C-267/91 and C-268/91, ECR, [1993] p. 1-6097.
constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". The grounds on which Member States can restrict intracommunity trade on the basis of article 36 have been interpreted in a series of decisions of the European Court of Justice. The measures taken have to be necessary and proportionate to the goal to be reached\textsuperscript{18}. The example of a prohibition of asbestos, as being a substance dangerous to the health and life of humans, animals and plants, could well be justified by the exceptions mentioned in article 36. On the other hand, the Court also decided that a general import prohibition on not-dangerous wastes cannot be justified under article 36\textsuperscript{19}.

Another important exception to article 30 was however created by the European Court of Justice in Cassis de Dijon\textsuperscript{20}. The Court held that a national trade restricting measure can be justified if, first, it applies in a non-discriminatory way to both national and imported products, second, if the goal of this measure is a mandatory requirement (such as public health in the Cassis de Dijon case) and, third, if the impact of the measure is proportionate to the interest that needs to be protected by it. This concept was extended to the field of the environment in the Danish bottles case\textsuperscript{21}, where the European Court decided that the environment can be qualified as a mandatory requirement. The Court held that environmental protection is an interest that can justify a national environmental policy with trade restricting effects, such as in casu a mandatory system of returnable containers for beer and soft drinks. Hence, since the Danish bottle case it is accepted that environmental protection can be one of the "mandatory requirements" which can restrict the applicability of the free trade principle of article 30. This exception of the Cassis de Dijon/Danish bottle case is in fact broader than the one offered by article 36. For the applicability of article 36 it is necessary that human, animal or vegetal life or health is at stake, whereas this is not required under the rule of reason of the Cassis de Dijon/Danish bottle case. However, an important condition for the applicability of the rule of reason of the mentioned cases is that the national measures taken apply to national and imported products in a non-discriminatory way. But even this non-discrimination principle has been alleviated importantly in the already mentioned Walloon waste case. The Court held in that case that the principle of preventive action at source, which implies that all regions or local authorities are entitled to adopt measures to limit transport of waste and to ensure that their disposal takes place as close as possible to their place of production, can justify an import restriction that only applies to foreign waste. The Court held that there was no violation of the non-discrimination principle although the prohibition in the Walloon regulation only applied to foreign waste. This principle of preventive action at source, which was introduced as a general principle of environmental policy in the single European Act, is

\textsuperscript{18} ECJ 20 May 1976, De Peijper, Case 104/75, ECR [1976] 613
\textsuperscript{20} ECJ 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), Case 120/78, ECR [1979] p. 649
\textsuperscript{21} ECJ 20 September 1988, Commission v Denmark (Danish bottles), Case 302/86, ECR [1988] p.4607
apparently considered to have priority over the freedom of trade and non-discrimination principles.

4.2 Taxes

According to article 95 of the Treaty environmental taxes are principally allowed under European law, provided that they are part of a general national system of taxes and are applied without discrimination to both national and imported products. In addition, the taxation may not lead to an indirect protection of other products. This means that products that are harmful to the environment can be submitted to higher taxes than environmentally friendly products, provided that such a taxing measure is applied to both national and imported products in a non-discriminatory way.

It therefore follows that national policy that wishes to introduce environmental taxes is not too much hindered by European limitations. The same can not be said for environmental subsidies which would be given by national authorities to for instance environmentally friendly production methods. An ex ante testing of the environmental subsidy to European law is required before the subsidy is awarded. Moreover, environmental subsidies are in principle not allowed under article 92 if they have a negative impact on interstate trade. The EC has however recently adopted a new set of guidelines for admissible environmental state aid.

5. EUROPEAN ENVIRONMENTAL LAW IN THE NATIONAL LEGAL PRACTICE

As we mentioned before, a large body of European environmental law has unrecognisably been implemented in the national systems of environmental law of the Member States. Most of these directives, the so-called secondary or substantive environmental law are therefore an integral part of national environmental law; hence it does not seem appropriate to discuss the contents of these directives in detail within the scope of this paper. The directives that have already been implemented can therefore be found in the national environmental legislation of the various Member States.

It is, however, noteworthy to discuss the legal mechanisms underlying the implementation of European directives. One can indeed note that an adequate implementation of the European environmental directives is often lacking. Directives are sometimes not implemented at all or only after the deadline for implementation passed; in other cases the national implementing legislation does not correspond with the provisions of the directive it is supposed to im-

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23 Official Journal, 1994, Nr. C 72/3

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plement. Therefore in this section we will address situations in which an implementation does not take place or takes place in an incorrect way. We will address the question whether citizens are able to enforce the rights given to them by European directives even though the Member State failed to implement the directive adequately.

Originally the duties laid down in the (then) EEC Treaty and coming from the European legislation based on the Treaty were only directed towards the Member States; the general rule was that individuals could not derive rights from EC legislation. This traditional point of view has, however, been changed dramatically. The most important changes concern the principle of direct effect, the principle of indirect effect and, most recently, the principle of state liability for defective implementation. We will now first address under what circumstances European directives can give a direct right of action to an individual citizen versus the government, the so-called direct effect. Then we will show how an individual can call on the rights given to him by a European directive in an indirect way via the principle of indirect effect which requires that national legislation has to be interpreted in a way which is in accordance with European directives. Finally we will give an overview of the possibilities of state liability to individuals for defective implementation.

5.1 The principle of direct effect

Already in 1963 the European Court of Justice decided in the well-known Van Gend en Loos case that the European Community constitutes a new legal order which gives rights not only to the Member States, but also to their citizens. The question whether individuals could extract rights directly from community law was according to the Court not dependent upon national legislation and had to be decided on the basis of the contents and wordings of the European legislation concerned. This Van Gend en Loos decision of the Court of Justice was the start of the development of the principle of direct effect. According to this principle a directly effective provision of European law can be called on by anyone who has an interest to do so in his own national legal system, using the procedural means that are at his position within his own national legal system. If a directly effective provision of European law is invoked, this European legal rule then has priority over national legislation, no matter what the status of this national regulation is.

In first instance this principle of direct effect was only used for provisions of the Treaty itself, but in the Grad case of 1970 it was also declared applicable to directly effective provisions of directives. In the Becker case the Court

24 For an overview of the status of the implementation of Community Law see Eleventh Annual report on monitoring the application of Community Law, COM(94) 500 final, Brussels, 29.03.1994
25 ECJ 5 February 1963, Van Gend en Loos, Case 26/62, ECR [1963], p.341

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summarised the principle, stating that "wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state".

From the Becker case and the following case law of the ECJ two conditions for direct effect can be deduced. First, the provisions of a directive that has not yet been implemented (or was implemented in an incorrect manner) have to be unconditional and sufficiently precise. Second, the time limit given for the implementation of the directive has to be exceeded. If these two conditions are met, directly effective provisions of a directive can be invoked with priority to national law by individuals.

Many examples of cases where directly effective provisions of European directives have been applied by national courts to put national legislation violating the provisions of the directive aside exist\(^{28}\). The legal protection given to citizens through this principle of direct effect has however two important shortcomings. First, it has been decided that provisions of a directive can not be invoked in a conflict between private companies or citizens (if, of course, the directive has not been implemented yet in national legislation). This exception, referred to as the lack of horizontal effect of directives, was established in the Marshall case\(^ {29} \) where European Court of Justice decided that "a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual". The compulsory character of a directive, which exactly explains the possibility to call on a directive before a national court, therefore only exists vis-à-vis the Member States to which this directive is directed. This rule has been somewhat alleviated by the Foster case\(^ {30} \) where the Court held that the notion of "Member State" has to be interpreted very broadly, as being organisations or bodies, whatever their legal form, which have "been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals". Nevertheless, an important restriction still applies if an individual wants to invoke a provision of a directive in a court case vis-à-vis another party that does not fall under the Court's notion of "state", even under the broadest interpretation of Foster. A second limitation is that in many cases European directives do not meet the conditions of being unconditional and sufficiently clear. In those cases where the conditions for the application of the directive have not been met yet or where the

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28 For an overview of examples in Dutch environmental law, see Jans, J.H., Europees Milieurecht in Nederland, Wolters Noordhof, Groningen 1994.
contents of the directive is not sufficiently clear the individual will not be able to invoke direct effect.

5.2 The principle of indirect effect

If the provisions of a directive do not have direct effect or if they have to be applied in a horizontal relationship between citizens, not-implemented directives can still play a role in national law since national law has to be interpreted in accordance with the provisions of directives. This notion, which is called the principle of indirect effect has been developed since 1984. It holds that the national judge has a duty, based on European Community law, to interpret national law in accordance with the goal and wordings of European law, more particularly directives. This duty of national judges to interpret national law in accordance with European directives is now of considerable importance in national legal practice, although it has been developed much later than the principle of direct effect. Nowadays, when a national judge is confronted with a conflict between national law and European legislation, he will in practice first examine whether the national law concerned can be interpreted in accordance with Community law before he will analyse whether the provisions of the directive concerned had direct effect.

This idea of indirect effect was first mentioned in the Von Colson and Kamann case\textsuperscript{31}. The European Court of Justice held that "in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [a] directive ..., national courts are required to interpret their national law in the light of the wording and the purpose of the directive". The Court decided that national courts have an obligation, based on EC-law to interpret national legislation in accordance with directives, which finds its ground in article 189, third al. and article 5 of the Treaty. This duty applies to all national authorities with government power, such as the judiciary. The Court held that these national authorities should, within the framework of their powers, take all the measures possible to realise the goals of a directive\textsuperscript{32}.

The principle of indirect effect has been further specified in 1987 in the Kolpinghuis case\textsuperscript{33}. First, the Court limited the principle by referring to general principles of law that are also a part of European law, such as the non-retroactivity principle. Second, the Court specified that the duty to interpret national law in accordance with directives applies irrespective of the fact whether or not the time limit to implement national legislation had passed. In the Marleasing case\textsuperscript{34} the Court gave a very far reaching interpretation of the

\begin{itemize}
  \item \textsuperscript{31} ECJ 10 April 1984, Sabine von Colson and Elisabeth Kamann gegen Land Nordrhein-Westfalen, Case 14/83, ECR [1984] p.1891
  \item \textsuperscript{32} ECJ 22 June 1989, Fratelli Costanzo spa v Comune di Milano and Impresa ing. Lodigiani spa., Case 103/88, ECR [1988] p.1839
  \item \textsuperscript{33} ECJ 8 October 1987, Criminal proceedings against Kolpinghuis Nijmegen BV, Case 80/86, ECR [1987] p.3976
  \item \textsuperscript{34} ECJ 13 November 1990, Marleasing SA v Comercial Internacional de Alimentación SA, Case 106/89, ECR [1990] p.4135
\end{itemize}
principle. The Court decided that a national judge has to interpret national law "as far as possible in the light of the wording and the purpose of the directive in order to achieve the result pursued by it", irrespective of the fact whether or not the national provisions date from before or after the directive concerned. In the Marleasing case there was not even a national implementing legislation that was discussed. Nevertheless the Court held that also in a horizontal relationship national law had to be interpreted in accordance with the applicable directive. Through this far reaching interpretation of the principle of indirect effect, the Court introduced the horizontal effect of European directives in an indirect way. Even though directives have no direct effect in horizontal relations (between citizens), they can still play a role using this principle. Obligations that were directed in the first place towards the Member States can now to a certain extent play a role against individuals as well, even if these European obligations conflict with national law. Legal practice will show how far this duty to interpret in accordance with European law will reach in the future.

To summarise, it can be said that the principle of indirect effect extends the principle of direct effect in three important ways. First, the principle also applies to provisions that are not directly effective. Second, the principle can be invoked as soon as the directive entered into force and not only from the moment that the time limit for implementation was exceeded. Third, the principle indirect effect can also be applied in horizontal relationships.

5.3 Francovich

Recently, another possibility was opened for citizens to take action against not or not-correctly implemented directives. On 19 November 1991 the European Court of Justice held in the Francovich case that under certain circumstances citizens who have suffered damage as a result of a lack of implementation by a Member State, can be entitled to compensation for this damage by the Member State concerned. Three conditions have to be met for such a right on compensation. First, the directive has to grant rights to individuals. Second, it should be possible to identify the contents of those rights on the basis of the provisions of the directive. Third, there has to exist a causal link between the violation of the duty to implement by the Member State and the damage loss suffered by the injured party. It should also be noted that the Court did not mention that for Member State liability it is not required that the provisions from the directive concerned should have direct effect.

The results of this Francovich case are far reaching. It means that an individual can claim compensation before a national judge in his own Member State, based on the provisions of his national tort law. The national judge will have to interpret the national tort law provisions in accordance with European law. This can have serious consequences for environmental law. Imagine for instance a situation where national drinking water companies have to stop the

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intake of water from the surface waters because of an emission in the surface waters of another Member State. Imagine further that the other Member State concerned would for instance not have implemented directive 76/464 of 4 May 1976 concerning pollution caused by certain dangerous substances into the aquatic environment of the Community and that the emission of certain of these substances which are prohibited under European law would be admitted under the national law of that particular state. In that case the drinking water companies might be able to claim compensation from the Member State concerned for the damage that the polluting emissions are causing them. We will have to wait for new case law of the European Court of Justice to see exactly how this Francovich doctrine will be interpreted.

6. CONCLUDING REMARKS

Although European environmental law is a relatively young field of law it has developed considerably in the 20 years of its existence. European environmental legislation has had a considerable influence on national environmental law. Many provisions of national environmental law were promulgated as a result of European directives.

The result of this is that many national environmental rules will have to be looked at from a European perspective. Hence, whenever there is doubt on the exact meaning of a national law or standard or if there is the possibility of a violation of European law, the national authorities and the national judges will have to interpret and apply the national legislation in a European context. The national judge will most likely first examine whether the national provision can be interpreted in accordance with European law, where his freedom of interpretation reaches rather far according to recent case law. Only if it appears that such an interpretation in accordance with European law is not possible, for instance because there is an explicit contradiction between national and European law, it will have to be examined whether the European provision has direct effect vis-à-vis a Member State or state institution. In that case the European rule can be invoked directly against the state or the state institutions, so that national provisions that would conflict with the European standards would have to be put aside. If also this possibility would not be possible in practice, one can finally examine whether the state that failed to implement the European legal norm correctly, committed a tort for which it is liable to compensate the citizen that suffered damage as a result of this fault.