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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 RESPONSIBILITES DE L'AGRICULTEUR

LANDWIRTSCHAFT, UMWELT UND ERNÄHRUNG: ROLLE UND HAFTUNG DES LANDWIRTS

General Report – Rapport général – Allgemeiner Bericht

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General Report

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Introduction

The topic dealt with by the Commission revealed its enormous significance to the main co-ordinator in two respects. On the one hand it revealed how much the different legal views on the topic have in common. On the other hand it was very satisfactory since it allowed Member States and International Organisations alike to adjust to the liability of farmers for damages to the environment caused by them, focussing on solutions, which have proven useful in a great number of instances. When evaluating the questionnaire addressed to all Member States we did not at first find many parallels. However we considered it to be extremely useful as a means of demonstrating the different problems, which arise for a lawyer in this context. The introduction also addressed the problems, which result from the existence of several persons or undertakings in a chain that ranges from the farmer to the consumer. Problems also arise from the different kinds of liability, which in turn are due to different kinds of damages that the product might suffer when moving along that chain. Indeed, in the case of any tortious act one should determine the kind of damage and also what the cause of the damage was. In addition to that it would have to be clarified whether the damage should be attributed to the farmer, or the co-operative society, or the natural or legal person charged with storing the goods, or the distributor, or the seller of the goods. This distinction is important as this study only deals with liability of farmers arising from damage to the environment, which occurred during the exercise of some agricultural activity. Some reporters extended the definition of damage to torts injuring human health by relying on food-stuffs regulation when looking for a legal basis for civil claims. Such an approach would, however, take us too far away from the objective of this Study, which is to avoid farmers having liability for damage to the environment.

It was very important to learn about the current state of the problem in all the different countries. Therefore the questions were put in a way as to gather the content of national legislations. Legislation turned out to be quite similar with regard to certain issues. For some issues, however, solutions were presented which are stimulating and even totally new to some states. We will now go through the issues - very briefly in order not to draw out my presentation excessively - by focusing on the main criterion to which was attributed the highest importance when answering the relevant question. At the basis of the presentation is a definition of damage, which is drawn from the draft Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage. According to the draft directive the definition of damage covers certain damage to the environment, in particular damage to biodiversity , which is protected under Community law as well as national law, contamination of water, and damage to human health if the danger for health is due to a contamination of the soil. In any case it must be taken into account that when it comes to the scope of application of the future directive with regard to professional activities, Annex I covers agriculture only indirectly when it reads “manufacture, use, storage, transport or emission of phyto-sanitary products or their active materials as well as the manufacture, use, storage, transport or emission of biocide products or their active materials”. There is, however, a more pertinent passage in Art. 3 Nr. 2 which makes the Directive applicable to damage to bio-diversity if that damage is caused by an activity not covered by the Annex I or a risk of such activity. It must be noted that in the latter instance the tort-feasor is liable only if there is evidence that he acted intentionally or negligently.

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1. General Questions and Community Law

1.1) In the first place we wanted to know from a legislator's point of view whether every country has adopted special provisions regarding the liability of the farmer

We will not address the definition of the farmer, which again would lead us to far away from the topic of this study. Nevertheless we agree with the Italian reporter to treat farmers and agro-undertakings alike. The latter should work under the same conditions as the natural persons who practice agriculture, forestry or stock farming. The definition covers also those who carry out related tasks such as processing, storing, conversion and marketing of products, which are grown in the exercise of the activities mentioned above and which secure the supply of goods and services, including activities of rural tourism.

Most states answered the question above in the negative. They confirmed that there were no special liability provisions for farmers, which were different from the provisions which would usually regulate the consequences of a tort according to civil law codifications or laws of procedure. In Belgium for example there exists an objective liability rule, which is based on the fault of the party responsible for the damage. However this has an irreversible consequence. The fault results from the violation of a legal provision. The provision containing an obligation or a prohibition may under certain circumstances be accompanied by an obligation to seek administrative authorisation. In Italy, the Art. 2137 of Codice Civile lays down that the farmer must obey the legal obligations and co-operative rules relating to the exercise of agricultural activities even if he uses the agricultural property of another person while exercising his activities. A more special legal regime is to be found in Slovenia where a higher standard of management is required ; this is due to the fact that new provisions have been introduced which set a minimum of qualification for certain agricultural activities. Also In Poland there exist special provisions relating to pollution control, environmental protection and mining. In fact those provisions are only modifications of the general liability regime of the Civil Code. There is, however, a provision for liability for damage caused to consumers by deficient products. This provision resembles Argentine law where the fundamental provisions on liability are contained in the country's civil law codification.

In addition to that Art. 1113 of the Italian Civil Code makes it possible to disregard subjective responsibility and focus on objective liability that is to say on the creation of a risk. This can be achieved by applying rules relating to consumer protection and the law concerning food-stuffs, although these were designed for industrially food-stuffs products and not for the naturally grown products of agriculture. The classification of the possible defects in agricultural products applied by the Argentine reporter seems to be acceptable. The following defects are differentiated : "Defects of production" which are connected to the origin of the product and affect smell, taste, colour, size, ripeness or cause residues ; "conceptual defects" defects which are inevitable and unforeseeable because they are due to the quality of the seeds ; "defects of commercialisation" which occur if the information for the consumer relating to storage, use, durability of the product proved to be insufficient ; "Lack of production" which leads to unknown side effects and might harm consumer's health due to inadequate research. The latter defects entail a high risk especially when it comes to genetically altered products, but also in relation to other kinds of products where a type of damage is likely to occur after a long period of time. If in such a case it can be shown that the farmer behaved with due diligence, interesting questions of liability arise. It should be seen that it is especially difficult to hold liable a farmer who at the time of the production of the good could not foresee the future damage due to his agronomic knowledge. The draft for a directive on liability was cautious in this respect and excluded the liability of the party causing the damage if he could not foresee it. When deciding on the question of liability one has to take into account the technical and scientific knowledge at the point in time when the emissions took place or when the tortious act was committed. This distinction is important as it allows the relationship between the farmer

and the damage to the environment to be examined in each case individually . The Netherlands has not adopted a special provision either. In general, claims against farmers are based on Art. 162 of the civil law codification, although the farmer may also be caught by provisions on use of dangerous livestock products. There, however, the farmer is liable because of the high risk of damage involved.

Moldavia does not follow this general criterion, since a very important provision has been adopted for this purpose : according to Art. 5 of the law on agriculture “the environmental protection of a holding of land has absolute priority over any other kind of activity”. This is not only a provision which serves to control environmentally adapted agricultural activity, but which also contains a hierarchy of values, clearly and unconditionally defining the true essence of agriculture. For all agricultural activity will influence the ecological equilibrium. According to the reporters the priority rule covers any kind of ground, both agriculturally used ground as well as privately owned land. Norway has also come up with a kind of special provision. It has adopted provisions on liability, which become applicable if damage occurs in the exercise of an agricultural activity, such as grazing reindeer or other damage caused by animals. Although Finland has a special set of rules for liability in case of damage to the environment, none of these rules apply especially to damage that occurred in the exercise of agricultural activity. This is even the case in respect of a rule, which provides for liability where damage has been done to the environment by emitting pesticides, or dung which has been collected when growing genetically altered products. Liability may only arise if there is evidence that the act of pollution is the cause of the damage done to the environment. Norway has also adopted special provisions in some areas. All owners of reindeer of one district are jointly liable to other farmers if damage caused by grazing reindeer is discovered. There are also special rules in place relating to the farmer’s liability for damages caused by their livestock or their employees. Another criterion has been developed in Argentina where no special rules exist with regard to the farmer’s liability for damage suffered by the environment as a consequence of some agricultural activity. The legislation contains provisions covering the protection of the environment, which by analogy may be applied to the damage to the environment mentioned above. In this context the restoration of the land to its previous condition is decisive. Avoidance of liability is only possible if it can be shown that the farmer applied all means at his disposal to avoid the damage and that he did not act negligently. In the U.S. the law for a liability claim based on negligence requires that the applicant shows that the defendant was obliged to apply a certain standard of diligence, that he violated the latter obligation, that the applicant suffered a damage, and that the non-compliance with the due diligence obligation resulted in the damage incurred by the applicant. Liability may also be found if the defendant engaged in an action, which normally would be deemed to be risky and dangerous. In order to better define the risk at hand the jurisprudence relies on certain criteria such as the degree of risk, the probability of damage occurring, the ability of the defendant to avoid the damage, the frequency of exercising the activity, the economic value of the activity and the circumstances at hand. The U.S. system may be analysed as voluntary and conditional as some of the government state aid is granted subject to the condition that farmers engage in environmentally friendly and sustainable agriculture.

It is clear however that since the entry into force of Directive 99/34 the principle of objective liability applies. This principle applies to any product, which caused damage even, of course, to agricultural products.

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1.2) The second question was mainly addressed to EU-Member States. It aimed at exploring to what extent Member States have implemented Directive 1985/374 of July 25, 1985 with regard to damage caused by deficient products. It was of special interest whether agricultural products were covered when implementing the Directive

Those countries, which until today have not become members of the EU have chosen different solutions. Poland has introduced a definition, which in meaning corresponds to Art. 2 of the Directive in the version of May 10, 1999. According to this definition all goods may be considered as products, even if they have become part of another product. This holds true equally for products of animal origin and products obtained from animals as for electricity. In France it is obligatory to inquire in time with a public authority, namely the French Authority for Sanitary Safety, whether the government is planning amendments to the existing legislation relating to animal diseases and vegetable products. Farmers failing to get the information in time may see their permissions granted earlier, withdrawn or declared null and void (Art. 356 of the Code Rural). This rule has a preventive effect, which cannot be valued highly enough. In addition, there is for the benefit of the consumer on the one hand an obligation to provide information as to the origin of the products offered on the market and on the other hand the law provides for measures whose objective is to secure transparency in the chain ranging from the producer to the consumer. When it comes to sanctions, the French authorities may impose several penal sanctions in order to prevent fraud involving foodstuffs, which puts at risk consumer health. Furthermore provision is made for objective and non-contractual liability.

A product is considered dangerous as soon as safety cannot be guaranteed during normal and intended use of the product. Liability for deficient goods (product liability) is a liability for risk. Exemption from liability is possible under certain circumstances. Despite existing product liability, further liability caused by non-performance or performance of contractual obligations is not excluded. One could also think of a guarantee for deficient products, such as a guarantee for qualitative deficiencies, which could be applicable alongside product liability and lead to a concurrency of legal bases. In such a situation the injured party may choose the legal basis, which appears to be the most favourable.

Not in contradiction to that and in the light of the approaching accession to the EU, the Polish reporter takes the correct view that all provisions fielding this area have to be interpreted in accordance with Directive 83/374. Nevertheless, when implementing the Directive the decisive question is whether or not agricultural products are considered to be natural products which are not covered by the Directive. In Norway primary products and processed products are caught by the law on product liability, but as emphasised by the Norwegian reporter, only in cases where fertilizers and seeds are involved. In the case of Italy, Art. 2 of the law of May 24, 1988 excludes from product liability products of animal origin, such as products of hunting and fisheries, which have not been altered or processed. The reason for this exception is the following : it is for example impossible for the farmer to foresee or avoid external environmental influences such as acid rain or pollution. In many cases finding the one farmer who is effectively responsible for the damage or who can be held liable adds to the existing difficulties. Finland has implemented the Directive by adopting the law on product liability of 1990. The scope of application of the law extends to products, which cause damage to either person or property. A precondition for the application of the law is however that the product was intended for private use and that it has been used accordingly. In addition to that Law 728/2000 has been adopted which contains a special provision on liability for damage, which is caused in the context of packaging and importing seeds.

In Belgium the Law of July 25, 1991 implements the Directive. In general the law was not applicable to agricultural products unless the products had been processed. After the publication of Directive 1999/03, Belgium implemented at once it by adopting the Law of December 12, 2000. This later law extends the scope of application to agricultural products.

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Accordingly a product is now understood to be any moveable, corporeal good, independent of it being part of another moveable or immoveable good or of being worked into an immoveable good.

Product liability can arise whenever there is damage, a deficient product and a causal link between the defect and the damage under normal use of the product. In the U.K. the implementation took place in 1987, but an amendment was made in 2000. Since the amendment, agricultural products may be a deficient product within the meaning of the Directive. The law however provides for a number of exceptions. The farmer is not liable under the following conditions :

- If it can be evidenced that the defect can be traced back to acting in compliance with legal regulations or EU legislation.
- If the person can show that he did not supply the product.
- If the product was not delivered as stipulated.
- If the product was not deficient at the time of delivery.
- If according to the most recent technical and scientific knowledge it was impossible to detect the defect.
- If the product originally delivered did not show a defect. This rule is not applicable if the defect can be traced back to later processing which the farmer could have avoided.

The implementation of the Directive has raised another important point, namely the question of what point in time a product becomes defective. According to COSTATO a product can be defective, without causing any damage whatsoever. In the view of the Italian reporter, who relies on the criterion in Art. 5 of the law 224/88, a product is defective “if it does not guarantee the same safety which may under normal circumstances be expected of a product of the same type.”

Relying on Directive 85/374 the Netherlands tried to take advantage of the situation to create a special legal regime for agriculture. The Dutch authorities argued that such a regime was necessary to protect Dutch agriculture from unfair competition, since it was unclear whether other Member States would also introduce liability for agricultural products. In the aftermath of Directive 1999/34 the special regime was abandoned and farmers were treated like other producers with respect to the question of product liability. The consequence of this is that farmers can be held liable for damage that their products inflict upon third parties. It is often however very difficult to determine who the producer is, e.g. in the case of eggs.

In Austria the principle of limited liability is very important. The applicant needs to show that the defect is contrary to a black letter law provision and that the defect in the product was foreseeable according to the state of technical and scientific knowledge at the time of the sale. The limitation for bringing the claim expires ten years after the time of sale.

1.3) The third question alone would be sufficient to preoccupy a Commission of the Congress. It revolves around the liability of the farmer for damage to the environment caused by nitrates

The fact that for some time now there has been a Directive explicitly devoted to this issue makes it especially interesting to find out how the Member States apply the Directive and which measures are applied by countries which are not members of the EU. There is a wide range : there are for example countries like France which have introduced a penal and a civil law provision, although France has been taken to a French court for non-implementation of the Directive. There are other countries such as Belgium, which provide comprehensive legislation on the issue. As far as potential damage to the environment is concerned, these provisions have a strong preventive and deterrent effect, even if only penal and administrative law

sanctions may be imposed. The penal law provisions allow for a victim to have recourse to civil law with a claim for damages. Under Polish Law the liability of the tort-feasor arises from his obligation to prevent damage from occurring. Within a claim for liability the applicant may demand on the one hand that the status quo ante be restored and on the other hand that the protection measures provided for by law are applied. If the damage is caused to the environment, liability for fault and for risk may be invoked. Italian legislation names the geographical areas, which are most sensitive to the agricultural use of nitrates. In those areas the exercise of agricultural activity has to comply with a special protective legal regime. Waters polluted by nitrates have to be restored. After the designation of these areas farmers are given a two-year time period to adjust to the new situation and to clean the contaminated waters.

Moldavia, of course, did not implement the Directive. However Moldavian legislation contains a prohibition against using chemical products, including mineral fertilizer, in specific areas such as near rivers, lakes, wells and other environmentally protected areas. Correspondingly all natural or legal persons contaminating the waters by foodstuffs or toxic substances can be held liable according to Art. 94 of the Law Governing Waters. Sanctions are put in place by a supervisory authority for environmental matters against all sorts of legal subjects, independent of their legal form, whenever there is suspicion of waters being polluted. Finally it should be mentioned that according to Art. 75 of the Law on Environmental Protection it is prohibited to store and use fertilizers and pesticides in non-authorized places, particularly in protected areas.

The Slovak government did not implement the Directive either. In this country the entire Slovak territory is considered to be an area vulnerable to the use of nitrate, since the 170 kg of nitrates, which are added to the soil each year as stable manure remains unsurpassed in Europe. The U.K is also divided into zones. Currently 47 % of the territory is considered to be endangered areas.

Finland has created a detailed legal regime (Decree 931/2000), which contains a plethora of rules to promote environmentally friendly agriculture. Several issues of agricultural activity are explicitly addressed : for example storage and use of natural fertilizers, use of chemical fertilizers, rules pertaining to sealing up silos, as well as the liability of the farmer when analysing nitrates, the registration of the quantities of fertilizers used and the productivity of a particular crop. The decree furthermore contains instructions on the storage of natural fertilizers (such as fertilizer obtained from stable manure) and lays down a period of time during which the use of fertilizers is prohibited, namely from October 15 to April 15, subject of course to certain exceptions.

In Norway the Directive on Nitrates has been integrated into Regulation N° 337 of November 2, 2002. The Regulation aims at protecting waters. It contains *inter alia* a liability clause according to which the tort-feasor is obliged to compensate for damage, i.e. for restoration measures in default of which his state aid may be reduced.

In the U.S., everything in the context of feeding cattle is especially regulated (CAFO). These rules require public authorisation from the competent authority to release substances into waters within the U.S., unless the quantity is so small that no authorisation is required.

1.4) The “Code of Farmers’ Best Practices” can be of remarkable help, if they comply with the criteria of Annex II to Directive 91/676 of December 12, 1991

On the one hand codes of conduct serve as a standard for uniform instruments to promote environmental protection within the entire EU, on the other hand they are an efficient legal basis to harmonise the legal position of farmers in the EU. An important additional element has been mentioned by the Moldavian reporters. Best agricultural practices are not only important for farmers, but also for scientists and local officials who are not yet very experienced in the fields of agriculture, agronomics and environmental protection. However the latter in particular have to supervise the way an area is worked and protected. They should be in a position to offer to farmers technologies which do not contaminate the soil and which take into account ecological

standards. So long as no harmonised codification exists with respect to best agricultural practices, it seems advisable to follow the criteria set up by certain countries such as Argentina and to create best practices areas other than the protection of waters. For example, in the agricultural sector comparable hygiene and production standards have been established with respect to packaging, storage and transport of fresh vegetables, aromatic products and fresh fruit. Belgium as not embraced such legally legitimised standards. However The authorities offer information brochures for every sector which are intended to spread technical and practical know-how. The objective is to strengthen the competitiveness of farms within the boundaries set by environmental protection. A variety of best practices can be found in Norway, such as provisions on storage of fertilizers and fodder, on growing, on biodiversity, on waste products, on erosion and on pollution of the air.

Poland has published a collection of all best practices in the Law of July 18, 2002. The law requires farmers to take preventive and precautionary measures when exercising their agricultural activity in order avoid serious contamination of waters. The law of July 26, 2000 goes even further. It provides for penal and administrative liability in case of damage to the environment or contamination of waters, which has been brought about by the use of nitrates. In the U.S. an abundance of so-called “best management practices” (more than 40) have been recognised. Some of them touch upon agriculture and should be mentioned here : best management practices relating to the storage and preservation of agricultural products, practices with respect to dealing with fodder and with respect to the cultivation of the soil. Administrative sanctions come into play where dung is being used, marketed, transported or stored. For lesser offences penal sanctions are applied. “Best agricultural practices” as well as special legal provisions (water and environmental protection) fall under the civil law codification as far as liability is concerned if no other express provision is made. The private law codification contains the principle that it is always a liability for risk. Slovenia has established a Code of best agricultural practice for dealing with machinery. The code lacks normative character, but contains recommendations and instructions. There are also comparable regulations and directions for use in the professional application of fertilizers, without however addressing the question of liability.

We believe that there is a manifest need to extend the content of these “Codes” to other areas, at least to water conservation, the use of pesticides, liability of farmers, the qualification of damage to the environment, the usual patterns of farm work.

Of higher importance is the question of the extent to which the codes of best agricultural practice can be considered to be binding. Normally it is left to the discretion of authorities, whether the provisions are applicable to farmers, even if – as emphasised by the Italian reporter – an instance of damage could have been avoided if the farmer had abided by the provisions.

From a practical point of view “best agricultural practices” in their entirety have no specific normative value. In the field of agriculture they establish an abundance of provisions and criteria with which the farmers must comply. They can therefore be considered to be more of a professional duty than a mandatory rule. In Austria best agricultural practices are applied in respect of preventive measures against contamination of waters through fertilizers or as environmental standards in the context of granting state concessions. Incorporation into the body of law has not taken place although harmonising agricultural practices in the different agricultural sectors has become an objective on the European level. Other countries, such as U.K., do not consider the standards to be binding either, but a penalty may be reduced if it is found that the farmer acted in accordance with these standards. In a few cases the recommendations contained in the standards have been introduced into the respective laws.

1.5) An extensive contamination of the environment constitutes an interesting problem regarding liability for damage to the environment. The cause of contamination may be hard to determine, if many factors may have played a role

The answers to this question were perhaps not sufficiently precise. This may be due to the fact that the question was not formulated clearly. If we are talking about an extensive contamination, we cannot apply an objective approach. We rather have to assess the damage according to the criteria of environmental science. Procedural issues need to be addressed as well. If it is impossible to track down the person responsible for the contamination, there are ways of holding the public sector liable instead. According to Spanish jurisprudence ecological organizations, e.g. the organization for the protection of forests, are vested with the right to bring an action. Other countries however have not adopted any procedural rules granting the right to bring an action without having suffered a incident of damage. In a further group of countries the exercise of such rights is possible only within a limited scope, i.e. tied to special conditions.

It would be very interesting to find out how legislation and jurisprudence of the Member States have progressed in this field. The text of the draft Directive does not contain any special provision on extensive contamination.

2. Special Illustration on the Liability of the Farmer

2.1) We did not want to deal with the question of the circumstances under which it may be reasonable to apply phytosanitary products and pesticides in order to improve and/or increase production. It appears to be more interesting to find out under which circumstances the application of such products may lead to liability of the farmer. When answering this question it is necessary to take into account the toxicity, quantitative restrictions, the method of application and the place of application

From a practical point of view, the European codifications are very complex and detailed with regard to this question. Poland for example has adopted a very detailed regime. It covers minimum distances from inhabited areas, contains provisions on maximum depth, bearing in mind that the soil may be frozen and requires farmers to abstain from using fertilizers during the pollination period by bees. Italy distinguishes between dangerous(that is highly toxic) substances which can be applied only after prior public authorisation on the one hand, and so-called “areas of integral reserve” on the other hand where agriculture is only allowed if traditional and organic methods are applied. Moldavian law also contains a pertinent provision : According to Art. 75 of the Law on Environmental Protection the storage of pesticides in non-authorized places and their use in protected areas are strictly forbidden. In addition to that it is prohibited to use pesticides during the blossoming period (of the plants pollinated by insects). The Finnish law is very clear-cut and provides a requirement for authorization for agricultural activities, which might affect the water or the sewerage systems. The French law both civil and criminal liability may arise if mandatory rules have been disregarded while using pesticides. The farmer has to take preventive measures in order not to affect inhabited areas, underground water, watercourses or the coastal areas. The situation in the U.K. is quite similar. There it is prohibited according to the law for the protection of waters of 1991 to dispose without authorisation of any sort of substance or waste in coastal, inland or underground waters. A violation of the provision leads to the imposition of penal sanctions.

The Austrian legislation establishes strict criteria for the issue of public authorisation for the use of pesticides : Firstly it is required that the pesticide exclusively serves the purpose of

protecting the plants and does not produce any secondary effects. Secondly the pesticide may affect neither the waters nor the environment. The use of pesticides in woodlands is explicitly prohibited if it can be shown that there is any form of risk.

In our view it is very important to create uniform criteria to determine when pesticides may not be used, when they may be used to a limited extent and when they may be used without any restrictions. Furthermore we are of the opinion that a central registry is indispensable. This registry would list any kind of chemical product applied in the exercise of agriculture, its effects, the conditions for use and marketing. With the help of the registry it would be possible to control whether liability can be construed in the case of the product used. Under Slovenian law fertilizer and phyto-sanitary products may only be applied if a minimum distances to the banks of lakes or rivers are maintained. The minimum distance amounts to 15m for waters of the first class and 5m for waters of the second class. As soon as the scope of contamination is clear it will not be difficult to show whether the minimum distance had been respected or not. Considering the severity and the scope of the damage caused it is equally important to agree on clear criteria for liability. The Dutch legislation of 1996 therefore allows the use of pesticides for professional or industrial purposes by persons who have been granted an authorisation by the Ministry of Agriculture. Prior to granting the authorisation the Ministry checks whether the person applying for authorisation has acquired the necessary knowledge for the application of pesticides. If pesticides are used without authorisation this amounts to a tort and the appropriate proceedings will be initiated. In Norway the entrepreneur (especially the farmer) is under an obligation to label the pesticide. The labels must be monitored by the Ministry for Environment, Alimentation and Agriculture. People who buy and use pesticides for professional purposes must be authorised by the authorities.

The topic is of great significance for the U.S. which alone spends one third of the overall money spent worldwide on pesticides. It follows that 70 % (?) of all pesticides are used in the U.S. The liability for damages due to the use of pesticides can be established if the wilful or negligent violation of a law governing the authorised use of pesticides can be evidenced.

2.2) The existence of sensitive areas where the use of chemical products is prohibited or restricted is due to the necessity to protect human health against serious risks. The protection is achieved by creating specially protected areas close to inhabited areas and in areas where flora and fauna are considered to be specially endangered or vulnerable

For more than 20 years now in agricultural science the farmer has commonly been called the guardian of nature. It appears to be important to find out to what extent today's farmers can still be considered in this way, especially if the protection of sensitive areas along ecological lines is at issue. The different systems introduced in different countries may not have identical names or definitions for the areas they consider sensitive and worth protecting. However the content of the protective measures is more or less similar in all countries. Belgium for example has defined sensitive areas. For those areas special provisions apply which lay down rules for the use of dung and pesticides and allow for a claim to state aid as compensation for the usage limitations in the area. In Italy the areas are put into different categories and nominated accordingly by the authorities. There are areas of extensive protection, areas of limited protection and so on. Other countries such as Moldavia do not distinguish between different areas. This may be related to the fact that after the privatisation of the agricultural land it was assumed that all private land should have equal value. Nowadays however only the owner of the land can estimate the sensitivity of the soil and the risk of applying harmful products and therefore prevent damage from occurring. In Norway areas have been designated where the use of nitrates is limited to a maximum amount per hectare. Dutch law requires a nitrate free strip – a sort of artificial boundary – between the field and river banks in order to hinder the contamination of waters with chemical substances. How broad the strip has to be depends on the kind of soil and the kind of spray equipment used. In our opinion the system in place in Italy

is most interesting. According to this system there are not only areas which have to be considered as sensitive and which are subject to certain limitations, but there are also areas were certain obligations need to be fulfilled. This sort of mandatory contribution makes it possible to restore those waters and areas, which in the past have been subject to an excessive use of nitrates. It therefore must be considered to be a very well thought-out system of protection whose purpose serves the interest of all parties involved. The protective provisions of the system should therefore not be limited to large agricultural undertakings, but should be applied to small subsistence farms as well. In the U.S. the law makes a distinction between areas where the use of pesticides is strictly prohibited and other areas where their use is allowed if certain protective provisions are observed. The most comprehensive and precise system is that of the U.K. This may be due to the fact that in the U.K. a high number of areas have been defined as sensitive (8 % of the territory) and that certain criteria have been established in order for an area to qualify as being sensitive. Among these criteria are the maximum content of nitrates in the soil and the condition of waters. As a result of the application of these criteria the over-all extent of sensitive areas amounts to 47 % of the cultivated land in the U.K. The Environment Authority is in charge of the implementation of projects for the protection of sensitive areas.

Finally it should be added that it appears to be reasonable that public authorities decide which areas must be considered sensitive and which not. Regional authorities are most familiar with the sensitive areas and have sufficient staff and information to ensure compliance with the legal requirements.

2.3) It is of considerable importance to know whether damage caused by agricultural activity results in liability requiring the farmer to pay damages or whether the liability only entails administrative sanctions.

In Italy the violation of provisions on the protection of the environment entails administrative sanctions if a farmer has committed the injurious act, whereas violations in the exercise of an industrial activity may lead to penal sanctions. The farmer has to restore the status quo ante and to adopt protective measures for the future if it can be shown that he is responsible for the damage to the environment. In Moldavia farmers run the risk of administrative sanctions if they violate any provision for the protection of the environment. In case of contamination of the soil simple farmers have to pay a fine equivalent to five months minimum salary while bigger agricultural undertakings will have to pay a fine equivalent to ten months minimum salary.

As far as the legal regime for the production of fertilizers is concerned, the Dutch system appears to be most interesting. It is necessary to distinguish between the expenditureof a farm to produce fertilizers, the quantity of fertilizer which can be produced and the manner in which the fertilizer is ultimately used. It is considered that every farmer is entitled to produce annually 125 kg of phosphate per cultivated hectare. The objective of the rule is to maintain a natural equilibrium between the number of livestock and the cultivation of agricultural products. If the farmer’s production exceeds this limit, he faces a high fine. In Austria penal sanctions (fines and prison) as well as administrative sanctions (fine provided that the commission of a violation or an omission can be shown) have been introduced.

In the U.K. a new type of sanction has been put into place. It is now possible to enter into a contract which provides that state aid must be reimbursed if provisions for the protection of the environment are not complied with. Even without that special agreement there is liability for farmers in case of damage to the environment. Such contractual arrangements could be extended to other principles of law.

2.4) When assessing whether a farmer is liable the prerequisite of a public authorisation for certain agricultural activities is an important issue

In most countries the exercise of agricultural activities that threaten the environment requires prior public authorisation. Austrian law contains a large number of authorisation requirements. Liability or the duty compensate for damage can only be assumed to arise in case of unlawful or culpable behaviour by the farmer. In Moldavia the law requires authorisation for a great number of different agricultural activities, e.g. the setting up and working of fishponds or vineyards, for the production of seed, for the breeding and selling of cattle etc. The authorisation contains all the necessary rules, the conditions of export, the rights and duties and also the conditions under which liability may arise. In other countries such as in Slovenia the requirement of authorisation for the exercise certain agricultural activities may be found in the Law on the Protection of Nature. The authorisation is required for activities that are likely to threaten biodiversity. There are different views in different countries as far as the legal effect on farmers is concerned – whether an authorisation is required or not. According to the laws of some countries, for example Italy, the Netherlands or Finland, for an exemption from liability it is not sufficient to prove that the farmer has acted in accordance with public authorisation. The farmer must also have taken all necessary measures in order to avoid the occurrence of damage. If he has exercised an especially dangerous activity it is for the farmer to prove that he has acted without fault (burden of proof for the avoidance of liability lies with the farmer). In contrast to this approach that liability may arise even if the farmer acted within the limitations of the authorisation some countries take the view that in general the public authority which granted the conditions for the authorisation is liable for the damage. Other countries such as Argentina support the view that in certain circumstances a joint liability may be appropriate.

The drafters of the proposal for a Directive on Civil Liability were aware of this problem and supported the approach that the Directive should not be applicable if legal emissions are at issue. This is an important criterion for England. This exception applies by analogy to all activities and equipment that require an authorisation. A very important topic however is not addressed. It is unclear how authorisation of genetically altered products should be dealt with. It would be a big step forward if public authorities had enough information to control the effect of using genetically altered organisms on human health and the environment. In addition to that an authorisation for the use of genetically altered products should be granted only if it is well established that they would not harm the environment.

2.5) From an all-European point of view there are no special provisions for legal consequences in case of damage to the environment caused by agricultural activity

In Spain the Guidelines on cultivating protected areas contain a special provision. It can be compared to the Finnish rule which prohibits the exercise of modern type agriculture in the protected areas.

In Slovenia the provisions for the protection of the environment are identical for all areas. The Law on Environmental Protection prohibits the wilful and unjustified destruction of the living space of plants and animals.

2.6) The application of the “polluter pays” principle has given rise to unsolved problems

In general the polluter pays principle is applicable. One may however wonder whether compensation may also be demanded for ancillary consequences of the main damage or if one should not apply instead the principle “I pay for the damage I did”. The Draft Directive contains the former principle. The person responsible for damage to the environment or for creating a risk of damage to the environment is obliged to bear the costs for the reparation of

the damage of the risk he created. This principle has been applied in the U.K. since the 19th century without it ever being necessary to prove negligence. Today, the person who brought about or permitted pollution, is liable. If that person cannot be tracked down, the owner of land can be held liable. The Argentine legislation imposes for each natural person and legal entity under private law and for each public-law institution and corporate body the duty to get insurance coverage for restoration in the event of damage to the environment. Finland has adopted a similar solution. Alongside the existing Law on the protection of the environment a further provision has been adopted obliging private undertakings to conclude an insurance contract. Undertakings which endanger the environment or affect the surrounding area must take out compulsory insurance. The insurance must cover not only the reparation of the damages caused, but also the cost of preventive measures against the occurrence of similar damage and the cost of general restoration to the earlier condition. I consider this insurance requirement to be appropriate. It does not however mean that every farmer must obtain environmental protection insurance. I doubt that an insurance company for each and every farmer could be found. If it were possible to determine which kind of agricultural activity is most likely to constitute a risk to the environment the agricultural associations could negotiate a contract with an insurance company and contribute to the premium in order to reduce the enormous costs to each farmer. The "polluter pays" principle needs to be effective. This means that coercive measures must be at the disposal of public authorities in order to enforce the payment of damages. Therefore it is very interesting that Belgian law provides that the assets gained through the injurious activity may be seized.

In the Directive mentioned above the insolvency of the tortfeasor has already been an issue. The authorities are aware of the essential problems that will be created by environmental protection insurance on the local level. They recognise the fact that such insurances will be more expensive than those currently in use in the U.S. At the same the U.S. experience shows that insurance premiums will come down once uniform conditions have been introduced and once the insurers are more familiar and experienced with the issue. One should not, however, forget that the main problem of such an insurance system is the quantification of damages. An example may the contamination of natural resources whose restoration will mean a lengthy and expensive process. When the proposal was drafted a limit on the damage which could be covered by insurance was rejected because of the high levels of compensation which would possibly be necessary. It is however left to the Member States whether they wish to introduce such limits in their national legislation. As mentioned above this system has been applied in the U.S. for some time. It has also been incorporated in the body of law. The provisions call for pecuniary damages, for restoration work in the environmentally damaged area or a requirement to halt harmful activities. It should be noted that the polluter pays principle is applied by analogy in combination with the national laws dealing with environmental protection, even if those laws contain no explicit liability provision. Finally we are interested in the question of who may be considered as exercising agricultural activity and therefore as being responsible and liable for the damage. According to a majority of Member States the person who actually caused the damage to the environment is responsible. It may also be the case that an association responsible for supervising and safeguarding the environment may be held liable – a situation which is more common in France.

2.7) National jurisprudence with regard to the liability of farmers who damage the environment while pursuing agricultural activities

Austria is without any doubt the country with the most varied jurisprudence regarding this topic. The jurisprudence of administrative law courts extends to questions of forest and water protection as well as to questions of common market organisations. Civil law courts had to rule on "neighbour law", road insurance law, on general questions of insurance law and on state support for the development of agriculture. There are even a lot of penal law judgements.