2. Regulations governing waste and polluting facilities

By M. GUYOMAR, Maître des requêtes (Counsel) at the Council of State of France.

I shall introduce this afternoon's discussions by presenting my report compiled on the basis of the wide-ranging and comprehensive contributions received from the Association's various member courts[(1)].

As the President has just outlined, **issues surrounding pollution and waste-management are, by their very nature, problems which need to be tackled at European level** since water, air and soil know no boundaries – and neither, therefore, is contamination of them restricted to any one area alone.

It is therefore extremely important to approach the environmental problems associated with pollution and waste-management from a transnational angle and a response at European level would seem to be the most appropriate course of action.

There is also a myriad of **Community legislation** on pollution and waste-management, a selection of which is detailed below.

The main piece of legislation in this area is Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, better known as the IPPC Directive.

Also of significance are:

- *Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to prevention and remedying of environmental damage* (I shall return to this particular directive in due course);

- *Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community*;

- *Framework Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste* (replacing Directive 75/442/EEC);

- *Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste*;

- the *draft Framework Directive on soil protection* (as mentioned this morning).

It seems to me that today's framework is, to some extent, saturated by Community legislation, the objectives of such legislation both intersecting with and complementing each other at various points.

In relation to types of pollution, reference should be made to the Framework Directive 2006/12/EC of 5 April 2006 (waste) and Directive 2006/11/EC of 15 February 2006 (pollution in aquatic environments). In turn, Directive 2004/35/EC of 21 April 2004 (environmental liability) outlines the duty placed on the party responsible for complying with environmental obligations to remedy any damage, while the draft

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(1) These contributions are available in full on the Association's website : www.juradmin.be.

Framework Directive on soil protection will no doubt form the future benchmark as regards the location of pollution.

It is clear, then, that by drafting this plethora of legislative texts – some pertaining to types of pollutant, some to polluters themselves and others to polluted locations – we face a mesh of interweaving rules and standards which we must ensure form a cohesive overall framework.

In addition to this internal 'mesh' of Community rules and standards, there is also combined a network of both Community and national legislation. To my mind, then, while there may be some *certainties* there are, unfortunately, also a great many *uncertainties* with which to contend.

In short, the **first certainty** from my point of view is that environmental issues *are best dealt with at European level* since they affect all Member States as well as economic players – such as companies and their respective boards – which themselves operate at European level.

The **second certainty** is that *consideration of the polluter-pays principle* enshrined in Article 174 of the EC Treaty is becoming increasingly important in the context of Community environmental law. It also forms the core framework of Directive 2004/35/EC of 21 April 2004 mentioned above and is also anchored in countless pieces of current national legislation.

The **third certainty** is that of the *principle of subsidiarity*. Community law forms the underlying foundation setting out minimum requirements while national standards may be much more stringent.

The **fourth certainty** is rooted in *the binding nature of Community law*. Accordingly, the Member States are duty bound to transpose Community legislation; if they fail to do so, they are penalised and this system ensures broad application of the concepts observed and, indeed, established by the Community court itself.

Let me give you an example. In the aforementioned Directive 2006/11/EC of 15 February 2006, the Community legislator opted to introduce a system of prior authorisation. In so doing, its terms were more stringent than some national rules, which simply required prior notification. However, this broad approach was adopted and enforced by the Community court.

The VAN DE WALLE ruling handed down by the European Court of Justice on 7 September 2004 is based on a broad definition of the concept of waste – one which continues to pose problems for Member States whose legal systems do not recognise such a wide-reaching concept.

These are just a few of what I consider to be the certainties in relation to Community environmental law.

However, it is important to highlight a number of uncertainties in this regard too. There are certainly grey areas in terms of environmental rules and standards and difficulties which we can overcome together since we, as judges representing our respective national courts, face the same difficulties as those arising within the framework of Community law.

The **first uncertainty** is clearly that associated with the *precise concept of waste*, which raises the question of whether the broad approach established by the *Van De Walle* judgement is likely to be enshrined in the draft framework directive or whether, by contrast, the Member States can somehow "secure" a more limited scope for the concept since, as you will recall, the *Van De Walle* judgement classed soil contaminated by hydrocarbons as waste.

A **second uncertainty** is the concept of *restoration*. What does restoration of a site entail? Restoring it to its condition prior to becoming polluted? Or rather 'restoring' it to a state compatible with future use?

Community law provides no degree of certainty on this issue either.

A **third uncertainty** is the *concept of "competent authorities"*. Does this refer to the State? Or perhaps local authorities? By definition, from the point view of Community law the issue of what constitutes a "competent authority" within individual national legal systems is irrelevant and this gives Member States some room for manoeuvre, which can result in complex – and often inconsistent – frameworks.

This list of uncertainties is by no means an exhaustive one and I shall conclude by highlighting the limitations of Directive 2004/35/EC of 21 April 2004 and, specifically, the ambiguity associated with the concept of "operator" contained therein (see Article 2(12), which states: *""operator" means any natural or legal, private or public person who operates or controls the occupational activity"*).

Article 2(12) therefore defines "operator" as the person who operates or owns an occupational activity – two concepts which, under national law, are generally quite different. It is up to first the national court and subsequently the Community court to clarify this crucial concept of "operator" and this is one of the difficulties facing us in our profession.

However, there are other 'grey areas' too. Great importance is attached to *subsidiarity* – and rightly so – but, paradoxically, *the room for manoeuvre this affords Member States can be a source of potential legal uncertainty*.

Of course, legal uncertainty in this field is linked to poor harmonisation of national systems and the role of Community law is not to impose a benchmark that is incompatible with the practical realities of each individual Member State but rather to map out a legal framework common to all.

I should like to highlight a further limitation of Directive 2004/35/EC of 21 April 2004 as regards the *underlying failure to introduce a system of subsidiary responsibility on the part of the State*. Naturally, the directive stipulates this subsidiary responsibility but it is optional and is therefore left to the discretion of each individual Member State. In this context too, therefore, the principle of subsidiarity is – paradoxically – a source of uncertainty.

This brief overview of rules and standards reveals, therefore, that the Member States are involved in generating Community and national legislation while at the same time being players within the latter since they themselves are responsible for complying with it.

I will now move on to present a **comparative view** of my findings – indeed the purpose of our discussions today – to highlight what we, as judges representing our respective national courts, can learn from courts in other Member States based on the national feedback received from the Association's members in response to common questions. This presentation will focus on three main areas:

- legal systems and the combined 'mesh' they form;

- environmental players: in this context, it will be important to underscore the role of the State in safeguarding compliance with rules and standards as well as the role of economic players, namely companies and their respective boards. In each case, I shall endeavour to outline the response of each Member State to the questions submitted by the President and designed to establish who is the responsible party in the event of pollution;

- the Community and national courts responsible for enforcing these legal systems vis-à-vis environmental players: we will observe together how conflicts between rules and standards are resolved and disputes between players settled, while all the time keeping sight of what, to my mind, is the shared challenge facing all of us, namely protecting the environment on the one hand and remaining sympathetic to economic interests on the other.

The interwoven 'mesh' of legal systems is *a problem which has been largely resolved by Community law and the primacy afforded the latter* insofar as the various individual national systems have gradually come to converge. Indeed convergence is becoming a greater priority given the mechanism for transposing and defining Community standards.

Nevertheless, when comparing the different legal systems in the various Member States, one key criterion for comparison is *chronology*, i.e. whether the Member States established a legal framework on management of waste and polluted sites before or after Community rules and standards were defined. Viewed from this angle, the paradox lies in the fact that where a Member State established the relevant legal framework of its own accord before the obligations inherent in Community law required it to do so it is more difficult to reconcile already established national rules and standards with Community legislation since the latter outline only minimum standards. This is certainly true in France in relation to Law No. 75-633 of 15 July 1975 on waste disposal and the recovery of material (*Loi du 15 juillet 1975 relative à l'élimination des déchets et à la récupération des matériaux*) and Law No. 92-646 of 13 July 1992 on waste disposal and registered environmental protection centres (*Loi du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement*).

By contrast, where Member States established the relevant frameworks at the time Community legislation itself was drafted or reworked said frameworks to reflect the new system of legislation in force at European level, there are fewer difficulties since full transposition simply entails either a sort of 'copying-and–pasting' exercise, as it were, or replacing national rules with Community legislation.

However, all legal systems whether established before, during or after the advent of Community rules and standards must all comply with the relevant requirements in full. Accordingly, in the national reports, I was struck by the fact that some Member States such as the Netherlands, Italy, Portugal, Finland and Estonia are making every effort to transpose Community rules and standards in full.

In some countries, though, two types of legislation have been introduced, i.e. legislation on environmental damage and separate legislation on waste. This is the case in France, Finland and Germany. By contrast, some Member States have taken as their basis Directive 2004/35/EC of 21 April 2004 and have put in place legislation combining environmental damage as a whole and making no distinction between contamination of sites as a result of operations and purely waste-related issues.

Some systems are often extremely complex. In Poland, for example (where the system is similar to the French model), there are three complementary sets of legislation governing respectively civil liability, criminal liability and administrative matters. This system is a complex one since it risks one set of legislation overlapping with another. France has a similar system based on a framework of administrative provisions (applicable to waste and registered protection centres) combined with a system of administrative penalties if the aforementioned administrative provisions are not observed. There is also a concurrent – and, potentially, simultaneous – system of criminal penalties.

These examples demonstrate that even within the same general trend towards full transposition of Community law, responses from individual Member States may vary widely; this disparity is, to a certain extent, the result of the room for manoeuvre afforded the Member States – according to the principle of subsidiarity – in tackling environmental issues in their own way.

It is also important to remember that these legal systems can result in **the overall legal framework becoming extremely complex for all players involved**. Said systems cannot be neatly summarised, i.e. there is not simply a public authority guaranteeing respect for the environment on the one hand and the private and economic players causing pollution on the other. Economic growth is also a matter for the State. So in my view it is impossible to compare one system against another.

The *definition of what constitutes a player* also varies widely. Firstly, in terms of the public authority, in some Member States the local authority is classed as a "state authority" depending on the field in question. This is true in France, for example, where the mayor is in charge of waste management while the *préfet* is in charge of registered centres. In the mayor's absence, the *préfet* may take his/her place.In addition, where waste has been produced by a registered centre, the mayor may act under waste legislation and the *préfet* under legislation governing registered centres. This is reflected in a recent ruling by the Council of State of France.

This kind of system is far too complicated – too complicated for the economic players themselves who are required to comply with two separate legal systems and are monitored by two separate authorities (the monitoring process itself also being subject to two sets of separate obligations), and too complex for mayors and *préfets* who sometimes become involved to little effect in respect of environmental legislation before the court has clarified the situation.

In Ireland, too, the local authorities oversee waste issues while there is a national agency for environmental protection. Such a system featuring an agency is echoed in other Member States, too, for example in Great Britain where both local authorities and a national environment agency are responsible for environmental issues.

In some Member States, whether authority is held by the State or the region is not determined by the purpose of the relevant legislation but by the size of the site in question and/or the scale of the operation (this is the case in Italy).

Although definitions vary, they also sometimes overlap. However, in all cases the various powers all enable the administrative authorities to enforce legislation. Said powers generally include the authority to require action to be taken, which may extend not only to automatic performance of the work in question as in France, the Netherlands and Estonia but also to the required posting of a bond or guarantee as in Germany. They may also result in the State being held liable in the event that it fails to fulfil its obligations. At this juncture I should like to return to a point already mentioned concerning the option granted to Member States under Directive 2004/35/EC of 21 April 2004 to claim subsidiary liability on the part of the State. As a judge, I find it a shame that this option is not available at European level – and for one simple reason: where the party responsible for complying with environmental obligations – and I will come back to this in a moment – is found to have failed to fulfil its obligations either because it cannot be identified or because it has become insolvent, some Member States have made provision for legal action to be taken against the State which, ultimately, ensures that environmental obligations are fulfilled. By contrast, in other Member States where no such provision has been made, there is the risk that some restoration measures will not be taken and/or that some of the costs associated with sorting out the damage will not be covered. So in this regard – even if only at the level of unfair competition – there is no common benchmark and I find this regrettable.

Some States, such as France, have agreed that the State should be held liable where a party responsible for complying with environmental obligations fails to fulfil those obligations. The ALU SUISSE judgement (dating from mid-July 2005) demonstrates that if, due to certain constraints, the State can no longer hold the operator liable for restoration, then the State itself must take responsibility for such. In the national reports, I came across case law from Austria (4 June 1996) ordering a province to remedy damage caused,

and from Finland stating that the municipality may, in the final instance, be required to take responsibility for making good any damage where all other responsible parties have failed to fulfil their obligations.

So it is clear, then, that different approaches are taken to this issue in different Member States. And, with the exception of cases where there is no *subsidiary liability* on the part of the State, this variety of approaches is *in no way detrimental to the system operating satisfactorily* since the solution required is ultimately provided for within the general administrative framework even if the latter is sometimes rather complex.

Much *more detrimental*, by contrast, is the *wide variety of responses to the question of the responsible party*, i.e. the issue of whose responsibility it is to comply with environmental obligations. Community law is not sufficiently binding and the definition of "operator" contained in Directive 2004/35/EC of 21 April 2004 is clear evidence of this. However, most national legal systems specifically stipulate that the operator is the party responsible for fulfilling restoration and clean-up obligations. In some cases, too, the party holding the operating permit bears said responsibility – I am thinking in this connection of examples from Luxembourg and Greek law – where there is a series of operators, a chain of responsibility. In such cases, the responses generally follow the same pattern, i.e. that the primary responsible party must be identified.

That said, I should point out that most national legal systems in the various Member States formally recognise the principle of subsidiary liability. So where it is not possible to identify the operator, the holder may be held liable – this is the case in Spain and Finland, for example. If neither the holder nor the operator can be identified, it is the owner who is considered liable; indeed in Hungary owners are the primary responsible party but in Ireland, Austria and the Netherlands they are subject only to subsidiary liability.

Finally, is interesting to look also at systems in which neither the operator, the holder nor the owner are considered liable and where the polluter-pays principle is applied – quite rightly in my view – directly. There is therefore no presumed automatic liability on the part of any operator, holder or owner since the party which caused any damage is required to rectify it. This system is applied in Great Britain, Portugal and Italy. In these countries, it is often the court that is best placed to ascertain who is liable and to me, this solution would seem to fit more comfortably with the practical economic and environmental reality

This brings me to the final aspect I wish to address, namely that of **courts** (both **Community and national**). To me this is a particularly interesting area since it is ultimately the courts' responsibility to ensure that the legal system in place remains coherent and balanced, i.e. to **rule on conflicting regulations and standards and to keep disputes between the various players involved to a minimum**. Courts perform this task on the basis of both Community law and national law; the latter is becoming increasingly 'common' in its scope and if one delves a little deeper and moves beyond the initial varying responses received, there are clear areas in which the various national systems converge. Hence the following question: Would it be possible to establish shared rules and standards on environmental issues which would take a different form to Community environmental law? And it is here that our comparative law approach comes into its own since this exercise demonstrates clearly that Community law is the driving force behind Member States and encourages them to establish this common framework of legislation – a common framework which is vital if we are to protect our environment and balance the economic interests of competing companies.

Let's now take a closer look at how courts operate.

It should be noted, firstly, that *the Association has helped to establish real dialogue between national judges and the Community court*.

In legal terms, this dialogue takes the form of a 'reference for a preliminary ruling'. Under this procedure, references are submitted for a preliminary ruling on the definition of a concept within the meaning of Community law. It is also an opportunity for the Community court to rule on the validity of a directive – I am thinking here of the ARCELOR ruling of 8 February 2007 in which the Council of State of France submitted a reference to the ECJ for a preliminary ruling concerning the validity of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC in view of the principle of equality throughout the Community. This reference raised the question of competition between the chemicals and plastics industries outside the territory of a Member State. In a case such as this it is the role of the Community court to issue a ruling – not least because a greenhouse-gas emissions-quota system can only function effectively at European level.

I should like to outline one further example of this process, namely that of a reference for a preliminary ruling again submitted by the Council of State of France in a bid to harmonise a number of systems which often do not operate smoothly together. I mentioned earlier on that the longer a national system has been established prior to Community legislation concerning it being introduced, the more introspective that system is and the more difficult it is, potentially, for it to be adapted to meet Community requirements. I was thinking there of the French system which I myself am required to implement on a daily basis. In a judgement handed down on 27 June 2007 (*Association nationale pour la protection des Eaux et Rivières* ruling), a reference for a preliminary ruling was submitted to the European Court of Justice in respect of the interpretation of Directive 2006/11/EC of 15 February 2006 (pollution in aquatic environments). This preliminary reference centred on the concept of prior authorisation governing the disposal of discharges of pollutants cited in the Annex to the aforementioned directive. Under the French legal system, ordinances have been passed simplifying legislation pursuant to which in respect of small companies – in this case fish-farming companies – the decision was taken to replace prior authorisation (considered a heavy-handed formality) by a system of prior notification. And this is where difficulties arise sine we have two opposing systems which cannot be combined, i.e. one, which I shall refer to as the 'material' system, focussing on the issue to which the system applies, namely pollution, and which is based on the directive (essentially, the discharge in question is a pollutant and therefore, if a company is likely to produce such discharge, it must be authorised to do so), and an 'organic' system (such as that of France) which views the size of a company and the scale of its operations as a criterion in respect of application of the legal system and which allows small companies to operate on the say-so of notification alone. Can the system of prior authorisation within the meaning of the directive also be a system of notification incorporating (as in France), the right of the *préfet* to decline it? The Council of State of France is awaiting a response to this reference and will, of course, adopt the ECJ's solution.

I should now like to address the *powers of administrative courts*. The administrative court system in France differs from ordinary law since national administrative courts enjoy substantive prerogatives which authorise them not only to quash but also to reverse rulings. This system dates back to the 19th century when the *préfet* (who is nowadays in charge of registered centres), used to sit in the Prefect's Court or *Conseil de préfecture* to hear administrative disputes. On that basis, then, it has been quite natural for the *préfet* ruling as the sole administrative authority to have the same powers as when he ruled as part of a panel of magistrates via the *Conseil de préfecture*. So in France, we have a court which has the same powers as the authorities, i.e. powers to reverse authorisations, make them contingent on fresh requirements, amend their duration or to issue formal notices.

Based on the national reports, it would seem that these exorbitant powers under ordinary law exist in other Member States too.

Of course, most national legal systems do not confer any special powers on the national administrative courts in terms of environmental law, other that granting them the power to quash rulings. Is this sufficient? This is another issue we shall need to address in our discussions. However, in some Member States the national administrative courts have the power to issue summary orders but such Member States are in the minority. One example is the Netherlands.

Another issue is that of *who may request a ruling from the court*. It is interesting in this context to note that ordinary citizens enjoy certain powers in this regard in Spain and Portugal. In Portugal, on behalf of the collective interest, any individual as well as associations and the public prosecutor's office may take action against the authorities where the latter have failed to fulfil their obligations and may ask the court to rule in a case where no restorative action has been taken. A judgement by the Porto Court of Appeal in 2001 mentioned in the report submitted by Portugal is testament to the sway of this popular right of action – a right of action which is also seen in Spain where associations can hold government authorities accountable for failure to act. I should point out that although I spoke earlier of the State, the administrative authorities and economic players, other stakeholders such as those campaigning for environmental protection (often associations) should also be included nowadays.

From this standpoint, we should also address the concept of suitable persons authorised to address the courts (as exists in the United Kingdom).

One final point I should like to raise is that of the *complex technical nature of environmental legislation* since we judges sitting in national courts are called upon to hear cases in which there is a large volume of scientific and technical information. Of course, in most Member States the courts may commission expert reports; I see that the responses received from Germany and Latvia describe the use of such expert reports as "commonplace".

There are two examples I should like to cite here and which to my mind are of particular interest. In the Netherlands, the Ministry of the Environment makes arrangements for an impartial report to be made available to national courts to assist judges. In Finland, too, the supreme administrative court comprises two expert judges sitting part-time in disputes concerning environmental issues and requiring specialist technical expertise or knowledge of natural sciences. In my view, such a system which combines technical and legal experts could be a very productive one and is worth exploring.

I should now like to **set the ball rolling for discussions on the following aspects:** a) To what extent does the drafting of Community rules and standards – as applicable to the European Commission and the European Parliament alike – take account of national traditions and any pre-existing national laws? b) To what extent do courts and/or lawyers exploit differences and indeed divergences between the Community legal system and the legal systems of the individual Member States? c) How do the Community court or national courts in the individual Member States rule in cases where Community and national rules and standards conflict

It would also be interesting to hear the views of the panel participants on the question of complex technical issues. Standards do exist – I am thinking here of the so-called 'best available techniques' or BAT. It would be worth examining how defining such standards at Community level would be received in the individual Member States and by the national courts.

In conclusion, I should like to underline that harmonising legal systems is a challenge in both environmental and economic terms and I think my presentation has demonstrated this quite clearly. Such a harmonisation is borne out of the requirements imposed under Community law and is a task for the Community legislator and national governments alike. Ultimately, however, I believe it is upon the courts that the onus for such efforts to achieve harmonisation rests and as such it is vital to establish the

necessary dialogue between the Community court and the national courts in the individual Member States. And indeed the dialogue under way at present is proving fruitful: I believe that the common challenges facing us are unfolding within a shared legal framework and that we must therefore make every effort to provide common answers in terms both of the complex technical considerations within disputes and in the legal aspects contained therein. The principle of legal certainty requires this and legal certainty itself is thus a precondition for securing economic security for all stakeholders. Viewed from this angle, I believe that creating a level playing field for competition and ensuring environmental security are vital. Legal certainty is therefore a fundamental precondition for ensuringboth environmental and economic security.