

“level playing field” requires that pension funds, as well as insurance companies, should be free to cover employees in other Member States.

We understand that the discussion paper will also look at the possibility of a “Pan-European Contract” and “Pan-European Pension Fund” taxed on the basis of territoriality. That is to say, contributions and benefits would be taxed in the State or residence of the contributor or beneficiary, and the fund or insurance company would be taxed in its country of residence. In each case, the taxing State could make no discrimination between the treatment of domestic and Pan-European contracts or funds.

Added to that, the Action Programme on the Social Charter has also promised a “communication” this year with a view to initiating a debate at community level on labour mobility aspects of occupational pension schemes (e.g. international transferability).

Conflict and co-operation at home and abroad – I think the story is just beginning!

PROPOSED STRICTER ENVIRONMENTAL LEGISLATION: ITS IMPACT FOR LIABILITY

by R M Aickin

1. Introduction

This article is written in the Spring as the Environmental Protection Bill reaches the end of its House of Commons Committee Stage and the Department of the Environment is in the early stages of preparing for the long awaited White Paper on the Environment. Both of these processes will be much further along and may be much changed when the Journal is published. There is confident expectation that the Environmental Protection Bill will have been given the Royal Assent and that the White Paper will have been published before the end of July. The White Paper is expected to lead to further Environmental Protection legislation in the 1990-91 session of Parliament. This is therefore a somewhat challenging article to write as it needs to be both predictive and descriptive and may well be overtaken by events in the course of publication.

2. Historical Basis of Control

It is often forgotten, as part of the Dirty Man of Europe image, that Great Britain has a

long history of statutory environmental control. Legislation on water pollution was first recorded in 1388 and there was a Royal Proclamation forbidding the burning of coal in London in 1273. Unfortunately we also seem to have a history of poor enforcement of pollution control legislation.

Traditionally pollution control has been based upon the polluted media. The approach towards air and water have always differed.

a. Air - Technology Based

Clean air legislation has been technology based. The first Alkali Act of 1863 required the reduction of 95% of offensive emissions. The second Alkali Act of 1874 required the application of Best Practicable Means, a concept which has survived through Best Practicable Environmental Option into Best Available Techniques Not Entailing Excessive Cost.

The common thread through all of these developments has been that the controls have been based on levels which are technologically achievable.

b. Water - Environmental Quality Based

In contrast the controls of water pollution have been based upon Environmental Quality Objectives. These were aimed at reducing pollution to achieve a particular environmental quality. This allowed for example higher discharges to faster flowing rivers.

The European standards of water, which do not have as long a history, have tended to be technologically based, in part also it must be said because of the difference between British and Continental rivers. This has led to disagreement between Continental and British regulators. There is similar argument between British regulators who have an air or water based experience.

3. Integrated Pollution Control

Integrated Pollution Control forms the first part of the Bill. This concept provides a unified control of emission to the three environmental media; air, water and land, which have previously been controlled separately.

This establishes the objective of Best Available *Techniques* Not Entailing Excessive Cost (BATNEEC). There is a subtle change in phraseology from the language of the

European Community Directive which talks of Best Available *Technology* Not Entailing Excessive Cost. This is a deliberate broadening of the term to include technical means, such as the damping down of dust which might not be described as technology. The term is specifically extended beyond any technical means and technology to include the number, training, qualifications and supervision of those involved in all stages of the process and the design construction and maintenance of the buildings in which it is carried on.

There will be onerous obligations on the operators of prescribed processes to protect the environment. In addition to any specific permit requirements there will be an implied condition of every authorisation that the release of any prescribed substances shall be prevented, (or where that is impracticable to reduce to the minimum and render harmless) and that the release of *any* other substance which might cause harm if released to any environmental medium will be minimised and rendered harmless.

In any proceedings for an offence consisting of a failure to comply with this general and implied condition there will be a reverse onus of proof and the accused shall have to prove that there was no Better Available Technique Not Entailing Excessive Cost than the one which was used. It may therefore be prudent for the operator of a prescribed process to extend the range of substances over which the authority set specific standards.

The maximum penalty is an unlimited fine or two years imprisonment or both. There is no restriction as there is elsewhere in the Bill, as to who may bring a prosecution. As a general rule under English Law anyone may bring a criminal prosecution, although private criminal prosecutions are rare.

Where any offence has been committed by a corporate body with the consent or connivance of, or attributable to, the neglect of any director, manager, secretary or similar officer of the corporation or a person purporting to act as such he as well as the corporation shall be liable to be proceeded against and punished accordingly.

Courts will have power to require a convicted person to remedy the offence within a specified time and by specified steps either as an alternative or in addition to the imposition of any punishment.

The Chief Inspector, with the written consent of the Secretary of State, will have power to take reasonable steps towards remedying any harm caused by the offence and for the recovery of the costs incurred from any person convicted of the offence.

4. Waste Disposal

Although falling within the general concept of integrated pollution control, waste disposal is treated separately in the Bill.

The Environmental Protection Bill creates a duty of care on all who import, create, keep, control, treat or dispose of controlled waste to take all reasonable and applicable measures to:

- (a) prevent the contravention of the Act by another,
- (b) prevent escape of the waste,
- (c) on transfer of the waste to ensure that;
 - (i) transfer only occurs to an authorised person,
 - (ii) transfer is accompanied by a written description of the waste sufficient to enable others to avoid contravention of the Act.

It is an offence to fail to comply with the duty of care. There is continuing consultation about the extent of the duty of care. This will be laid out in a code of practice.

5. Regulation Authorities

Although the Environmental Protection Bill establishes the concept of Integrated Pollution Control the implementation of pollution control is left in the hands of several regulation authorities.

Her Majesty's Inspectorate of Pollution has overall charge of the implementation of integrated pollution control and of overall supervision of waste disposal.

The National Rivers Authority which was established by the Water Act 1989 has overall responsibility for control of pollution of rivers and estuaries. There is overlap with HMIP and there are continuing discussions about the interrelationship of the two bodies. It is noticeable that while HMIP is losing staff and appears to be suffering from morale problems the NRA have mounted a successful prosecution of Shell following last year's incident in the Mersey. This is an interesting development for two reasons. Firstly that the NRA was prepared to take the prosecution to the High Court. In the past prosecutions for contravention

of pollution regulations have generally been taken to the Magistrates Courts. Secondly in setting the £1,000,000 fine the judge clearly had two distinct things in mind. The first was Shell's ability to pay. The other was the general care for the environment which Shell had displayed in the past.

Local Authorities are also involved in regulation of Pollution Control. Firstly they have an involvement in Integrated Pollution Control as far as air emissions are concerned. They will also have a major role in the control of waste disposal through local waste regulation authorities which are to be established and separated from the waste disposal functions.

This multiplicity of regulation authorities is a target of much criticism. The Earl of Cranbrook's Environment Protection Bill championed the setting up of an Environment Protection Commission. While this Bill has been withdrawn there can be little doubt that the concept will be examined in detail in the White Paper.

6. Contaminated Land

Contaminated land is also the subject of much discussion. It has been the subject of a recent report of the House of Commons Select Committee.

The major control of contaminated land lies in conditions applied to planning consents. The result is a tendency to look for alternative uses of the land rather than to carry out the clean-up of the site.

However there is provision in the Water Act 1989 which allows the NRA to carry out clean-up when there is a threat of pollution to controlled waters. The NRA is entitled to recover the costs from the person responsible for the pollution. These powers specifically do not apply to abandoned mine workings.

There is provision in The Environmental Protection Bill that Waste Regulation Authorities will have a new duty to monitor and secure the safety of closed landfill sites. This extends to all land where controlled waste has been deposited at any time, before or after 1st January 1976. The Authority is under a duty to take preventive measures on the affected land or adjoining land to prevent pollution or harm. The Authority can recover the costs incurred from the owner of the land.

This section has been the subject of much discussion in the House of Commons Committee Stage and is likely to be amended before it reaches the statute book. However as the drafting stands this clause could be applied to all contaminated land.

7. Public Access to Environmental Information

There is also considerable discussion about the Public Access to Environmental Information. This is the subject of a European Directive. It is included in the Environmental Protection Bill and consultations are continuing about precise implementation. However the result will be that more environmental information will be publicly available.

8. Conclusion

This paper has been a quick gallop through some of the likely provisions of new legislation. I am conscious that I have not really addressed the question of liability which appears in the title at all.

There are bound to be effects on liability. For example increased public access to environmental information may make it easier for victims to sue.

However it is my submission that the major trend is the use of the criminal law. Its effect can be seen in the case of the Mersey spill. The use of the criminal law avoids the difficulties with common law of who is entitled to sue on behalf of the commons and establishing the quantum of damages. Although the burden of proof in the criminal law, beyond reasonable doubt, is more onerous than the common law, on the balance of probabilities, much of this is reduced for example through the introduction of a reverse onus of proof.

I believe that this development, in contrast to the US Superfund Legislation which relies upon liability, will simplify matters and lead to greater environmental protection. It may also mean a demand for insurance against the risk of criminal prosecution, for example where it is alleged that a particular process does not adhere to the principles of BATNEEC when the operator believed that they did.

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