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Commission I – Kommission I

**AGRICULTURE, ENVIRONMENT AND FOOD PRODUCTION:
THE ROLE AND LIABILITY OF THE FARMER/GROWER**

**AGRICULTURE, ENVIRONNEMENT, ALIMENTATION:
FONCTIONS ET RESPONSABILITES DE L'AGRICULTEUR**

**LANDWIRTSCHAFT, UMWELT UND ERNÄHRUNG:
ROLLE UND HAFTUNG DES LANDWIRTS**

National Report – Rapport national – Landesbericht

Denmark – le Danemark - Dänemark

The Role and Liability of the Farmer/Grower

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1. General questions regarding Community law

1.1) *Specific norms dealing with civil liability of farmers*

There are no specific norms in Denmark dealing with civil liability of farmers. On the contrary, farmers or agricultural pollution are often exempted from liability rules, e.g. as regards soil pollution and environmental liability in general. The 1994 Environmental Liability Act¹ that introduced an objective liability for environmental damage regarding certain industrial installations only names one category of agricultural installation namely properties with manure storage tanks larger than 3.750 m³. The objective liability embedded in the Act is specifically related to the risks of manure storage of a certain volume. Thus, other damaging activities than leakage from manure tanks will not be subject to objective liability. Although the Act has a relatively broad concept of environmental damage only holders of certain rights will be able to raise claims according to the Act.

The 1999 Soil Pollution Act² which is generally based on clean-up responsibility etc. for polluters – explicitly exempts agricultural pollution stemming from the spreading of pesticides, fertilizers, manure etc. Point-source pollution of pesticides, e.g. by spills, falls within the act. However, this does not affect the possibilities to invoke civil liability claims according to the general liability rules.

Only one very specific piece of legislation includes specific liability norms for farmers (and others) spraying pesticides that may be toxic to bees. Beekeepers, seed-breeders and others may according to the Act on Bee-keeping³ claim compensation based on general liability rules.

1.2) *Liability for defective products*

The Danish Act on Product Liability (1989)⁴ also includes agricultural products. The specific exemption as regards unprocessed agricultural products was repealed with effect from 4 December 2000 in accordance with Directive 1999/43/EC amending Directive 85/374/EEC. Previously, the concept of “unprocessed agricultural products” had been interpreted narrowly.

1.3) *Liability for environmental damage – Nitrates Directive*

The implementation of the Nitrates Directive in Denmark has not included rules on civil liability for farmers. The general rules on civil liability, however, cover a fault based liability for pollution of e.g. watercourses. Several court cases hold farmers liable for pollution caused by the handling of manure, either spreading or leaks from storage tanks etc. As mentioned above since 1994 an objective liability applies as regards manure storage tanks according to the Act on Environmental Liability.

¹ Act no. 225 of 6 April 1994.

² Act no. 370 of 2 June 1999.

³ Consolidated Act no. 585 of 6 July 1995.

⁴ Act no. 371 of 7 June 1989 as amended by Act no. 1041 of 28 November 2000.

1.4) Code for good agricultural practice

Good agricultural practice as regards fertilizers is in Denmark embedded in law and thus applies as general restrictions upon all professional farmers. According to the Environmental Protection Act (1973/1991)⁵ rules have been laid down on storage, spreading etc. in a regulation.⁶ Additionally, the Act on Fertilizers (1998)⁷ requires the elaboration of fertilizer accounts based on N-norms, N-efficiency norms and the establishment of “green fields” etc.

As regards pesticides there are certain education and reporting requirements according to the Act on Chemical Substances and Products (1979)⁸ and the Act on Pesticide Reports and Equipment Control (1993).⁹ On a more voluntary basis the advisory service operates with codes of good spraying practices and integrated control.

The requirements for “good agricultural practice” do not include rules on civil liability. Civil liability has not been discussed in the so-called Action plans regarding pesticides and the aquatic environment (nitrates) that has been adopted by the Government since the mid-80’ies. At the moment new Action Plans both as regards pesticides and the aquatic environment are being discussed.

1.5) Regulation of diffuse contamination

There are as mentioned above a number of rules that seeks to prevent diffuse contamination in particular as regards nitrates. These rules are issued according to the Environmental Protection Act and the Fertilizer Act. Since the mid-80’s there has been an increasing political attention regarding agricultural pollution of the aquatic environment which has resulted in several so-called Action Plans adopted by the Government. A quite comprehensive general regulation of manure handling cf. above has been adopted as a follow-up to the Action Plans. This is of course supplemented with licensing and EIA requirements for livestock installations. More recently, focus has also been directed towards airborne pollution of sensitive natural or semi-natural areas, e.g. heaths and bogs, and initiatives have been taken to reduce ammonia pollution through storage and spreading requirements etc. Presently, the establishment of buffer zones is being discussed.

2. Specific subjects of civil agricultural liability

2.1) Limitations as regards phytosanitary products and pesticides

Generally, pesticides and phytosanitary products should be used according to the conditions stipulated on the product. This may include certain limitations as regards the application of the products. It has been agreed politically in Denmark that the use of pesticides should be reduced by the amount sold and by the so-called treatment frequency. Different measures have been put into place to achieve these goals. However, most of the measures are based on voluntary initiatives.

There is a general legal basis in the Act on Chemical Substances and Products to issue rules that limits the use of pesticides in specific locations. Such rules have not been issued yet. Alternatively, pesticide free zones are sought established on a more voluntary basis. The Nature Protection Act identifies a number of areas in which it is prohibited to change the natural environment, e.g. by starting to spray with pesticides. These general “compensation-free” protection rules, however, do not restrict the existing use of the area. A very specific piece of

⁵ Consolidated Act no. 753 of 25 August 2001.

⁶ Regulation no. 604 of 15 July 2002 on livestock installations, manure etc.

⁷ Consolidated Act no. 551 of 2 July 2002 on agricultural use of fertilizers.

⁸ Consolidated Act no. 21 of 16 January 1996 (several later amendments)

⁹ Act no. 266 of 6 May 1993.

legislation regarding a part of the Wadden Sea Area – the Tönder Marsh Act¹⁰ – generally prohibits the use of pesticides in this area. Otherwise, the use of pesticides may be limited or prohibited on an individual basis by agreement or by the issue of an order. Farmers will generally be compensated for restrictions in existing land use practices.

As a new area of regulation the use of genetically modified organisms will trigger new rules on so-called co-existence between GMO-farmers and non-GMO-farmers. In March 2003 a ministerial report on this issue was published and a new bill is expected to be presented in Parliament in Spring 2004. The proposed act may include specific liability rules regarding the relationship between farmers, but not in other respects, e.g. environmental damage in general. The ministerial report concludes that neither the Act on Product Liability nor the Act on Environmental Liability will apply in the case of pollen spreading from one field to another. Regarding the general liability rules the report concludes that a GMO-farmer may be held liable due to fault. The report and a follow-up strategy argues that specific liability rules will not be needed, but that a supplementary compensation mechanism may be established for those cases where a damage will not be compensated by the GMO-farmer.

Regarding liability for environmental damage as such caused by GMO's the Environmental Liability Act only applies to contained use of micro-organisms and not to the growing of GM-crops.

2.2) Vulnerable zones or special zones of protection

Apart from the above mentioned rules an indirect restriction as regards pesticides and fertilizers exists according to the Watercourse Act. The Watercourse Act in Sec. 69 establishes a 2 m cultivation free zone along almost all watercourses. This restriction has been challenged by farmers claiming compensation. However, the Danish Supreme Court declared the 2 m cultivation free zone as "compensation-free" regulation since it was a general restriction with only very limited significance to the farmers.

2.3) Non-compliance reactions

Non-compliance in the above mentioned cases is normally considered as a simple administrative infringement followed by criminal proceedings. However, if an economic damage has been suffered civil liability claims can be brought forward.

2.4) Licenses or administrative authorizations for agricultural activities

An environmental license is required for all livestock installations above certain size limits according to the Environmental Protection Act. Environmental licenses are, however, primarily focused on pollution stemming from the installation as such and not on e.g. land use activities. In the Environmental Protection Act there is a legal basis for issuing rules on environmental licenses for all livestock installations within "nitrate management areas". Such rules have not been issued yet, however. The EIA requirements imply a broader regulation of livestock installations focusing on land use activities as well. There are, however, a number of problems in this respect. If a license is not required an EIA permit must be issued also for other agricultural activities than livestock installation, cf. Annex II in the EIA Directive 85/337/EEC as amended by Directive 97/11/EC.

Generally, acting within the limits of a license or other restrictions does not exempt from liability. As regards fault based liability it can, however, be difficult to prove fault. This cannot be excluded, however. As regards objective liability according the Environmental Liability Act farmers will be held liable although acting within the limits of a license unless very specific prescriptive norms have been laid down.

¹⁰ Act no. 111 of 12 March 1998

2.5) Specific norms of civil liability within protected areas

In Denmark, there are no specific norms of civil liability concerning agricultural activities causing damages within protected areas.

2.6). The polluter pays principle

In the public debate it is often put forward that the polluter pays principle does not apply to agricultural activities in Denmark. To some extent this attitude can be explained by the fact that farmers are often paid not to pollute when it comes to restrictions in land use activities. Such restrictions may be in conflict with the constitutional protection of property rights and thus requires compensation. However, a number of restrictions in particular with the purpose to reduce agricultural nitrates pollution have been established without compensation. Thus, the costs of such restrictions, e.g. lower yield, has been “paid” by the farmers in accordance with the polluter pays principle. Agricultural activities are also, however with some exemptions, subject to ordinary liability norms. Apart from such rules, there are, no concrete manifestations of the polluter pays principle with regard to agricultural activities.

2.7) Jurisprudence related to civil liability

There are court cases – often by the lower courts - that hold a farmer or others liable for causing environmental damages based on fault. Most cases are related to a leakage or spill of animal manure to the aquatic environment. In relation to leakages from manure tanks the courts have applied a fairly strict liability (objective liability now applies according to the Environmental Liability Act), e.g. MAD 2001.154 Western High Court. Not only the owners of the property (farmers) but also workmen etc. have been held liable. In other cases fault has been handled in less strict terms, e.g. a case concerning storage of compost containing e.g. plastic, glass and metal. The compost could not lawfully be spread on the land. However, the authorities felt it necessary to remove the compost from the property and claimed reimbursement of the incurred costs from the farmer (property owner). The farmer refused to pay and the district court held that just receiving and storing the compost was not sufficient to hold the farmer liable (MAD 1996.622).

In an old case (UfR 1952.364) the Supreme Court held a company that was spraying pesticides on a field liable for the damage to a neighbouring field due to strong winds during spraying.

In a more recent case (UfR 2003.1628 Eastern High Court) the permit to establish a manure tank 100 m respectively 50 m away from two neighbours was declared invalid since the authorities had not informed the neighbours before the permit was issued and additionally not in a sufficient manner had taken all relevant aspects into consideration. In this case, thus, the authorities will have to pay for the removal of the manure tank. There are so far no court cases that hold a farmer “liable” in a nuisance suit, but an increase in the number of cases can be expected.