# OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 22 October 2009 [1]

## I — Introduction

'*δός μοί (φησι) πού στώ καί κινώ τήν γήν*' [2]

1. This sentence is attributed to the Greek scholar Archimedes. It illustrates the effect of his laws of the lever.

2. Archimedes lived in the city of Syracuse in Sicily. Not far away is a bay, the Augusta roadstead, an area which has been very heavily polluted by harmful substances for many years. The efforts to remedy that environmental damage gave rise to the present references for a preliminary ruling. [3]

3. It is not a question of finding a point from which the earth could be lifted off its hinges. However, the question arises of the connecting factor for liability for environmental damage. Can only those who caused the damage be held responsible or are others who own land in the area in question or are industrially active there possibly also liable?

4. In the main proceedings in Case C-378/08 it is claimed that the competent authorities required undertakings operating in the area in question to remedy environmental damage without having assessed and proved a causal

1 — Original language: German.

2 — 'Give me a point on which to stand, and I will move the Earth!' Cited by Pappi Alexandrini, Collectionis quae supersunt, Voluminis 3, Tomus 1, edited by Friedrich Hultsch, 1878, p. 1060 (http://gallica.bnf.fr/ark:/12148/bpt6k99429t.image.f62.pagination, last visited on 2 September 2009).

3 — In addition to the three cases examined here, two further joined cases concerning this polluted area are pending before the Court of Justice: *Buzzi Unicem and Others* (C-478/08 and C-479/08, OJ 2009 C 19, p. 14 et seq.).

link between the conduct of the undertakings and the environmental damage or fault on the part of the undertakings.

5. The referring court asks this question in particular in connection with 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 [4] ('the Environmental Liability Directive'). However, it must first be clarified to what extent that directive is relevant to damage the vast majority of which was caused before the directive entered into force.

6. Further questions arise from the measures imposed to remedy the damage. The competent authorities made significant subsequent modifications to a rehabilitation plan which had already been adopted without consulting the undertakings concerned, assessing the effects of those modifications or giving reasons for that course of action. It is therefore asked whether such conduct is compatible with the Environmental Liability Directive.

4 — OJ 2004 L 143, p. 56.

7. Lastly, with regard to public procurement legislation, the question is raised as to the conditions under which public authorities may award contracts for planning and implementing remedial measures without carrying out a public tendering procedure.

## II — Legislative context

8. The Community's environmental policy principles, in particular the 'polluter pays' principle, are laid down in Article 174 EC:

'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community.

It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

…'

9. According to its objective as laid down in Article 1, the Environmental Liability Directive is based on the 'polluter pays' principle:

'The purpose of this Directive is to establish a framework of environmental liability based on the "polluter pays" principle, to prevent and remedy environmental damage.'

10. Under Article 3(1), the directive applies to:

'(a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities;

(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.'

11. Exceptions to the scope of the directive are laid down in Article 4. Article 4(5) states as follows:

'This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character where it is possible to establish a causal link between the damage and the activities of individual operators.'

12. With regard to remediation costs, Article 8(1) provides:

'The operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive.'

13. The term 'operator' is defined in Article 2(6) as follows:

'(A)ny natural or legal, private or public person who operates or controls the occupational

activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity'.

14. Article 16(1) lays down rules governing the adoption of more stringent provisions by the Member States:

'This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties.'

15. The temporal application of the directive is limited in Article 17:

'This Directive shall not apply to:

— damage caused by an emission, event or incident that took place before the date referred to in Article 19(1),

— damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said date,

— ...'

16. Article 19(1) lays down the period within which the directive must be implemented:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2007. They shall forthwith inform the Commission thereof.'

17. The reference for a preliminary ruling in Case C-378/08 also concerns, with regard

to public procurement, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,[5] Council Directive 93/37/EEC[6] of 14 June 1993 concerning the coordination of procedures for the award of public works contracts,[7] and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.[8] However, there is no need to reproduce individual provisions of those directives.

## III — Facts and references for a preliminary ruling

### A — *Case C-378/08*

18. The following facts are evident from the order for reference in Case C-378/08.

19. The Augusta roadstead area is affected by environmental pollution phenomena which, in all likelihood, originated a long time ago, probably in the period after the Second World War at the latest. In particular, the seabed in the area is heavily contaminated by pollutants.

20. In the period in which the pollution occurred, a number of undertakings operated in parallel in the Augusta roadstead and/or succeeded one another in operating variously in the industrial and hydrocarbons sector. According to the referring court, this may mean that a specific assessment of the individual liability of the various undertakings for the pollution is impossible.

21. By several successive measures, the Italian authorities required the undertakings currently operating within the limits of the Augusta roadstead to clean up the contaminated sea-beds. In the event that the undertakings failed to comply with the measure, the authorities warned that they would have the remediation work carried out themselves, the costs to be borne by those undertakings.

5 — OJ 2004 L 134, p. 114.

6 — In the order for reference the national court asks about compatibility with Directive 93/97/EEC. However, Council Directive 93/97/EEC supplementing Directive 91/263/EEC in respect of satellite earth station equipment is manifestly irrelevant to the main proceedings, and it must therefore be assumed that this is a typographical error and the national court actually intended to ask about compatibility with Directive 93/37/EEC.

7 — OJ 1993 L 199, p. 54.

8 — OJ 1989 L 395, p. 33.

22. The undertakings required to carry out the remedial measures operated in areas of activity which involved the use or treatment of polluting substances.

23. According to the findings of the referring court, the authorities required the undertakings operating in the Augusta roadstead to remedy the existing environmental pollution, without differentiating between previous and current pollution or assessing the extent to which each individual undertaking is responsible for the pollution which has occurred.

24. Those measures have been challenged by some of the undertakings concerned. Before it made the present reference to the Court of Justice, the Tribunale Amministrativo Regionale della Sicilia (Regional Administrative Court, Sicily) had already delivered a number of judgments declaring unlawful several of the contested measures, on the ground in particular that they infringed the 'polluter pays' principle under Community law. On the other hand, the appeal court, the Consiglio di Giustizia Amministrativa per la Regione Siciliana (Council of Administrative Justice for the Region of Sicily), considered that it was lawful to require undertakings established in the Augusta roadstead to remedy the damage in question and, in one of the cases, therefore ordered that the judgment of the Tribunale Amministrativo Regionale della Sicilia be suspended.

25. In the proceedings in Case C-378/08, several of the undertakings operating in the Augusta roadstead challenge the most recently adopted measure of 20 December 2007, which requires them to clean up the sea-bed.

26. The sea-bed is to be cleaned up in accordance with a plan drawn up by Sviluppo Italia Aree Produttive ('Sviluppo Italia'). Under that plan, the contaminated sediment is to be dredged and, after being treated, used to build an artificial island in the sea. The artificial island is to serve as a 'harbour hub' for the interchange of container ships of different sizes.

27. Sviluppo Italia is an undertaking set up by the State, which operates on the market. The Italian authorities called upon Sviluppo Italia to carry out the planning and — in the event of default by the undertakings — the subsequent implementation of the remedial measures in question, without first carrying out a public tendering procedure. According to the national court, the works awarded were of 'very high economic value'.

28. In addition to the action for the annulment of the contested measure, the applicant undertakings have applied for an interim order for suspension of the operation of the measure.

29. In interlocutory proceedings, the Tribunale Amministrativo Regionale della Sicilia refers the following questions to the Court for a preliminary ruling:

'(1) Do the "polluter pays" principle (Article 174(2) EC (formerly Article 130r(2)) of the Treaty establishing the European Community) and the provisions of Directive 2004/35 preclude national legislation which allows the public authorities to require private undertakings — merely owing to the fact that they currently carry on their activities in an area which has been contaminated for a long time or borders on an area which is historically contaminated — to implement rehabilitation measures, irrespective of whether or not any preliminary investigation has been carried out to identify the party responsible for the pollution?

(2) Do the "polluter pays" principle (Article 174(2) EC (formerly Article 130r(2) of the Treaty establishing the European Community) and the provisions of Directive 2004/35 preclude national legislation which allows the public authorities to impute liability to make good the environmental damage in a particular form to the person who owns the property rights and/or carries on commercial activities on the contaminated site without first having to assess whether there is a causal link between the conduct of that person and the occurrence of the contamination, by virtue merely of that person's "situation" (namely, that of being an operator whose activities are carried on inside the site)?

(3) Do the provisions of Community law in Article 174(2) EC (formerly Article 130r(2) of the Treaty establishing

the European Community) and Directive 2004/35 preclude national legislation which, overriding the "polluter pays" principle, allows the public authorities to impute liability to make good the environmental damage in a particular form to the person who owns the property rights and/or operates an undertaking on the contaminated site, without first having to assess whether there is a causal link between the conduct of that person and the occurrence of the contamination or the subjective requirement of intent or negligence?

(4) Do the Community competition principles laid down in the Treaty establishing the European Community and Directive 2004/18, Directive 93/97 and Directive 89/665 preclude national legislation which allows the public authorities to award to private persons (Società Sviluppo SpA and Sviluppo Italia Aree Produttive SpA) the activities of characterisation and of planning and performing decontamination operations — or more correctly, the carrying out of public works — in areas owned by the State directly, without first carrying out the necessary public tendering procedures?'

B — *Joined Cases C-379/08 and C-380/08*

30. These proceedings concern two measures for remedying environmental damage which were imposed by a decision of 16 April 2008.

31. First of all, the applicant undertakings were required to contain land owned by them adjacent to the Augusta roadstead by constructing a physical barrier on the sea-bed. Secondly, authorisation to use land in the areas to be decontaminated was made subject to the remediation of the environmental damage and the construction of the barrier. These conditions applied equally to cleaned up areas and areas which were not polluted.

32. The applicant undertakings argue that those requirements have the effect of modifying earlier decisions and were made without consultation, without giving reasons and without a proper assessment of their effects.

33. In the interlocutory proceedings, the Tribunale Amministrativo Regionale della Sicilia therefore refers the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the Community Environmental Liability Directive (Directive 2004/35 and, in particular, Article 7 and Annex II thereto) preclude national legislation which allows the authorities to require, as "reasonable options for remedying environmental damage", that actions be taken concerning environmental matrices (comprising, in this case, the "physical containment" of the groundwater along the entire seafront) which are different from and go further than those originally chosen at the conclusion of an appropriate investigation carried out on a consultative basis, which have already been approved and put into effect and are being implemented?

(2) Does the Community Environmental Liability Directive (Directive 2004/35 and, in particular, Article 7 and Annex II thereto) preclude national legislation which allows the authorities to impose such requirements on its own initiative, that is, without having assessed the site-specific conditions, the costs of implementation of the measures in relation to the reasonably foreseeable benefits, the possible or probable collateral damage and adverse effects on public health and safety, and the necessary time scales for implementation?

(3) Does the Community Environmental Liability Directive (Directive 2004/35 and, in particular, Article 7 and Annex II thereto) preclude national legislation which allows the authorities to impose such requirements on its own initiative as conditions for authorisation for the lawful use of areas of land not directly affected by the decontamination measures, in so far as they have already been decontaminated or were not, in any event, polluted, and situated within the

confines of the Priolo Site of National Interest?'

## IV — Proceedings before the Court of Justice

34. Polimeri Europa SpA and Syndial SpA, with joint submissions in Case C-378/08 (collectively, 'Polimeri and Others'), and ENI SpA, Polimeri Europa SpA and Syndial SpA, with joint submissions in Cases C-379/08 and C-380/08 (collectively, 'ENI and Others'), and ERG Raffinerie Mediterranee SpA ('ERG'), as applicants in the main proceedings, took part in the written procedure, as did the Italian Republic and the Commission of the European Communities. The Kingdom of the Netherlands and the Hellenic Republic submitted written observations in Case C-378/08.

35. Polimeri and Others, ENI and Others, ERG and Sviluppo Italia, as parties to the main proceedings, took part in the joint hearing for all three cases on 15 September 2009, as did Italy, Greece, the Netherlands and the Commission.

## V — Legal assessment

### A — *Admissibility of the references for a preliminary ruling*

36. First of all, I will briefly mention the objections raised by Italy as to the admissibility of the references for a preliminary ruling. In so far as there are specific doubts regarding the admissibility of individual questions, I will consider them in connection with the relevant question.

#### 1. The aim and purpose of the reference for a preliminary ruling

37. The Italian Government argues that the reference for a preliminary ruling serves primarily to confirm the referring court's interpretation of national law, which departs from the interpretation of the appeal court, and thus pursues an objective not provided for in Article 234 EC.

38. It is true that proceedings under Article 234 EC may concern only the interpretation

of Community law or the validity of secondary law.[9] However, the present references expressly seek an interpretation of rules of primary and secondary Community law. That argument is therefore unfounded.

39. The departure from the opinion of the appeal court does not preclude the reference either. A reference for a preliminary ruling is intended to dispel doubts as to the interpretation of Community law.[10] Differences of opinion between courts on points of Community law are indications that the reference for a preliminary ruling is based on genuine doubts.

2. The content of the reference for a preliminary ruling

40. The Italian Government also considers the questions to be too detailed and criticises the description of the facts as inaccurate and tendentious.

41. Whether questions are too detailed can be of relevance to the admissibility of references for preliminary rulings only in so far as, in proceedings brought under Article 234 EC, the Court has no jurisdiction to apply the rules of Community law to a specific case.[11] In the present case, however, it is necessary only to interpret provisions of Community law in the light of the facts of the case. The application of the law to the specific case remains the responsibility of the national court.

42. It is not for the Court of Justice to ascertain in preliminary ruling proceedings whether the referring court accurately reports the facts.[12] Rather, it is for the competent national courts to ascertain the facts.

43. The objections raised by Italy concerning the admissibility of the references for a preliminary ruling cannot therefore be accepted.

9 — Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 34.

10 — See C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 33.

11 — Case 37/86 *Coenen* [1987] ECR 3589, paragraph 8, and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraph 24.

12 — Case C-153/02 *Neri* [2003] ECR I-13555, paragraph 34 et seq.; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42; and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 21.

B — *The first three questions in Case C-378/08*

44. The first three questions in Case C-378/08 are intended to clarify whether it is compatible with the 'polluter pays' principle set out in Article 174 EC and the Environmental Liability Directive to impute liability for remedying environmental damage to certain persons by reason of their commercial activities or their status as owners of land, irrespective of any causal contribution or fault.

45. The order for reference mentions Article 174 EC, but there is no need to examine that provision separately. Article 174 EC simply sets out the general objectives of Community environment law, which the Community legislature must give substance to before they can be binding on the Member States. [13] Article 174 EC is not therefore a criterion for assessing the applicability of national rules on liability.

46. On the other hand, it cannot be ruled out that the Environmental Liability Directive precludes national rules on liability. In interpreting that directive, particular importance must be attached to Article 174 EC and the 'polluter pays' principle enshrined therein, since they underlie the Community's guiding principles for environmental policy.

47. The liability mechanism under Italian law described in the order for reference is neither mandatory nor expressly prohibited under the Environmental Liability Directive. Rather, under Article 16, Member States are not prevented from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional responsible parties.

48. Article 16 of the Environmental Liability Directive is based on Article 176 EC. Under that provision, measures imposed under Article 175 EC, that is to say, provisions falling exclusively within the ambit of Community environmental law, [14] such as the Environmental Liability Directive, do not prevent any Member State from maintaining or introducing more stringent protective measures.

13 — Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 57 et seq.

14 — Paragraphs 4 to 6 of that provision contain special rules regarding derogations from environmental protection measures which may also be valid, in particular on the basis of Article 95 EC.

49. According to the Court, a more stringent national protective measure within the meaning of Article 176 EC must follow the same policy of protecting the environment as the directive in question [15] or be compatible with it. [16] Measures which do not meet those conditions either are contrary to the directive or concern matters which are not regulated by the directive.

50. It would be incompatible with the binding legal effect of Community law if the Member States were able to take measures which were contrary to the directive. Such measures are precluded by the directive.

51. On the other hand, reliance on Article 176 EC is not possible where the national measure concerns a matter which is not regulated by the directive. The notion of more stringent protective measures logically requires a comparison to be made. A prerequisite for a 'more stringent protective measure' is the existence of a potentially less stringent measure under Community law. If no such measure exists, then there cannot be a more stringent measure either. Given that, in the absence of relevant Community legislation, the Member State simply exercises its own competences, purely environmental Community provisions cannot affect national rules in this case. Article 176 EC does not concern the extent to which other Community legislation precludes national measures.

52. These considerations must apply not only to more stringent protective measures under Article 176 EC, but also to more stringent measures under Article 16 of the Environmental Liability Directive.

1. The applicability of the Environmental Liability Directive

53. The Environmental Liability Directive can therefore be used as a point of reference for more stringent measures only if it is applicable. However, doubts have been expressed as to both its temporal and material application in the main proceedings.

15 — Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 41.

16 — *Deponiezweckverband Eiterköpfe*, cited in footnote 15, paragraph 52.

(a) The temporal scope of the Environmental Liability Directive

54. Under Article 17 and Article 19(1) of the Environmental Liability Directive, the directive does not apply to damage caused by an emission, event or incident that took place before 30 April 2007. Nor does it apply to damage caused by an emission, event or incident which takes place subsequent to that date when it derives from a specific activity that took place and finished before that date.

55. In their observations, the Italian and Netherlands Governments and the Commission therefore express doubts as to the applicability *ratione temporis* of the Environmental Liability Directive. They based their arguments on the assumption that all the environmental damage to be remedied occurred before 30 April 2007. If that assumption is correct, that view must be shared.

56. The Netherlands Government rightly states that the measure contested in the main proceedings is based inter alia on a study which was produced in April 2007, that is, before the relevant date. Furthermore, according to the brief description of the environmental damage in the order for reference, the Augusta roadstead area is affected by environmental pollution phenomena which, in all likelihood, originated a long time ago. [17]

57. However, the activities which are assumed to have caused the damage apparently continue to be carried out. I therefore conclude that, according to the current findings of the referring court, the environmental damage to be remedied represents cumulative damage, the majority of which occurred before 30 April 2007, although this does not mean that further environmental pollution has not occurred since then. It is not for the Court to establish in preliminary ruling proceedings whether this is actually correct. [18] Rather, it is for the competent national courts to ascertain the facts.

58. It is apparent from the wording of the first and second indents of Article 17 of the Environmental Liability Directive and the schematic context of the directive that in a situation involving cumulative damage the

17 — At the hearing Polimeri and Others even argued that the damage was caused by pollution which occurred between 1958 and 1979.

18 — See the references in footnote 12.

directive is applicable to that part of the damage or imminent threat thereof which occurred after 30 April 2007.

59. Under the first indent of Article 17 of the Environmental Liability Directive, the directive does not apply to damage caused before the relevant date (old damage).

60. Furthermore, the second indent of Article 17 of the Environmental Liability Directive excludes damage caused by an emission, event or incident which takes place after the relevant date when it derives from a specific activity that took place and finished before that date.

61. Typical cases in which the rule laid down in the second indent applies are, in all likelihood, primarily old pollution which causes new damage, such as when harmful substances escape from a waste dump and contaminate adjacent waters. This form of propagation of pollutants can also be regarded as an emission. [19] In German law, the illustrative term '*Weiterfressen*', meaning propagation of damage, has been developed for this type of damage. [20]

62. The rule in the first and second indents of Article 17 of the Environmental Liability Directive is intended to preclude the retroactive application of the directive. The Commission pursued that objective even during the preparatory work on the directive. [21] The idea is taken up in recital 30 in the preamble to the directive, which states that damage caused before the expiry of the deadline for implementation of the directive should not be covered by its provisions.

63. The reason for which retroactive effect is precluded is to be found in the principle of legal certainty, which in general precludes a Community measure from taking effect from

19 — See the definition in Article 2(8) of the Environmental Liability Directive: 'the release in the environment, as a result of human activities, of substances, preparations, organisms or micro-organisms'.

20 — See the judgment of the Bundesgerichtshof (Federal Court of Justice) of 24 November 1976 (VIII ZR 137/75, *Neue Juristische Wochenschrift* 1977, p. 379 [381]).

21 — The Commission White Paper on environmental liability (COM(2000) 66 final, 9 February 2000, p. 14 et seq.), and the Commission Proposal of 23 January 2002 for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (COM(2002) 17 final, 23 January 2002, p. 17 and 24) expressly rejected retroactive application.

a point in time before its publication. It may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. [22] However, the legislature expressly stated that it did not intend to give the Environmental Liability Directive any such retroactive effect.

64. On the other hand, new rules can apply immediately to the future effects of a situation which arose under the old rules. [23] The scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose earlier. [24]

65. Viewed in this light, the first indent of Article 17 of the Environmental Liability Directive defines damage occurring before 30 April 2007 as a pre-existing situation, which is not covered by the directive.

66. Contrary to the view taken by the Greek Government in the written procedure, this applies even if the activity which gave rise to the damage began before the relevant date but continued after that date. Such cases are not covered by the second indent of Article 17 of the Environmental Liability Directive, as, under that provision, the activity must have finished before 30 April 2007. However, the first indent may exclude such activities from the scope of the directive if they took place before the relevant date.

67. On the other hand, as the Commission rightly argues, the Environmental Liability Directive must apply where continued activity results in new damage. This is necessary in particular if the obligation under Article 5 to prevent environmental damage is to be discharged. In addition to the 'polluter pays' principle, that provision lays down two further principles of Community environmental law in accordance with Article 174(2) EC: preventive action and rectification of environmental damage at source.

22 — Case 98/78 *Racke* [1979] ECR 69, paragraph 20; Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 151; and Case C-17/01 *Sudholz* [2004] ECR I-4243, paragraph 33.

23 — Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8; Case 270/84 *Licata* v *ESC* [1986] ECR 2305, paragraph 31; Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 14; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50; Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraph 43.

24 — Case 84/78 *Tomadini* [1979] ECR 1801, paragraph 21; Case 278/84 *Germany* v *Commission* [1987] ECR 1, paragraph 36; Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 25; and *Pokrzeptowicz-Meyer*, cited in footnote 23, paragraph 55.

68. The fact that an activity was begun before the entry into force of the Environmental Liability Directive cannot render worthless the obligation to take preventive action. If, for example, an installation has caused environmental damage for a long time in the course of its normal operation, such damage must be prevented in principle under the directive as of 30 April 2007.

69. In the present case, it cannot be ruled out in particular that the measure contested in Cases C-379/08 and C-380/08 concerning the construction of a physical barrier also contributes to the prevention of future environmental damage resulting from the continued operation of the installations. It is for the competent national courts to clarify, if necessary, whether that measure would be appropriate for achieving its aim.

70. At the same time, the application of the obligation to take preventive action implies that damage which should have been prevented, but nevertheless occurred, must be remedied. Consequently, the damage caused since the relevant date as a result of continued activities must be remedied under the Environmental Liability Directive. In so far as those activities are consistent with the applicable law and/or the state of technology, however, Article 8(4) permits an exemption from the costs.

71. In the case of cumulative damage, it may be difficult in practice to differentiate between new damage and old damage, but the problem of cumulative damage causation is familiar from other areas of the law on liability and is certainly not irresolvable. Article 9 of the Environmental Liability Directive gives the Member States considerable scope in this respect by making it clear that the directive is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation. This can also cover polluters who are not subject to the directive in so far as they are responsible for old damage, but are covered in so far as they cause new damage.

72. It therefore remains to be clarified whether the more recently occurring element of old damage which was propagated comes under the Environmental Liability Directive where the activity which gave rise to the pollution is continued.

73. Such an interpretation could be based on the wording of the second indent of Article 17 of the Environmental Liability Directive, because the activity which gave rise to the pollution has not finished, but continues. The fact that the activity continued to be pursued and old damage spread indicates that it is a situation which is still ongoing and is subject to new rules for the future. At the same time, that would ensure for the future that such continuing damage is curbed, in accordance with the directive.

74. However, the application of the directive would be indirectly extended to activities carried out before it came into force. This is precisely what the provisions on the temporal application of the directive are intended to prevent.

75. The obligation to take preventive action against environmental damage does not lead to any other conclusion. Preventive action against environmental damage in the exercise of an activity is totally different from the prevention of propagation of old damage. Measures to prevent the propagation of damage cannot really be regarded as preventive action or rectification of environmental pollution at source. They will often amount to measures for remedying old damage. However, the Environmental Liability Directive does not impose any such duty on the operator. On the other hand, the prevention of further damage in the future as a result of an activity focuses precisely on the activity. It is the express aim of the directive that such activity should not cause further damage in the future.

76. The Environmental Liability Directive does not therefore apply to environmental damage which was caused by activities which were carried out before 30 April 2007. It does not therefore preclude national rules on the remedying of such damage.

(b) The material application of the Environmental Liability Directive

77. The Commission also expresses doubts regarding the material applicability of the Environmental Liability Directive to the facts in the main proceedings. Those doubts stem from the national court's view that, because of the large number of undertakings which have succeeded each other in the Augusta

roadstead, an assessment of individual liability could be impossible.

78. Under Article 4(5), the Environmental Liability Directive applies only to environmental damage caused by pollution of a diffuse character where it is possible to establish a causal link between the damage and the activities of individual operators.

79. Admittedly, that provision is among the exceptions to the Environmental Liability Directive. However, it is in fact rather a clarification of the scope of the general provisions on the application of the directive set out in Article 3(1). Under that provision, the directive applies to damage caused by an occupational activity. Article 4(5) makes it clear that damage which can be attributed to pollution of a diffuse character is also covered. Such pollution does not therefore in principle preclude the application of the directive, provided that the necessary causal link can be established.

80. Article 4(5) of the Environmental Liability Directive is based on the idea that it may be particularly difficult in practice to prove specific causation of pollution of a diffuse character. This is shown by the examples cited by the Commission when it was preparing the legislation: the effects of climate change brought about by carbon dioxide and other emissions, forests dying as a result of acid rain and air pollution caused by traffic. [25] Nevertheless, this does not affect the material scope of the directive.

81. However, the condition for the applicability of the Environmental Liability Directive laid down in Article 3(1), namely that the environmental damage in question must be caused by an occupational activity, must be given a strict interpretation. The directive also provides for the investigation of the causes of the damage. Under Article 11(2) the duty to establish which operator has caused the damage or the imminent threat of damage rests with the competent authority. Furthermore, Article 5(4), Article 6(3) and the second subparagraph of Article 8(2) permit measures to be taken where the polluter cannot be identified. These provisions, which will be further examined below, [26] would be redundant if the directive were not applicable if the cause of damage were not established.

25 — White Paper, cited in footnote 21, p. 11.
26 — See point 118 et seq. below.

82. It is therefore correct to regard the causation of damage by an occupational activity as the primary requirement for liability for environmental damage under the directive. Nevertheless, other provisions of the Environmental Liability Directive may be applicable, even though it is not (yet) established that the environmental damage in question was caused by such activity.

(c) Liability under the Environmental Liability Directive

83. In so far as the Environmental Liability Directive is applicable to the main proceedings, any limiting effects on national law stem from its rules on liability for remedying environmental damage in the light of the 'polluter pays' principle.

84. Under Article 174(2) EC, the 'polluter pays' principle is one of the fundamental principles underlying Community policy on the environment. Article 1 and the second recital in the preamble to the Environmental Liability Directive provide that the prevention and remedying of environmental damage should be guided by that principle. The 'polluter pays principle' is therefore the guiding principle of the Environmental Liability Directive.

85. According to the 'polluter pays' principle, the person who caused pollution is responsible for remedying it. Language versions other than the German, which expressly state that the polluter should pay ('*polluter pays*' *principle, principe du*'*polleur-payeur*'), make it clear that it is a principle governing liability for costs. [27] It is not society or third parties, but the polluter who should pay the costs of eliminating pollution. Consequently, there is an internalisation of environmental costs, that is to say the environmental costs are included in the polluting undertaking's production costs. [28]

86. This creates an incentive for those who might potentially cause environmental damage to prevent environmental pollution. [29] In

27 — See my Opinion in Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, point 120.

28 — See the Opinion of Advocate General Jacobs in Case C-126/01 *GEMO* [2003] ECR I-13769, point 66.

29 — See Section 1 of the Annex to Council Recommendation 75/436/Euratom, ECSC, EEC of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, OJ 1975 L 194, p. 94.

addition to the function of allocating costs fairly, the 'polluter pays' principle therefore also has an incentive function and complies with the principle of preventive action. [30]

87. The Environmental Liability Directive gives concrete expression to the 'polluter pays' principle in particular by requiring the operators responsible to take remedial action under Article 6 and by providing, in Article 8(1), that the operator must bear the costs for the preventive and remedial actions taken pursuant to the directive. Under Article 2(6), the operator is the person who is responsible for the activity which has caused the damage. He is in principle best placed to prevent the environmental damage deriving from his activity.

88. In practice, there could be a need for further regulation in relation to damage on third party land. The directive refers to the owners of such land only in so far as it provides in Article 7(4) that they are to be consulted. However, it cannot be inferred from this that the person required to take remedial action is automatically able to take measures on third party land.

89. Furthermore, under Article 3(1), the Environmental Liability Directive does not establish liability for all environmental damage and also distinguishes between different types of damage in connection with such liability.

90. First, the directive covers environmental damage caused by any of the occupational activities listed in Annex III (Article 3(1)(a) of the Environmental Liability Directive). Annex III lists various activities which are associated with particular environmental risks under other provisions of Community environmental law. In the present case, for example, Section 1 and/or Section 7 of that annex could be relevant, that is the operation of installations subject to permit under Directive 96/61/EC, [31] or the manufacture, use, storage, processing, filling, release into the

30 — See my observations regarding the functions of the polluter pays principle in my Opinion in Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, point 30 et seq.

31 — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8).

environment and onsite transport of certain dangerous substances.

91. Second, Article 3(1)(b) of the Environmental Liability Directive provides for liability for action where the operator has been at fault or negligent in the case of other activities where protected species and natural habitats are damaged which are protected under Article 6(3) and (4) or Article 16 of the Habitats Directive [32] or Article 9 of the Birds Directive. [33] No evidence of such damage has been notified or submitted, however.

92. Because liability for damage to protected species and natural habitats is expressly linked to fault, in principle liability for damage as a result of activities in Annex III may be invoked, *a contrario*, irrespective of fault. This is confirmed by the options available to the Member States under Article 8(4) to provide for exemption from remediation costs where the operator was not at fault *and* the causal activity was authorised or was carried out according to the current state of technology. The more stringent liability mechanism of strict liability is associated with the particular risks to the environment which are accepted in connection with the activities in question, which by their nature involve risks.

93. In both cases, liability under Article 3(1) of the Environmental Liability Directive requires in any event that the damage is caused by the activities covered. Under Article 11(2), the duty to establish which operator has caused the damage rests with the competent national authority. Irrespective of any such finding, under Articles 5 to 7, the operator is required to take preventive and, if necessary, remedial action and to inform the competent authorities. That liability is limited under Article 8(3) if the operator proves that the damage was caused by a third party or resulted from orders emanating from a public authority.

94. The Environmental Liability Directive therefore seeks to implement the 'polluter pays' principle in a certain form. In essence, operators are to bear the costs of environmental damage which they cause. This allocation of costs creates an incentive for operators to prevent environmental damage.

32 — Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

33 — Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1).

This is fair in so far as the operators carry on an activity involving risk, particularly in the case of strict liability, and generally also benefit from an economic return on that activity.

95. Where the person who caused damage is not known, on the other hand, there is no duty to take remedial action under the directive. Given that this is the case in the main proceedings, according to the order for reference, it must be assumed that the contested remedial measures are not to be regarded as having been adopted pursuant to the Environmental Liability Directive.

(d) Liability without causal connection with the damage

96. With the second question in Case C-378/08, the referring court seeks to ascertain whether it is permissible to impute liability to make good environmental damage to the person who owns the property rights and/or carries on commercial activities on the contaminated site. The court makes that question more specific by asking whether liability may arise merely by virtue of that person's 'situation' (namely, that of being an operator whose activities are carried on inside the site). There is no need to prove the existence of a causal link between the conduct of that person and the occurrence of the contamination.

97. The Commission takes the view that such liability is permissible as a more stringent measure under Article 176 EC and Article 16 of the Environmental Liability Directive.

98. I cannot concur with that view unreservedly, however. Liability irrespective of any causal contribution would neither follow the policy of the Environmental Liability Directive nor be compatible with it if it diminished the liability of the person who is responsible for the environmental damage under the directive. The directive creates an incentive specifically for the responsible operator to prevent environmental damage and provides that he is to bear the costs of remedying damage which nevertheless occurs.

99. The conditions under which the polluting operator is not required to bear the costs

are laid down in particular in Article 8 of the Environmental Liability Directive. Further-reaching exemptions from the costs would as a rule undermine the implementation of the 'polluter pays' principle by the directive. They would diminish the incentive effect of the liability envisaged and alter the cost apportionment which is regarded as equitable by the Community legislature.

100. However, Article 16(1) of the Environmental Liability Directive shows that the polluting operator may not be the only possible responsible party. That provision expressly permits the Member States to identify additional responsible parties.

101. The permissibility of supplementary liability rules is also illustrated by Article 5(4), Article 6(3) and the second subparagraph of Article 8(2) of the Environmental Liability Directive. Under those provisions, the competent authority may itself, and if necessary at its own expense, take remedial or preventive measures if the polluting operators cannot be identified. The Council introduced these provisions, which were not included in the Commission proposal, at the request of various Member States. [34]

102. If the primary liability of the responsible operator is not to be negated, Article 16(1) of the Environmental Liability Directive cannot be interpreted as meaning that the Member States may identify other [35] responsible parties to replace that operator. Additional [36] responsible parties which are equally liable with him and diminish his liability are also to be rejected.

103. Furthermore, it would be questionable to require, without good cause, a contribution to costs from another party who would then have to make a claim against the responsible operator. Article 8(3) of the Environmental Liability Directive does appear to suggest that

34 — See Articles 4(4), 5(3) and 6A(4) of the proposal of 16 April 2002, Council document No 7771/02, and Article 8(4) of the proposal of 7 May 2002, Council document No 8647/02.

35 — See in particular the French, Italian, Spanish, Portuguese and Romanian versions of the Environmental Liability Directive.

36 — See in particular the German and English versions.

possibility, because under that provision the Member States must make provision for the operator's remediation costs to be recovered when he proves that the damage was caused by third parties or as a result of compliance with a compulsory order. However, this can be explained by the fact that the operator is generally best placed to carry out remedial action because he controls the source of the damage and, in any event, the immediately affected land. Other polluters, on the other hand, may for the most part only be required to contribute to the costs.

104. The liability of other parties must, instead, be supplementary. It may be imputed only if liability cannot be ascribed to any polluting operator.

105. Subject to that restriction, the Member States may implement the 'polluter pays' principle in a different way from the Environmental Liability Directive (see under (i)) and develop rules on liability which apply irrespective of a causal contribution (see under (ii)).

(i) Supplementary liability mechanism based on the 'polluter pays' principle

106. It is also reasonable to identify additional responsible parties on the basis of the 'polluter pays' principle. In view of the potential complexity of the causes of environmental damage, both the Member States and the Community enjoy a broad margin of discretion in this respect. [37] The Environmental Liability Directive does not impose exhaustive limits on the scope available under Community law. It imputes liability only to the responsible operators, as polluters, but allows the Member States the possibility of extending liability to other polluters. Article 16(1) mentions an extension to include additional activities, for example.

107. Furthermore, it could be conceivable in the present case, for example, to regard the owner or user of land the condition of which causes environmental damage — by means of propagation for example — as the polluter, irrespective of any occupational activity. The cause of the damage is in his control and its remediation requires his cooperation. It is

37 — See my Opinion in *Futura Immobiliare and Others*, cited in footnote 30, point 52 et seq., in particular point 58.

not therefore contrary to the 'polluter pays' principle to require the owner or the user of the land to contribute to the costs of remedying damage.

108. Nor would it be contrary to the 'polluter pays' principle also to regard the polluter's legal successor as a polluter, at least where liability can no longer be imputed to the original polluter.

109. Moreover, financial liability is also essentially consistent with the 'polluter pays' principle where a causal contribution can be identified, but not its extent. It will often be difficult or even impossible in practice to put precise figures on the causal contribution of individuals to specific environmental damage. If they were absolved entirely from their responsibility, the 'polluter pays' principle would be weakened. In such cases, the Member States could impose the costs jointly on the polluters who could be identified. In this connection, national law would have to make the necessary provision regarding the sharing of the burden between the individual polluters, which could be based on the relevant rules applicable in other areas of the law on compensation for damage. This national competence is consistent with the spirit of Article 9 of the Environmental Liability Directive.

110. During the legislative process, the Commission still clearly proceeded from the assumption that it would be compatible with the 'polluter pays' principle to impose on a possible polluter the burden of proving that he has not caused damage. [38] Eventually, it proposed reducing the burden of proof, at least in relation to showing that damage fell within the temporal scope of the directive. [39] Even though that provision was not included in the final version of the directive, it would be possible — subject to the rules laid down in the Environmental Liability Directive on establishing the causes of damage, which are still to be discussed [40] — to conceive of national rules which establish rebuttable presumptions on the causation of damage.

(ii) Supplementary liability mechanism irrespective of any causal contribution

111. On the other hand, in the view of Polimeri and Others, liability which does not require a causal link between the activity of the party responsible and the damage would be contrary to the 'polluter pays' principle established in the Environmental Liability Directive. That view is correct in so far as the

38 — White Paper, cited in footnote 21, p. 19.
39 — Article 19(2) of the proposal, cited in footnote 21, p. 46.
40 — See below, point 118 et seq.

function attributed to that principle of the fair apportionment of costs would be weakened if remediation costs were imposed on someone who did not cause the damage. [41]

112. However, it is not possible to derive from the 'polluter pays' principle an absolute prohibition on imposing the costs of remedying environmental damage on parties other than the polluters. Such a prohibition would be tantamount to accepting environmental damage where the polluter cannot be made liable. Even where remedial action is taken at public expense, the costs have to be borne by someone who is not responsible for the damage. However, accepting environmental damage would be incompatible with the aim of encouraging a high level of environmental protection and improving the quality of the environment. The function of 'polluter pays' principle is to help to achieve that objective, which is laid down not only in Article 174(2) EC, but also in Article 174(1) EC, and above all in Article 2 EC. The 'polluter pays' principle may not be construed in such a way that it is inconsistent with environmental protection, for example by preventing the remedying of environmental damage where the liability of the person responsible cannot be established.

113. Accordingly, the Environmental Liability Directive also accepts that remediation costs have to be borne by persons other than the operator responsible. In particular, it permits the State to take measures at its own expense if the polluter cannot be identified or is not capable of paying for the damage. [42]

114. If a polluter cannot be identified, the fair apportionment of costs would justify requiring the owner of the cleaned up land to bear the remediation costs since the value of that land is increased. Otherwise, he would be unreasonably enriched at the expense of others.

115. On the basis of the information given in the order for reference, it is irrelevant in the present case whether supplementary liability rules which operate irrespective of a causal contribution — to which there would be objections under Community law — are conceivable. A possible limitation could be found in the principle of proportionality,

41 — See my Opinions in *Commune de Mesquer*, cited in footnote 27, point 141 et seq., and *Futura Immobiliare and Others*, cited in footnote 30, point 32.

42 — See above, point 100.

which precludes manifestly disproportionate results. [43] However, it is doubtful whether this principle of Community law may be applied to more stringent measures within the meaning of Article 176 EC. [44] If the rule that the operator responsible has primary liability is respected, no manifestly inappropriate rules on liability are discernible in the present case at least.

(iii) Answer to the second question in Case C-378/08

116. To go back to the sentence by Archimedes quoted in the introduction, liability for environmental damage does not necessarily require a fixed point in the form of causation, as provided for in the Environmental Liability Directive. Rather, the Member States enjoy a broad margin of discretion in laying down supplementary liability mechanisms.

117. The answer to the second question must therefore be that the Environmental Liability Directive precludes liability for environmental damage irrespective of any causal contribution only in so far as such liability negates the primary liability of the polluting operator responsible for the damage.

(e) No investigation of causes

118. The first question in Case C-378/08 is intended to clarify whether undertakings which currently carry on their activities in an area which has been contaminated for a long time or borders on an area which is historically contaminated may be required to implement rehabilitation measures, without any investigation being carried out to identify the party responsible for the pollution.

119. Under Article 11(2) of the Environmental Liability Directive, the duty to establish which operator has caused the damage or the imminent threat of damage rests with the competent authority. That obligation is of central importance for the application of the 'polluter pays' principle, as expressed in the

43 — See *Futura Immobiliare and Others*, paragraph 56, and my Opinion in that case, point 32 cited in footnote 30.

44 — *Deponiezweckverband Eiterköpfe*, cited in footnote 15, paragraph 63.

directive. If potential polluters have no fear of being discovered, there is no incentive to prevent damage. In addition, a fair apportionment of costs is impossible if the polluter is unknown.

120. Furthermore, the complaints procedure provided for in Article 12 of the Environmental Liability Directive in relation to possible environmental damage ('request for action') would be largely redundant if the competent authorities were not required to investigate environmental damage. Consequently, the referring court will have to examine the claim made by ERG, ENI and Others, and Polimeri and Others, that a third undertaking had been identified in other proceedings as having caused the environmental damage.

121. Nevertheless, the order for reference illustrates that considerable difficulties may be encountered in identifying the polluter. The Environmental Liability Directive therefore expressly recognises the possibility that the operator responsible may not be identified. Under Article 4(5), the directive is not applicable to pollution of a diffuse character where it is not possible to establish a causal link between the damage and the activities of individual operators. In the case of other pollution, Article 5(4), Article 6(3) and the second subparagraph of Article 8(2) permit the competent authority itself, that is to say at its own expense, to take remedial or preventive measures if it cannot identify an operator, as a means of last resort.

122. It must be concluded that the Environmental Liability Directive permits an examination of the causes of damage to be dispensed with if further investigations are unlikely to be fruitful.

123. It is also conceivable that urgent measures could be taken before the investigations are completed or even initiated. The competent authorities must decide what action is to be taken on the basis of a comprehensive assessment of the circumstances of the individual case.

124. Because such decisions call for a complex assessment based on estimates, the competent authorities enjoy a broad margin of discretion. However, as is generally required in connection with the application

of European environmental law under Article 174(3) EC, they must base their findings on the best available scientific and technical data. [45]

125. The answer to the first question must therefore be that the Environmental Liability Directive permits

— an investigation of the causes of damage to be dispensed with if further investigations are unlikely to be fruitful, and

— urgent measures to be taken before the conclusion of the investigation.

(f) Strict liability

126. By the third question, the referring court is essentially seeking to ascertain whether the Environmental Liability Directive precludes national legislation which provides for strict liability for environmental damage.

127. The Environmental Liability Directive itself recognises two kinds of liability for environmental damage. An objective, strict liability applies under Article 3(1)(a) to certain activities associated with particular risks. In addition, all occupational activities are subject to a fault-based liability under Article 3(1)(b) for certain damage to protected species and natural habitats.

128. Strict liability going beyond the activities referred to in Article 3(1)(a) of the Environmental Liability Directive would follow the same policy of environmental protection as the directive and be compatible with it. In so far as the Environmental Liability Directive requires fault, it restricts the 'polluter pays' principle. The Member States must have the right to dispense with that restriction in the context of more stringent measures. In

45 — See Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraph 25, on special protection areas for birds; Case C-79/03 *Commission* v *Spain* [2004] ECR I-11619, paragraph 41, on numbers hunted; and Case C-405/07 P *Netherlands* v *Commission* [2008] ECR I-8301, paragraph 61, on Commission measures under Article 95(5) and (6) EC.

practice, strict liability essentially gives rise to more stringent duties of care being imposed on the parties in question vis-à-vis the environment. That applies not only to the liability mechanisms provided for in the Environmental Liability Directive, but also to any supplementary liability rules introduced by the Member States.

129. It must be concluded, as regards the third question in Case C-378/08, that the Environmental Liability Directive does not preclude rules on liability for environmental damage which do not require fault.

2. The relevance of the 'polluter pays' principle in the context of the Framework Directive on Waste

130. Independently of the Environmental Liability Directive, the questions regarding the 'polluter pays principle' are also relevant to the main proceedings because the Framework Directive on Waste [46] may be applicable.

131. The Framework Directive on Waste has been applicable only since 1977 [47] and thus, in all likelihood, does not cover all the pollution which has resulted in the environmental damage in question. However, it is possible that far more of the environmental damage occurred during the 30 years before the Environmental Liability Directive came into effect than was caused in the 2 years since the Environmental Liability Directive has been applicable. In the present case, no question has been asked concerning the extent to which the Framework Directive on Waste is still applicable since the entry into force of the Environmental Liability Directive or the future effects of its revision, and nor is there any need to clarify those points. [48]

46 — Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9). That directive codifies Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39) and its subsequent amendments.

47 — As amended by Directive 75/442, which already contained a provision governing responsibility for costs in accordance with the polluter pays principle in Article 11.

48 — Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3). Under Article 2(1)(b), land (*in situ*) including unexcavated contaminated soil and buildings permanently connected with land is excluded from the scope of the revised Waste Framework Directive. Under Article 41, the previous Waste Framework Directive is repealed with effect from 12 December 2010.

132. The Court has already found that hydrocarbons unintentionally spilled into the soil, the groundwater or the sea, which are no longer fit for proper use, are to be regarded as waste. [49] Earth contaminated as a result of an unintentional spillage of those substances is also to be classified as waste. [50] The same considerations should apply to other pollutants.

133. Under Article 4 of the Framework Directive on Waste, waste must be recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. By disposing of or recovering the pollutants which caused the environmental damage in question and the contaminated earth, part of the damage will, in many cases, already by remedied.

134. Under Article 15 of the Framework Directive on Waste, in accordance with the 'polluter pays' principle, the cost of disposing of waste must be borne by the holder who has waste handled by a waste collector or by a disposal undertaking, and/or the previous holders or the producer of the product from which the waste came. Under the Framework Directive on Waste, liability is not conditional on the existence of fault.

135. Unlike the Environmental Liability Directive, that provision does not make clear who among those persons must bear the costs of disposing of the waste. Nevertheless, the Court took the view, as regards hydrocarbons which were spilled in the course of the operation of a service station, that, in principle, the operator of the service station was responsible, as the holder and producer of that waste. [51] In the case of hydrocarbons spilled by accident at sea following damage to an oil tanker, the owner of the ship carrying those hydrocarbons is in possession of them immediately before they become waste. In principle he is therefore liable to pay the costs of disposal. [52]

136. Imputing liability to other parties is possible, however, if they are responsible for creating the waste as a result of particular circumstances. [53]

49 — Case C-1/03 *Van de Walle and Others* [2004] ECR I-7613, paragraphs 47 to 50, and *Commune de Mesquer*, cited in footnote 27, paragraphs 57 to 59.

50 — *Van de Walle and Others*, cited in footnote 49, paragraph 52.

51 — *Van de Walle and Others*, cited in footnote 49, paragraph 59.

52 — *Commune de Mesquer*, cited in footnote 27, paragraph 74.

53 — *Van de Walle and Others*, cited in footnote 49, paragraph 60, and *Commune de Mesquer*, cited in footnote 27, paragraph 76 et seq.

137. There is thus much evidence to suggest that, in the main proceedings the undertakings are responsible, under the Framework Directive on Waste, for disposing of the pollutants which were released into the environment from their production facilities.

138. The Framework Directive on Waste treats exceptional provisions, in principle, in exactly the same way as the Environmental Liability Directive. This means that the primary liability of the party with primary responsibility, in accordance with the 'polluter pays' principle, may be extended, but not replaced or diminished. Accordingly, the investigation of the responsible parties may not be dispensed with as a matter of course.

C — *The questions in Cases C-379/08 and C-380/08*

139. The questions in Cases C-379/08 and C-380/08 do not concern fundamental liability for environmental damage, but the identification of remedial measures under the Environmental Liability Directive. Because it cannot be ruled out that the directive is applicable in relation to at least some of the environmental damage in question,[54] these questions must also be answered by the Court.

1. The first question in Cases C-379/08 and C-380/08 — modification of remedial measures

140. By the first question, the referring court seeks to ascertain whether the Environmental Liability Directive precludes national legislation which allows the authorities to require different remedial measures from those initially selected at the conclusion of an appropriate investigation carried out on a consultative basis which have already approved and put into effect or are being implemented.

141. The Environmental Liability Directive does not make any express provision regarding the modification of remedial measures.

54 — See above, point 54 et seq. (in particular point 57).

Article 7(2) and Article 11(2) simply state that the competent authority must decide which remedial measures are to be implemented. This wording can be easily interpreted as including modified or additional [55] remedial measures.

142. This interpretation is necessary because the assessment of the effectiveness of remedial measures may change during or after their implementJation. It would therefore be incompatible with the aim of a high level of environmental protection and, moreover, potentially disproportionate, for operators always to be required to adhere to remedial measures without any possibility of modification, even if their effectiveness were increasingly doubtful.

143. Since the directive does not contain relevant rules on the modification of remedial measures, it is for the Member States to regulate such matters. However, they must observe the framework set by the relevant principles of Community law, which must be respected in the implementation and application of Community law, such as the protection of legitimate expectations [56] and the principle of proportionality. [57] [58]

144. A legitimate expectation that remedial measures will be maintained may therefore be created where the conduct of the administrative authorities gave rise to a reasonable expectation in the mind of a reasonably prudent economic agent that those measures will not be altered. [59] In view of the scientific uncertainty which exists in connection with the remedying of environmental damage, however, situations in which a legitimate expectation may arise are rare.

145. In accordance with the principle of proportionality, measures to remedy environmental

55 — Not to be confused with 'complementary remedial measures' which compensate for the loss of non-restorable natural resources and/or services under Annex II, point 1(b).

56 — Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 65; Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87; Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 105; and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28.

57 — Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraph 26; Case C-376/02 *Goed Wonen* [2005] ECR I-3445, paragraph 32; and Joined Cases C-181/04 to C-183/04 *Elmeka* [2006] ECR I-8167, paragraph 31.

58 — Case 25/70 *Köster, Berodt & Co.* [1970] ECR 1161, paragraph 21 et seq.; Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 15; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, paragraph 97; and Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handel* [2008] ECR I-69, paragraph 33.

59 — *Elmeka*, cited in footnote 57, paragraph 32.

damage may not exceed the limits of what is appropriate and necessary in order to restore the environment; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [60]

146. In its question the referring court stresses in particular the fact that the modified measures have already been carried out. This fact must certainly be taken into consideration in the context of the decision to modify the measures, but cannot necessarily rule out any modification. It may be disproportionate if the competent authorities subsequently invalidate certain remedial measures by requiring other measures to be taken, even though they do not guarantee sufficient added value. However, if it transpires in the course of the implementation of remedial measures that they are insufficient, it must be possible to require modified or additional measures to be taken in order to guarantee the success of the remedial action.

147. With regard to the first question, it must be concluded that the Environmental Liability Directive does not preclude the imposition of modified remedial measures, provided that the general principles of Community law are observed.

2. The second question in Cases C-379/08 and C-380/08 — No assessment of effects

148. Whilst the competent authorities may therefore modify remedial measures in principle, it is unclear under what conditions this is possible. Some of those conditions are the subject of the second question, which asks whether the competent authorities may modify remedial measures on its own initiative without assessing the site-specific conditions, the costs of implementation of the measure in relation to the reasonably foreseeable benefits, the possible or probable collateral damage and adverse effects on public health and safety, and the necessary time scales for implementation.

60 — See *Köster, Berodt & Co.*, paragraphs 28 and 32; *Fedesa and Others*, paragraph 13; *Viamex Agrar Handel*, paragraph 35, all cited in footnote 58; Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, paragraph 21; and Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81.

(a) Ex officio measures

149. As ENI and Others and ERG point out, Article 7(1) of the Environmental Liability Directive provides that it is the responsible operator who proposes remedial measures, in principle. The provision expressly provides by way of exception that the authority itself may take the necessary remedial measures (Article 6(2)(e)), in particular if the operator cannot be called on to do so (Article 6(3)).

150. However, this does not mean that the authorities must always in all other cases wait for proposals from the operator. If that were the case, operators could block or at least impede the remedying of environmental damage through inactivity.

151. Accordingly, Article 6(2)(b) to (d) of the Environmental Liability Directive authorise the authorities to require the operators to take remedial measures *at any time*. Article 11(2) also states that the competent authority must determine which remedial measures should be taken. According to recital 24, that decision lies expressly in its discretion.

152. Article 11(2) of the Environmental Liability Directive authorises the competent authority to require the relevant operator to carry out his own assessment and to supply any information and data necessary. However, the authority is not required to have recourse to the operator in this way.

153. It is not therefore possible to identify any provision in the Environmental Liability Directive which would prevent the competent authority from modifying remedial measures on its own initiative.

(b) The assessment of effects

154. Provision is made for the assessment of effects in Section 1.3.1. of Annex II. Alongside other criteria, the factors mentioned by

the referring court in its question are also covered.

155. Annex II is binding in principle with regard to the identification of remedial measures in accordance with Article 7(2) and the introduction to the Annex. However, Section 1.3.1. merely states that the reasonable remedial options 'should' be evaluated. The Commission proposal provided that evaluation should always take place, [61] but the Council heavily revised that provision and in doing so clearly intentionally avoided a mandatory form of wording. [62]

156. However, that legislative approach cannot be understood to the effect that, in choosing remedial measures, the competent authorities do not have to carry out an assessment. Rather, any decision to choose measures requires an assessment of the various options. This is illustrated in particular by Article 7(3) of the Environmental Liability Directive, which provides that certain criteria must be taken into account where it is necessary to choose which instance of damage is to be remedied first. The choice between different possible remedial measures for damage is essentially of the same nature.

157. In particular, the principle of proportionality, [63] referred to by ENI and Others, must be taken into account in the assessment. The Community legislature considered the criteria set out in Section 1.3.1. of Annex II to the Environmental Liability Directive to be particularly appropriate for the purpose of reaching a proportionate decision on remedial measures. However, that provision allows a margin of discretion in the choice of assessment criteria. This discretion is intended, as a rule, to be exercised in such a way that the criteria expressly mentioned are employed, but the competent authorities may find reason to depart from them completely or partially, on legitimate grounds.

158. It is conceivable, for example, that particularly urgent measures have to be identified without first carrying out a comprehensive assessment under Section 1.3.1. of Annex II

61 — See Annex II, Section 3.2.1. of the Commission proposal, cited in footnote 21.

62 — This appears to have happened for the first time in the version of Annex II, Section 1.3.1. in Council document 6191/03 of 13 February 2003.

63 — See above, point 145.

to the Environmental Liability Directive. Nor can it be ruled out that additional assessment criteria influence the choice, for example on the basis of the particular circumstances of the individual case or relevant experience.

159. In any event, the assessment criteria used, the result of the assessment and the reasons for not applying certain criteria in Section 1.3.1. of Annex II to the Environmental Liability Directive must be set out in the reasons for the decision on the remedial measures. Article 11(4) requires, in accordance with the principle of effective legal protection, the 'exact grounds' on which decisions imposing remedial measures are based to be stated. Those grounds are necessary to enable the competent national courts to review the decision. [64]

160. Since the applicants in the main proceedings claim, according to the order for reference, that they were not consulted with regard to the contested measures, reference must also be made to Article 7(4) of the Environmental Liability Directive. Under that provision, the competent authority must invite the persons on whose land remedial measures are to be carried out to submit their observations and must take them into account.

161. Even if the parties responsible for remedial measures were, exceptionally, not the owners of the land for the purpose of that provision, they must nevertheless be consulted. Under the Environmental Liability Directive, they are generally even more closely involved in identifying remedial measures. Under Article 7(1), they are required to identify and propose remedial measures. If, in derogation therefrom, the competent authority identifies measures itself, it must invite the parties responsible for remedial measures, at the very least, to submit their comments before a decision is taken.

162. ENI and Others rightly state that the abovementioned procedural requirements apply, *a fortiori*, to the modification of remedial measures. If remedial measures are initially imposed on the basis of a comprehensive

64 — See Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15; Case C-239/05 *BVBA Management, Training en Consultancy* [2007] ECR I-1455, paragraph 36; and Case C-75/08 *Mellor* [2009] ECR I-3799, paragraph 59 with further references.

assessment, their modification must be based on grounds which prevail over the original assessment. This presupposes in particular that the new grounds are based on a comparable scientific foundation.

163. Nevertheless, expenditure incurred in assessing a modification to remedial measures may be reduced because important information was gathered in connection with the assessment of the original remedial measures. It cannot be ruled out that a relatively limited amount of new information, which comes to light, for example, in studying remedial measures, will call into question the previous findings and, together with the known information, necessitate a re-orientation of the remedial action.

164. Lastly, it should be made clear that restrictions on the assessment of remedial measures, the reasons given for a decision on remedial measures and consultation with the responsible operators cannot constitute either a 'more stringent protective measure' within the meaning of Article 176 EC or a 'more stringent provision' within the meaning of Article 16 of the Environmental Liability Directive. Failure to take these procedural steps would not be appropriate for the purpose of bringing about greater protection of the environment, but would instead jeopardise it. The assessment and consultation of the parties concerned are intended to enhance the information on which the decision imposing remedial measures is based. On the other hand, the explanation of the reasons for a decision entails an element of self-control. [65] If it not possible to formulate convincing reasons, there is cause to review the decision.

(c) Answer to the second question in Cases C-379/08 and C-380/08

165. The Environmental Liability Directive does not therefore preclude national legislation which allows the competent authority to modify remedial measures on its own initiative. Such a decision must generally be preceded by an assessment of the site-specific conditions, the costs of implementation of the measure in relation to the reasonably foreseeable benefits, the possible or probable

65 — See my Opinions in Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, point 97, and in *Mellor*, cited in footnote 64, point 32.

collateral damage and adverse effects on public health and safety, and the necessary time scales for implementation. However, the competent authority may refrain from doing so, completely or partially, in special cases, after due exercise of its discretion, if the decision is taken after consulting the parties concerned and a statement of reasons is duly given.

3. The third question in Cases C-379/08 and C-380/08 — linking remedial measures to the use of land

166. The third question in Cases C-379/08 and C-380/08 concerns the linking of remedial measures to the use of land. The referring court seeks to ascertain whether it is compatible with the Environmental Liability Directive to require modified remedial measures to be carried out as a condition for authorisation for the lawful use of land not directly affected by the decontamination measures, in so far as it has already been decontaminated or was not in any event polluted.

167. The Environmental Liability Directive concerns the use of land directly only in so far as it has a bearing on preventive or remedial measures. Preventive measures in particular may affect directly the activity exercised on the land, for example if thresholds have to be observed. There is no prohibition on imposing conditions, in connection with remedial measures, which must be met in order to use cleaned-up areas. As Italy explains, any conflict between use and decontamination must be avoided. In addition, Section 2 of Annex II to the Environmental Liability Directive illustrates, for example, the need to take measures to prevent risks arising in connection with use which could stem from the contamination of land.

168. Such measures must comply with the requirements of the Environmental Liability Directive, in particular the abovementioned procedural conditions.

169. If, on the other hand, as the referred questions intimate, the land in question does not have or cause (any longer) any environmental damage, the Environmental Liability Directive does not contain any applicable rules. Contrary to the view taken by ERG, no prohibition restricting the use of fully decontaminated land can be specifically inferred

from it. On the contrary, if restrictions on the use of such land are an effective and proportionate means of implementing the obligations under the Environmental Liability Directive, it may even be necessary under Community law to adopt them. [66]

170. It is not therefore contrary to the Environmental Liability Directive to require modified remedial measures to be carried out as a condition for authorisation for the lawful use of land not directly affected by the decontamination measures, in so far as it has already been decontaminated or was not in any event polluted.

D — *The fourth question in Case C-378/08 — need for a public tendering procedure*

1. Admissibility

171. The Commission expresses strong doubts as to the admissibility of the fourth question in Case C-378/08, on the ground that the national court has not sufficiently explained the factual and legislative context of the fourth question.

172. In fact, according to the Court's settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. [67]

173. The order for reference does not meet those requirements. The referring court merely explains that Sviluppo Italia was called upon to carry out the planning and — in the event of default by the undertakings — subsequent implementation of the remedial

66 — See, for example, Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 65 and the case-law cited.

67 — Judgment in Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4; Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 5; Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 15; Case C-190/02 *Viacom* [2002] ECR I-8287, paragraph 15; judgments in Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, paragraph 10; Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 45; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 26; and Case C-260/07 *Pedro IV Servicios* [2009] ECR I-2437, paragraph 29.

measures without a public tendering procedure and that Sviluppo Italia is an undertaking set up by the State which operates on the market.

176. In my opinion, the fourth question should therefore be rejected as inadmissible.

2. Supplementary observations on the answer to the question

174. There is no more specific information on the award of the contract. It is not clear when, in what form and with what precise content the contract was awarded or what value it has. Instead, the referring court simply describes the contracted work in very general terms as 'operations of significant environmental impact and very high economic value'. There is similarly no information on the extent to which Sviluppo Italia is State-controlled. Lastly, the referring court fails to explain what provisions of Italian law are relevant to the award of the contract.

177. In the event that the Court should decide to give a ruling on the fourth question, I will nevertheless include in my Opinion some observations on the Community-law framework for the award of public contracts, which may be of assistance to the national court in assessing the facts in the main proceedings from the point of view of Community law.

178. The referring court asks whether national legislation which allows the public authorities to award a contract for implementing remedial measures without a public tendering procedure is compatible with Directive 2004/18, Directive 93/97 and Directive 89/665.

175. In view of the inadequacy of that information, the Court cannot determine exactly which rules of Community law are actually relevant to any legal assessment of the award of the contract, let alone give an interpretation in the light of the facts of the main proceedings. Consequently, the information contained in the order for reference does not allow the Court to give the national court an interpretation of Community law that may be of use to it.

179. As the Commission rightly argues, Directive 89/665 is not relevant for the purpose

of assessing whether the award of the contract for remedial measures in the main proceedings is consistent with Community law. Directive 89/665 contains only procedural rules on the legal remedies available for infringement of procurement rules. Directive 89/665 does not contain any substantive provisions relating to the procurement procedure itself.

180. The Commission also rightly points out that Directive 93/37 does not appear to be applicable *ratione temporis*. Under Article 82 in conjunction with Article 80(1) of Directive 2004/18, Directive 93/37 was repealed with effect from 31 January 2006. Directive 93/37 is replaced by Directive 2004/18. [68] Although the referring court does not mention the date on which the contract was awarded to Sviluppo Italia, on the basis of the information given in the order for reference, it must be presumed that the contract was awarded after 31 January 2006. The plan drawn up by Sviluppo Italia, which envisages, inter alia, the construction of an artificial island, appears to be a more recent plan, on which a decision was first taken on 20 December 2007.

181. The national court will therefore first have to determine whether Directive 2004/18 is applicable. For that purpose, a 'public contract' would have to exist within the meaning of Article 1(2)(a) of Directive 2004/18, and the directive would have to be applicable in accordance with Title II, Chapter II. The information provided in the order for reference is not sufficient to assess this. However, the overall context of the case in the main proceedings suggests that it concerns service and works contracts the value of which exceeds the thresholds. If that is correct, the tendering procedure under Directive 2004/18 should have been applied. In addition, the need for such a procedure does not necessarily cease to apply if the contract in question is awarded because one of the main parties required to carry out the work fails to comply with that duty ('substitute performance').

182. However, the Italian Government claims that, as an 'in-house transaction', the award of the contract does not fall within the scope of Directive 2004/18. Polimeri and Others contest that view.

183. According to the Court's case-law, the procurement rules of Community law are

68 — See recital 1 in the preamble to Directive 2004/18.

not applicable to in-house deals, because no contract is concluded between two different persons in in-house deals. An in-house deal exists when the following two criteria are satisfied. First of all, the contracting authority must exercise over the separate entity which was awarded the contract control similar to that which it exercises over its own departments. If a private undertaking has a shareholding in the separate entity in question, the contracting authority cannot exercise a similar control to that which it exercises over its own departments. Secondly, the entity in question must carry out the essential part of its activity with the controlling public authority. [69]

184. Polimeri and Others claim that the shares in Sviluppo Italia are not held entirely by the public authority and that Sviluppo Italia does not carry out the essential part of its activity with the public authority either. However, in the absence of relevant information in the order for reference, the Court cannot investigate that claim. It is for the national court to make that assessment.

185. If there is no in-house deal and if Directive 2004/18 does not otherwise apply, a contract may be awarded without publication of a notice only in the cases listed in Article 31.

186. Only Article 31(1)(c) of Directive 2004/18 may be relevant in the present case. Under that provision, contracts may be awarded by a negotiated procedure without prior publication of a contract notice in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time-limit for the procedure cannot be complied with. It would appear unlikely, however, that the planning and implementation of the remedial measures became urgent without this being foreseeable by the authorities. The environmental pollution has existed for a long time and has even been the subject of other remedial measures. However, this question must also ultimately be assessed by the national court alone.

69 — With regard to both requirements, see Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraph 38; Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 33; and Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, paragraph 34.

## VI — Conclusion

187. In the light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling in Case C-378/08 as follows:

(1) Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage does not apply to environmental damage which was caused by activities carried out before 30 April 2007. It does not therefore preclude national rules on the remedying of such damage.

(2) Directive 2004/35 precludes liability for environmental damage irrespective of any causal contribution only in so far as such liability would affect the primary liability of the polluting operator.

(3) Directive 2004/35 permits:

— an investigation of the causes of damage to be dispensed with if further investigations are unlikely to be fruitful, and

— urgent measures to be taken before the conclusion of the investigation.

(4) Directive 2004/35 does not preclude rules imposing strict liability for environmental damage.

188. The Court should answer the questions in Cases C-379/08 and C-380/08 as follows:

(1) Directive 2004/35 does not preclude the imposition of modified remedial measures, provided that the general principles of Community law are observed.

(2) Directive 2004/35 does not preclude national legislation which allows the competent authority to modify remedial measures on its own initiative. Such a decision must generally be preceded by an assessment of the site-specific conditions, the costs of implementation of the measures in relation to the reasonably foreseeable benefits, the possible or probable collateral damage and adverse effects

on public health and safety, and the necessary time scales for implementation. However, the competent authority may refrain from doing so, completely or partially, in special cases, after due exercise of its discretion, if the decision is taken after consulting the parties concerned and a statement of reasons is duly given.

(3) It is not contrary to Directive 2004/35 to require modified remedial measures to be carried out as a condition for authorisation for the lawful use of land not directly affected by the decontamination measures in so far as it has already been decontaminated or was not in any event polluted.