3. Conclusions

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At the close of this successful seminar, I should like to extend my warm thanks to the General Secretariat of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, represented by the Association's President, Yves Kreins, and to the Secretary- General for organising the event to perfection since I fully appreciate what a mammoth task staging such a seminar is.

I would also like to thank the chairmen, the general rapporteurs and the members of the two panels who provided an excellent springboard for our discussions through their summaries, presentations and questions. They devoted a substantial amount of their personal time to outlining their views on and approach to the issues of access to information and public participation and on the concept of waste. They drew our attention to a number of extremely thought-provoking considerations and helped to expand and refresh our existing ideas.

The various topics addressed during the seminar clearly underscore the fundamental principles of environmental law, namely the principle of access to information and public participation and the polluter-pays principle.

I – The need for participatory democracy dovetails with the first signs of increased international awareness of the threats facing the environment.

The 1972 Stockholm Declaration called upon States to facilitate "*public participation in managing and monitoring the environment*."

The World Charter for Nature adopted by the United Nations General Assembly on 28 October 1982 and cited specifically in the Åarhus Convention outlined the principle of public access to planning elements and the opportunity for all members of the public to participate in environmental decisionmaking.

The principles set out in the 1992 Rio Declaration also follow this line.

But it was the Aarhus Convention of 25 June 1998, drawn up under the aegis of the United Nations Economic Commission for Europe (UNECE) and signed, notably, by the European Union which set out in the most detail the conditions governing access to information, public participation in decisionmaking and access to justice in environmental matters.

The convention outlines the arguments in favour of these two primary rights: on the one hand public access to information serves an educational purpose while participation promotes social acceptance of the decisions ultimately taken, while on the other, the public can provide information thereby helping to identify the most efficient and most viable solution.

Although public access to information and participation are not among the principles of Community environmental policy cited in the EC Treaty, Community legislation has always remained mindful of the need for environmental democracy. This concern is evidenced not only by sectoral legislation but also in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and in Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. In order to comply with the requirements set out in the

Åarhus Convention, the first of these directives was supplemented by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, and the second was repealed and replaced by Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003.

Rules governing access to information have been drafted in the broadest possible sense in terms both of defining the concept of environmental information (which includes topics indirectly related to environmental matters such as contamination of the food chain and cultural sites) and of the source of said information, the latter not being confined to documents produced by the public authorities or private parties fulfilling public-service tasks but extending to evidence held by such authorities and parties and, indeed, to documentation held by other parties on their behalf. Ultimately, access is available to all natural and legal persons without any need for said persons to give reasons for requiring such access.

The general nature of these terms has already led to disputes concerning recognition of the right of public authorities to request documentation from each other, an issue also raised by the Committee of the Regions during preparatory work on Directive 2003/4/EC.

However, it is derogations from the principle of unfettered communication which will no doubt raise the most controversial questions, specifically questions concerning "documents in the course of completion" and those produced on the basis of confidential information protected by law, primarily to ensure protection of intellectual property rights and to safeguard public security. Naturally, these exceptions must be interpreted stringently but ongoing terrorist threats and the increasingly radical approach being adopted by some environmental protest movements may make arbitration difficult. The confidential nature of criminal investigations also raises certain issues: an administrative report citing the failure on the part of a company to comply with discharge standards imposed upon it is one of several documents cited in the directive but this in itself may be the underlying basis for criminal proceedings.

The issues raised by Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment and Directive 2003/35/EC of the European Parliament and of the Council supplementing it and concerning the drawing up of certain plans and programmes relating to the environment are a different kettle of fish entirely. They pertain primarily to the scope of the provisions in question (for example, the decommissioning of a nuclear power station featuring in French case law), determining what parties constitute the 'public concerned', ascertaining the ways in which to provide access to information and facilitate consultation (which must ensure that the relevant parties can make a useful contribution at the appropriate stage of the decision-making process) and considering the consequences of failure to facilitate such consultation mechanisms.

Community rules calling for mandatory public consultation on environmental matters are certainly vague in countries which traditionally promote participatory democracy and reaching a consensus. In countries where the general trend is towards confidentiality and details of the government's decisionmaking process are not freely available, Community law creates a special framework as pertaining to environmental matters – a framework which, in turn, throws into question the relevance of rules applied in other fields.

Take, for example, the precautionary principle which transcends environmental law and extends equally to consumer protection and health; transparency and participation, in all their various forms, are extremely dynamic and can be extended and applied in a variety of fields.

On all issues, national case law is formulated either upstream or in counterpoint to the case law of the European Court of Justice. It is up to us to ensure that such national case law is circulated adequately and that all supreme administrative jurisdictions are aware of it and can, where appropriate, draw inspiration from it. In light of the written and oral exchanges on these issues, it is my feeling that the major points on

which the systems of the various Member States diverge are rooted less in differences as regards the content of the right to information and participation and the manner in which said rights can be exercised, and more in the ways in which justice can be accessed: it would seem that the means f accessing justice vary considerably from one Member State to the next – a situation which explains he lack or abundance (as the case may be) of case law.

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II – While the first half of this seminar focussed on largely consensual issues (even though it may have merged that such issues are applied in very different ways in the various Member States), the second essentially highlighted the limitations of what is perhaps the most emblematic principle of Community environmental law and expressly cited in Article 174 of the EC Treaty, namely the polluter-pays principle. The issue of polluted sites, which concerns us both as legal experts and as citizens, centres around two aspects: What does restoration entail and whose responsibility is it?

A – What does restoring an industrial site entail?

Should consideration be given to the initial state of the site (i.e. prior to its expropriation or at the time industrial operations commenced)? While this solution complies most fully with the polluter-pays principle, it is highly unrealistic in terms of former activities. Or should only future use of the site be taken into account and the clean-up requirements adapted accordingly? Should such an approach be imposed by the government or should it be negotiated with the operator? Ultimately, should we be content with minimum conditions ensuring that neighbouring waters and land remain uncontaminated?

Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC Directive) provides no answer to these questions.

The Commission has tried on several occasions to close this loophole.

One proposal for reforming the IPPC Directive would entail operators drafting thorough reports on the state and level of contamination of soils and groundwater to ascertain the restoration requirements when the activity ceases. However, such provisions would only be of use for future application and would not address the problem of historic pollution.

The same can be said of 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, which pertains specifically to soil contamination posing a serious risk to human health. It seeks to ensure restoration of natural resources to their original state “based on the most accurate information available” and makes provision for additional compensation in the form of establishing comparable natural resources on another site if such restoration cannot be achieved.

However, the scope of Directive 2004/35/EC does not include damage caused by an activity completed prior to 30 April 2007 and as such is also only relevant to future contamination.

Only the draft Framework Directive on soil protection tackles the problem of historic contamination and endeavours to define remediation of soil as actions “[...] to remove control, contain or reduce pollutants so that the contaminated site no longer poses any significant risk to human health or the environment, taking account of its current use and approved future use.”

Of course, as clearly stated in the presentation of the grounds for this draft directive, soil – unlike air and flowing water – may be appropriated by private individuals but there is no question that civil law mechanisms – be they rules governing action in respect of a warranty against hidden defects in the case of a property sale or liability on the part of the landowner for pollution emanating from his site – are woefully inadequate on account of the sometimes longstanding nature of the pollution in question and the unpredictable restoration costs as well as the degree of the threat to human health and the environment. Since the public authorities are responsible for monitoring polluting activities and for planning and authorising land use, they must exercise these powers or be held accountable. This will certainly give rise to disputes before the administrative courts and such disputes will be an opportunity to define the precise scope of the powers of and obligations incumbent upon the public authorities and, in turn, of operators within the pollution chain.

B – Ascertaining what restoration of contaminated sites entails is one thing, but identifying who is responsible for the clean-up operation is just as tricky.

Like the Environmental Liability Directive, the IPPC Directive only recognises the operator, i.e. the party authorised to perform the regulated activity and acting under the supervision of the authorities, which have broad powers to issue approvals, injunctions and alternative orders.

When the activity is completed, the polluter-pays principle requires that the most recent operator take full and sole responsibility for restoration of the site. Even if it is taking over the activity from another party either through the purchase of equipment, via a merger or by any other means, the mechanisms of private law have, in theory, given it knowledge of the assets and liabilities – including in an environmental context – of the operation it has taken over and he must therefore take responsibility for such.

However, this model is often difficult to apply in practice either because the most recent operator has long since disappeared or because it has become insolvent. Permanent decommissioning of an industrial facility also often comes as a result of financial difficulties.

Where the most recent operator is part of a flourishing group, to what extent is it acceptable – from both a legal and a social standpoint – to hold a parent or holding company responsible for the environmental liabilities of its subsidiaries? Should not the principle of corporate bodies remaining autonomous only be bypassed in the case of established fraud? Or should more flexible solutions be sought allowing a broader third-party claim against parent companies at the very least in cases where the latter are involved in managing the subsidiary or where an unconventional system of financial links is in place?

Such solutions, if adopted at national level, are likely to result in unfair competition and should therefore be tackled through transversal solutions.

Another avenue explored in both Community and national case law is that of appeals under waste legislation and, specifically, Framework Directive 2006/12/EC of 5 April 2006.

Waste legislation and the aforementioned Framework Directive do not recognise ‘operators’ but rather ‘producers’ and ‘holders’ of waste. Producers are those whose activities give rise to waste or who process waste in such a way that its composition alters. Holders of waste are simply those parties who have possession of the waste – they need neither be the source of the waste nor the owners of it.

Like the concept of waste itself, such a category is very broad. Indeed anything which can be polluted by waste itself becomes waste, even in the case of immovable property such as contaminated and nonexcavated soil (as per the European Court of Justice’s ruling in the well-known VAN DE WALLE case of 7 September 2004).

Consequently, a holder of waste who is neither the producer of it nor the former operator is likely to have to cover the financial costs not only of removing movable waste abandoned on its site but also of measures to decontaminate the soil. The facts of the VAN DE WALLE case entailed a scenario in which the service-station operator prosecuted for hydrocarbon leaks from its storage tanks had been both the holder and the producer of the waste in question insofar as it owned the contents of said tanks and had 'disposed' of the hydrocarbons by allowing them to leak into the subsoil. The Court also invited the national court to identify from within the chain of successive producers and holders the most appropriate responsible party. Equally, the definition of 'waste' and 'holder of waste' takes the form of a broadening and extension of the polluter-pays principle. The concept of 'holding' waste also makes it difficult to apply another general principle (that enforced by the Environmental Liability Directive), namely limitation of civil obligations.

The durability of the VAN DE WALLE case law is by no means assured. Indeed, the fourth recital of Framework Directive 2006/12/EC suggests applying the concept of waste solely to movable property while the proposed reform by the Commission seems to go even further down this path.

However, that should not preclude us from reflecting in more detail on an issue not satisfactorily resolved by any legislation currently in force.

Here too, certainly, the scope of the responsibilities incumbent upon the public authorities do not compel national courts to take a position on these issues – issues which will ultimately be clarified by the case law of the European Court of Justice however Community legislation evolves.

Legislation on registered centres and waste should also be articulated more clearly since such legislation, given its distinct purpose, results in concurrent systems of liability overlapping on the same or similar issues.

In terms both of waste and access to information and participation, the role of national courts should be to promote the following under the supervision of the European Court of Justice:

- effective and standardised (as standardised as possible) application of Community law;
- economic neutrality of rules and regulations via such effective and standardised application;
- enhanced legal certainty via clarification of applicable legislation and the raising of its profile;
- the highest possible level of environmental safety.

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In conclusion, I should like to outline some of the results achieved by the seminar.

I – Results in terms of exchanges on and training in Community environmental law

Through its Environment DG, the Commission is looking to implement a cooperation programme with courts in the Member States on environmental law. This programme would be an opportunity both to run training exercises and to share details of good practices and as the discussions at today's seminar have shown, this would certainly be a worthwhile initiative. The Member States of the European Union share the same principles, are party to the same conventions and apply the same rules and standards; this means that they need to work more closely together and that there needs to be more dialogue between their various national courts. Since environmental law increasingly has its origins at Community level, the programme devised by the Commission is vital. It should enable the courts in the individual Member States to supplement and enrich their training and to exchange information on their experiences,

difficulties and respective case law not only with each other but also with the institutions and courts within the European Union system.

During its presidency of the European Union during the second half of 2008, France is to host the launch conference for this programme (date and venue to be confirmed) and the event will be included on the official list of engagements for the French Presidency.

II – Results in terms of environmental courts in particular and administrative courts in general

Like all public law in the Member States, environmental public law is undergoing radical change. In the past, such legislation was the sole and sovereign preserve of individual Member States and remained extremely resilient to outside influences. As evidenced by current environmental law, public law is now heavily influenced by Community law in the way in which it is conceived, amended and updated. The experience of the court over which I preside is, I believe, one which is widespread: between 32% and 45% of the major rulings passed by the Council of State of France have, over the years, been in application of either European Union law or the terms of the European Convention on Human Rights.

And this trend is set to continue. There are three resources to which we all have access:

1) Common rules governing trials and, in particular, governing fair trials along with, specifically, access to justice and effective judicial proceedings;

2) shared monitoring mechanisms and techniques[(1)] under Community law, which shore up the procedural guarantees for individuals and companies alike: these include, for example, the principles of proportionality, legal certainty and legitimate expectations, liability, good governance and reasoning, transparency and access to administrative documentation;

3) shared substantive law, the scope of which is increasing since it is linked to achieving the European Union's goals in various fields (single market, environmental protection, asylum and immigration and so forth), achieving said goals being the responsibility in whole or in part of the authorities within the individual Member States. This substantive law influences and directly inspires the actions taken by said public authorities and the national courts are increasingly applying it.

The trend towards convergence between the various bodies of administrative law is become even more marked since these procedural and substantive rules and regulations we now share are being combined with the principles of the primacy and ability to plead Community law and Member States are duty bound to comply with the latter when implementing it or indeed derogating from it. Failure to comply with these shared rules and regulations means that Member States can be held liable before national courts where their failure to fulfil their obligations – even where the legislator is at fault – has resulted in serious damage and where there is a direct causal link between the breach committed and the damage caused. The impact of Community legislation on administrative law and liability is particularly striking. For confirmation of this, see the *Francovich* (ECJ, 19 November 1991) and *Factortame and Brasserie du Pêcheur* (ECJ, 5 March 1996) judgements.

It is therefore clear that while national courts have become ordinary-law courts as regards application of Community legislation, the individual Member States' bodies of administrative law have become instruments borne out of implementing said legislation. In assuming this role, they are ensuring their own continued transformation within the European melting pot and are contributing to developing a truly European system of administrative justice.

[(1)] judicial and non-judicial.

To my mind, then, it is our responsibility as administrative courts to play an active role in applying Community legislation as comprehensively and effectively as possible and, in so doing, to encourage convergence between the systems of administrative law in the individual Member States and to promote the emergence of a European system of public law shared by all Member States. In this way, we will be helping to minimise legal uncertainty and to avoid the scourge of unfair competition. In assuming this role, there are two paths open to us – paths which may be followed either alternately or concurrently:

1) Institutional cooperation – or 'vertical' dialogue – based on the system of preliminary references submitted by national courts to the European Court of Justice to ensure uniform interpretation and application of legislation as well as monitor the legality of Community law: this vital form of cooperation functions effectively and could be expanded in some cases but in isolation is not sufficient.

2) Informal collaboration – or 'horizontal' dialogue – between courts to share experiences, working methods and case law, and to compare issues raised in the light of applying Community law and the responses provided. It is vital for national courts to be able to operate in full knowledge of responses given and issues raised by other courts. Given the challenges we face in applying Community law comprehensively and coherently, engaging in dialogue on experiences, methods and bodies of case law and even organising a court exchange programme within either a bilateral framework or a network of European associations and supreme courts are crucial and efforts must be made to promote more such action.

This collaboration and enhanced dialogue between European courts should not result in any particular feature of the national law of an individual Member State being discounted or, on the contrary, to any particular national model being exported. The principle of subsidiarity remains valid. It is more a question of providing a complementary mechanism to the key role of the European Court of Justice as a regulator and of holding ourselves accountable to our counterparts in other Member States and discussing together the conditions governing the implementation of Community law and the consequences this may and should entail for our respective national practices and bodies of case law.

Against the backdrop of this informal consultation, the seminar model – along the lines of that held today – bringing together both national courts and the institutions of the European Union (the European Commission, the European Parliament and the European Court of Justice) and academics and lawyers should certainly be pursued, as should all the future planned exchange mechanisms (exchanges between courts and concerning bodies of case law as well as rapid consultation via resources administered by the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union such as the Forum and the Jurifast database).

There are many topics worthy of discussion, for example sectoral issues such as:

- State aid;
- public-sector contracts and public concessions;
- certain issues pertaining to asylum and immigration (e.g. family reunification, expulsion measures for Schengen countries);
- tax-related issues such as abuse of right.

Cross-sectoral issues such as the following could also be addressed:

- implementation by national administrative courts of the primacy of Community law;
- the system of administrative liability under Community law;
- the system of administrative rulings;

- implementation of a proportionality review.

Indeed we are spoilt for choice! At a time when legislation is undergoing such far-reaching changes and public action is increasingly being pursued at European level, I am certain that with 27 Member States we can, between us, identify an appropriate and balanced route via which to investigate these and other issues. I am preaching to the converted, I know. I hope that this initial meeting – which is an extension of the work done by the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union – is just the first of many and that today's success will spur us on and help keep the momentum going.

To quote Yves Kreins at the start of the seminar, this is the start of a process which I hope will go from strength to strength.