

sort of scientific evidence to act as the basis for regulation of risk [...] correlative associations are permitted at the EU level [...] some member states allow hypothetical evidence to act as the basis for risk regulations". As is recognised, this directly impacts upon the measure of "sufficient" scientific evidence and in turn, the potential for informal dispute resolution. From this, it is argued that there is a need for multi-lateral engagement with the definition of "sufficient science" and with what is recognised as "legitimate science". Hornsby states in his introduction that "understanding differences in how science is treated between sovereign jurisdictions can build understanding of why efforts towards achieving sustainable development appear so contentious and fraught". It would be good to see this idea developed and explored.

The examination of the case studies in question undertaken here is informative and valuable, it exposes the key points of divergence between the different regulatory contexts specifically in terms of how regulatory institutions have treated the scientific evidence emerging from both "epistemic communities" and other recognised sources. These very points of divergence are themselves coloured by the culture in which risk regulation takes place. The focus upon sufficiency of scientific evidence, rather than uncertainty is intended to deepen understanding of the underlying differences in regulatory approach and it certainly succeeds in demonstrating these differences and the implications thereof. Hornsby "seeks to engage scholars of international political economy and governance into thinking more broadly about how science can matter" and this book should certainly achieve this. This is an interesting contribution to the literature on a subject of immediate relevance and pressing importance. Reading this book as an academic lawyer, I am reminded of the need for not only greater engagement between legal and scientific researchers, but also of the value of greater inter-disciplinary engagement between law and the social sciences, including political economy.

*Environmental Liability Directive – A Commentary*  
by Lucas Bergkamp and Barbara Goldsmith  
(eds.)

Oxford: Oxford University Press, 2013, 408 pp.,  
€ 168.01; Hardcover

*Joseph Huggard\**

In his introduction, Hans Lopatta, of DG Environment, points out that "more than eight years after its entering into force and five years after its application [...] it seems the right time to look again at some theoretical and practical issues arising under the Environmental Liability Directive" (ELD)<sup>1</sup>. The book, in the opinion of the reviewer does an excellent job of just that. The book is extensive and I would commend it to all who wish to gain greater insights into the Directive, its implications, impacts and application to date. It is also potentially of considerable use to corporate counsels of non-European companies currently investing or planning to invest in Europe. The book creates an understanding that this Directive is not, as the name might suggest, designed to create a civil liability regime for enabling private parties to gain recourse for environmental damage. The ELD rather creates one of administrative law "requiring public authorities to ensure that the polluter pays for environmental damage". I particularly commend it to those of us interested in the process whereby legislation is developed in Europe as it gives further evidence in support of the old adage that those who like sausages and respect the law should never watch either being made.

The ELD is fundamentally designed "to provide a common framework for preventing and remediating certain forms of environmental damage and to complement existing EU nature and conservation regimes, such as those established by the Wild Birds Directive and the Habitats Directive." ELD suggests that these measures do not allow responsibility or remediation measures to be imposed nor the associated costs to be recovered by the authorities. ELD is designed to provide a framework by which polluters pay and operators can be forced to take measures in the case of threat of environmental damage or to prevent or limit "further environmental damage and the adverse effects thereof on human health or the further impairment of services provided by the impacted natural resources to other natural resources and the public."

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1 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental Liability with regard to the prevention and remedying of environmental damage.

The book comprises some 15 Chapters by a broad range of authors who take us on a journey from the history and theory underlying the ELD via a consideration of the practice to date ultimately to a discussion on the way forward. It is divided into three parts. Part I deals with the scope, substance and procedures of the ELD. Part II examines emerging issues and practices in ELD application and Part III discusses the ELD's future: tools, approaches and further development.

The book presents a wealth of useful detail and particularly examines the potential ambiguities in the legislation. For example, the potential of the ELD definition of land damage to create confusion in distinguishing between when substances harmful to health are introduced into land and when the soil itself poses a threat to human health. It also drills down to explain the rationale behind certain provisions of the ELD such as the need to cover the type of environmental damage not previously generally recognised by the Member States as compensable under civil or administrative law. This, the book explains, creates "a new administrative cause of action". The book highlights ambiguity as a recurring theme and hence the applicability of the ELD is a "critical threshold issue that must be evaluated and ascertained for a case to proceed under the regime".

From an operator's and in the worst case, their counsel's perspective, the book also highlights the important distinction between exceptions and defences. In the case of exceptions, the responsibility lies with the authorities to determine if they are applicable before initiating proceedings. On the other hand, it is not the responsibility of the authorities to identify defences. These must be invoked by the operator and ultimately their applicability demonstrated. Both are discussed and outstanding uncertainties that need to be addressed in the future and are highlighted with the recommendation that they should be resolved in a neutral manner such that there is a "balanced, reasonable and predicable application of the ELD".

In consideration of the remediation aspects of the ELD, a central challenge of the book is highlighted. While the ELD has been enacted over eight years and in force for over five years, there "have been very few published cases [...] and incidents to draw upon for case studies". Hence, in order to illustrate the potential manner in which incidents might be evaluated as subject to ELD and discuss some of key technical issues that will need to be addressed by authorities

and operators, the book relies on examining past incidents that might well have fallen within the scope of the ELD, had it been in place at that time. This approach, in the opinion of the reviewer, works, allowing a discussion of the various categories of remediation (primary, complementary and compensatory) and of the challenges facing authorities in determining if the incident is subject to the ELD and, if so, the type and nature of remediation required.

A keystone of the ELD is the polluter pays principle. The book reviews the possible instruments available both *ex ante* and *ex post* to an incident to fund the potentially very significant costs of remediation, and concludes that the lack of standardisation of the Member State's financial security regimes will create a significant barrier to the "adoption of EU-wide solutions".

The reviewer would never suggest that companies should consider or would find any benefit in jurisdiction shopping based on the ELD. However, the book does provide a good overview of how the measure has been transposed into the legislation of 26 Member States (Slovenia is not considered). It also examines how some of the operator-critical options such as the scope of the strict liability provisions, exceptions and defences have been incorporated into the legislation in Member States. Overall, it illustrates a somewhat patchy level of "gold plating" in transposition, reflecting, one assumes, national leanings/policies.

An examination of the scope, substance and procedures of the ELD ends with a consideration of the administrative procedures that are required to be executed by the Member State under ELD. While these may have burdens from the perspective of the authorities, a salient point for operators is the book's discussion of the implementation of ELD provisions which entitles NGOs to submit observations to authorities with the potential to ultimately lead to action.

While, as is pointed out, there is a significant difference between the ELD and the US NRD (Natural Resources Damage), a discussion of the common concepts is coupled with a detailed examination of a US case study. In this example, HEA (Habitat Equivalency Analysis) and a "service to service" equivalency approach were used. This provides a very concrete example, lacking any from the EU, of what might be entailed in a future application of the ELD. At the centre of both measures are the principles that the

polluter pays and that the public should be made aware of “the injuries to the natural resources and their associated services”. Major differences, such as the definition of “operator” and financial security requirements are considered, but as the authors point out, the EU has and will continue to look at the operation of US NRD programme and learn.

The book highlights the fact that a fundamental dimension to the ELD, when considering prevention and remediation of environmental damage, are the technical and economic aspects. Key issues range from initial identification of “significant” environmental damage to “scaling of requisite remedial activities”, which, in addition to not being fully defined in the ELD, are further complicated by being delegated to the Member States, with attendant variations. The book seeks to address these by proposing a generic decision-making framework to assist in performing a damage assessment. This is particularly useful because, as is correctly pointed out, economic operators deserve to have the uncertainty around the ELD minimised.

In support of this approach, the book while again conceding that actual case experience under ELD is limited, presents an excellent detailed example of a hypothetical case study designed to act as a resource and focus of discussion for all involved parties “relative to future ELD cases”.

As discussed above, minimising uncertainty is key to promoting an ELD regime which is “reasonable, balanced and predictable”, something to which the economic operators should be entitled. There is a detailed set of recommendations in this area, which are, in the opinion of the reviewer, evidently based on extensive experience and therefore deserve particular attention.

In terms of sanctions and enforcement mechanisms, the ELD is not specific other than imposing a requirement on Member States to provide for adequate enforcement. The book concludes that the ELD can be variously enforced through criminal, administrative and civil law sanctions as a function of the Member State’s national laws, again emphasising the lack of impact of the legislation relative to its objective of creating a common framework with the implied benefits of a level playing field.

It may be remiss to single out any chapter and its authors for particular mention in a book which is clearly a collective effort from extremely knowledgeable authors, assembled by the editors, Lucas Bergkamp and Barbara J Goldsmith. However, because of personal interest in the political and administrative processes by which legislation evolves from the twinkle in the eye of an official to the ultimate legislation, promulgated across the EU, the reviewer found the opening chapter extremely informative. The slightly tongue cheek style of Geert van Calster and Leonie Reins was particularly appreciated.

They describe the evolution of the legislation over a period of 20 years tracing the Commission’s initial desire to put in place a civil environmental liability scheme which was ultimately watered down to an administrative regime. It questions what, if anything, ELD really adds in terms of enhancing protection over and above the legislation instruments that had already existed in the armamentarium of the EU and the Member State’s administrations. One is stuck by the narrative, which could almost be caricatured as the Commission saying “By hook or by crook we will have EU legislation on environmental liability, regardless of whether it contributes to protecting the environment”. It may help to understand this commitment to creating a liability regime by considering that at around that time, one of the reasons advanced in the White Paper<sup>2</sup> for the need to have the chemicals legislation that ultimately became REACH was the absence of a liability such as existed in the United States. The concern of the Commission was that “compensations awarded by the courts of the EU Member States are generally not as high as [...] in the US and hence have a limited deterrent effect”.

If the above could be described as an *ex ante* review, then it is complemented by an *ex post* review in Part III of the book. This review leads the reviewer, who may be guilty of making a somewhat biased interpretation of the more nuanced language used by the authors, to the conclusion that other than to reiterate the polluter pays and the preventative principles, the ELD is likely to produce little benefit. It certainly does little to achieve a level playing field of competitive conditions, one of the much used legislative rationales of the Commission. It does have cost implications for Member States who have to put in place administrative apparatus to service the ELD and for the economic operators, both with the associated opportunity costs.

2 White Paper, Strategy for Chemicals Policy, COM(2001) 88 final.

The book concludes by rightly emphasising that the ELD is on the books, being implemented and beginning to be applied in real cases. It encourages those impacted by the ELD and those wishing to offer services in this area to work to promote the clearly desirable but ambitious goal of a balanced, reasonable and predictable implementation of the ELD.

The overall conclusion of the reviewer is that at worst the legislation is ineffective or, at best, it is too early to properly quantify if it will provide a net benefit to the protection of the environmental and human health in the EU.

In conclusion, I would like to commend the editors Bergkamp and Goldsmith for conceiving the idea for this book, for assembling such a diverse group of practitioners of standing and for the ultimate output, a book that is extremely informative, very useful to a diverse group and stimulating to this reviewer.

*Die Novellierung der europäischen Tabakprodukttrichtlinie – Grundfragen der Vereinbarkeit mit EU- und WTO-Recht*

by Udo di Fabio, Christian Pitschas and Werner Schroeder

Deutscher Fachverlag GmbH, Fachmedien Recht und Wirtschaft, 2014, 193 pp.

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Marcus Klamert\*

This is not the first book to critically assess the Commission Proposal for the New Tobacco Products Directive<sup>1</sup>. It examines a draft that has in the meantime become law<sup>2</sup>. This book also shares with the aforementioned study<sup>3</sup> that it is wholly based on legal opinions rendered by the three authors individually on behest of the tobacco industry, in the present case two German business associations.

It is rather unusual that so much thought is invested into a “mere” legislative proposal. Yet, tobacco has always been at the heart of the debate on the reach of the market-shaping powers of the EU legislature<sup>4</sup>. This has two reasons: firstly, this industry does not flinch easily when it comes to taking its affairs to court, and secondly, what better subject could there be to illustrate the policy dilemmas of regulating on two quite distinct objectives, viz. the “cerebral” functioning of the internal market, and the “emotional” public health. Regarding the former, the EU is well

equipped with law-making powers in Article 114 TFEU, for most parts of the latter it has to do without a harmonisation mandate in Article 168 TFEU. Nonetheless, the Court has in the past accepted – in the tobacco area – a broad prohibition of advertising and a sweeping regulation of tobacco products, both based on what is now Article 114 TFEU.

The TPD relies on this case law to partly update existing rules, such as on ingredients and emissions (Art. 3 TPD), but also to bring further product categories within its scope of regulation, such as electronic cigarettes (Art. 20 TPD), chewing and nasal tobacco (Art. 11 TPD). Most importantly however, it does two things that are at the centre of critique in the book: It makes pictorial health warnings mandatory and increases their size (Art. 10 TPD); also it bans characteristic flavours such as menthol (Art. 7 TPD).

Before I get to the gist of the arguments of the three authors, one weakness of the book is quite apparent. Since it covers the Commission proposal for the TPD, it is already somewhat outdated, as not all of the proposed measures have “survived” the co-decision procedure. Especially the flavour regulation is less broad in its product-related scope, carving out exceptions for all products but cigarettes and roll-your-own, and is subject to a long transition period on menthol. Thus, some arguments in the book have probably lost their basis, such as that by prohibiting characteristic flavours for chewing and nasal tobacco products, which are very traditional in parts of Germany and are claimed to be not marketable without such flavours, they would effectively be outlawed (pp. 45 *et seq.*), and those arguments on the lack of consideration allegedly given to the interests of small and medium-sized enterprises, which are the main

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1 COM(2012) 788 final; see also Hans Jarass, *Neue Dimensionen der Tabakproduktregulierung und Grundrechte sowie Grundfreiheiten – Grundfragen des Schutzes von Markenverpackungen, der Produktpräsentation in Verkaufseinrichtungen und der Produkzzusammensetzung* (Berlin: Lexxion 2012).

2 *Viz.* Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (“TPD”), OJ L 127, 29 April 2014, p. 1 *et seq.*

3 *Supra* note 1.

4 See among many others, the classic textbook by Stephen Weatherill, *Cases and Materials on EU Law*, 11<sup>th</sup> ed. (Oxford: Oxford University Press, 2014).