

Transboundary river basin management in Europe Legal instruments to comply with European water management obligations in case of transboundary water pollution and floods

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1. Introduction

Modern water policy is shaped by geographical areas in the context of which water courses are divided into river basins. This is reflected on an international level by treaties such as the 1992 Convention on the Protection and Use of Transboundary Watercourses and International lakes (the Helsinki Convention),¹ and at the European level by the Water Framework Directive (the WFD)² and the Floods Directive.³ An interesting feature of modern water law, particularly on a European level, is that it aims to achieve a specific ‘status.’ This implies that ground water and surface water in the river basin should be in a certain ‘good status’ under the WFD, while the Floods Directive stipulates that flood risks should be manageable in order to reduce the risk as well as the consequences of a flood for humans, the environment, cultural heritage and the economy.⁴

The obligations arising from the European water directives are, in principle, aimed at a certain result to be achieved by each individual Member State.⁵ Due to the transboundary nature of water management, these objectives can only be achieved, however, if the parties located in a transnational river basin (EU Member States and non-Member States) cooperate. The combination of, on the one hand, the geographical area approach which requires Member States to cooperate (even with third countries, if need be) and, on the other, objectives that have to be met by each Member State individually, leads to a fragile balance as a result of which it is not clear whether Member States can be held responsible for not achieving the objectives due to reasons over which they do not have complete control. To put it differently: Member States can manage

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1 In force since 6 October 1996; 31 *ILM* 1312 (1992).

2 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, *OJL* 327, 22.12.2000, p. 1.

3 Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, *OJL* 288, 6.11.2007, p. 27.

4 Cf. the objective of the Marine Strategy Framework Directive (Directive 2008/56/EC, *OJL* 164, 25.6.2008, p. 19) is a ‘good environmental status’ for marine regions.

5 Art. 249 EC Treaty.

water that fails to meet the quality requirements without this failure being (completely) attributable to events taking place on their own territory.⁶

There may be several reasons why a Member State is not able to meet its own obligations arising from a water directive. One can think in this context of international cooperation within a river basin that does not achieve the intended results in time, and particularly regarding the WFD one also can think of the inability of EU Member States to take the measures required in other policy fields because they lack the adequate powers to do so (agricultural policy, fisheries policy, admission of products for *e.g.* medicinal products and pesticides). In the latter case (lack of adequate powers) it means that Member States have to rely on initiatives taken by Community institutions.⁷ The WFD does not provide for an exemption in these cases, and neither does the Floods Directive.⁸ This means that it is doubtful whether a Member State will be able to defend itself by (partly) shifting the blame onto another (Member) State. After all, a Member State is responsible for its own waters.

As the new water directives, and the WFD in particular, focus primarily on the achievement of a specific objective, it is of the utmost importance to know exactly which possibilities are available to central or decentralised government bodies in order to meet these obligations in cases of transboundary water pollution or increased flood risk. This article addresses the legal instruments which Member States and (decentralised) water authorities have at their disposal in this respect to meet their European obligations and thus shape transboundary river basin management. First of all, we will discuss aspects of transboundary cooperation aimed at combating transboundary water pollution and floods within river basins, including instruments to create such cooperation (Section 2) and ways of effectively implementing this cooperation (Section 3). Subsequently (Section 4), the article will address the remedies Member States and decentralised water authorities have at their disposal to enforce the said cooperation, ranging from international dispute settlements (Section 4.1) to European procedures (Section 4.2) and domestic administrative procedures (Section 4.3).

If the cooperation and the enforcement of compliance fail, a downstream Member State will have to make an extra effort to meet its obligations under European water directives. It may need extra water treatment capacity or water storage to meet its obligations to achieve a specific result. Obviously, that Member State incurs additional expenses. Moreover, the continuation of transboundary water problems may lead to a complete failure to meet its European obligations and, as a result, the Member State will be liable for damages towards the European Community. That is why we conclude the article with a description of a possible remedy which Member States or water authorities have at their disposal to seek damages from another Member State or a foreign decentralised government body in a civil lawsuit before a domestic court (Section 5). Here, we will discuss issues such as the jurisdiction of the domestic court under public international and private international law (Section 5.1), the applicable law (Section 5.2) and the effects of EU law on the assessment of liability (Section 5.3).

6 For a further discussion on this topic see H. van Rijswick, *Moving Water and the Law. On the Distribution of Water Rights and Water Duties within River Basins in European and Dutch Water Law*, 2008.

7 We will not discuss this issue here. Cf. M. Montforts *et al.*, 'Legal constraints in EU product labelling to mitigate the environmental risk of veterinary medicines at use', 2004 *Regulatory Toxicology and Pharmacology* 40, no. 3, pp. 327-335; M. Montforts *et al.*, *De relatie tussen productregistratie en waterkwaliteitsregelgeving: geneesmiddelen, diergeneesmiddelen en veevoederadditieven*, 2006, Report of the Netherlands National Institute for Administrative Health and the Environment, with a summary in English; H. van Rijswick *et al.*, 'The Influence of Environmental Quality Standards and the River Basin Approach taken in the Water Framework Directive on the Authorisation of Plant Protection Products', 2008 *European Energy and Environmental Law Review*, pp. 78-89.

8 By contrast, the Marine Strategy Framework Directive and the Directive on Priority Substances (Proposal for a Directive of the European Parliament and of the Council on environmental quality standards in the field of water policy and amending Directive 2000/60/EC, COM(2006) 398 final) recognise such an exception in the event of pollution originating abroad.

The article will end with some concluding remarks about the legal instruments we have discussed and the possibility to seek damages if these instruments fail (Section 6).

2. Creating transboundary cooperation

The WFD, and in its wake the Floods Directive, compel Member States to institutionally embed consultations between Member States on how to meet the objectives of the WFD for the entire river basin.⁹ Member States are required to create a river basin district for each river basin, which includes the incorporation of the necessary administrative regulations and the appointment of an appropriate competent body.¹⁰ A river basin may cover the territories of more than one Member State. If this is the case, the Member States involved should cooperate within an international river basin district for which they can use existing structures which have been put in place by virtue of international agreements.¹¹ This means that Member States can choose from several alternatives regarding their cooperation with other Member States within a river basin. We would like to make the distinction between, on the one hand, forms of cooperation that are more suitable for large rivers and, on the other, forms of cooperation developed for regional transboundary cooperation regarding water management of smaller rivers and waters.

The WFD and the Floods Directive also aim at cooperation within an international river basin district when the river basin extends beyond the territory of the Member States.¹² The Rhine and Danube are examples of rivers that extend beyond the EU's territory. A river basin which extends beyond the EU leads to complications because third countries cannot be compelled to implement the WFD and Floods Directive. This does not mean, however, that third countries are unwilling to support the creation of an international river basin district or meet the objectives laid down in these directives. Indeed, in some cases, non-Member States may be bound by similar obligations by virtue of watercourse treaties to which they are parties. This is particularly the case with respect to the Helsinki Convention, as the obligations of this treaty, which the EU has also joined, have been implemented in the WFD.¹³

2.1. Treaties dealing with international watercourses

Member States can conclude bilateral and multilateral treaties (or use existing treaties) to shape the transboundary cooperation required by the WFD with respect to the management of major rivers. Treaties have traditionally been a favoured instrument, although the use of treaties as an instrument for the implementation of European law obligations is a tricky business.¹⁴ Problems arise in particular in the relation between the WFD and treaties concluded between one or more Member States and third states, which the EU has also joined (mixed treaties), as these treaties may serve more than one purpose. While the WFD is used for the implementation of the EU's obligations arising from treaties, these may in turn serve as a way to implement the obligations regarding cooperation under the WFD. The Helsinki Convention is a good example of this, but so are regional seas conventions such as the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)¹⁵ which deals with land-based

9 Art. 3 of the WFD. Art. 3 of the Floods Directive provides that the rules in the WFD apply accordingly.

10 Art. 3 Paras 1 & 2 of the WFD.

11 Art. 3 Paras 3 & 4 of the WFD.

12 Art. 3 Para. 5 of the WFD.

13 See consideration no. 35 Preamble WFD.

14 E. Hey *et al.*, 'Transnational watermanagement', in: O. Jansen *et al.* (eds.), *The European Composite Administration* (forthcoming).

15 In force since 25 March 1998; 31 *ILM* 1072 (1993).

sources of marine pollution. These mixed treaties are not suitable for the implementation of the obligations regarding cooperation arising from the WFD because that is not their intended purpose. Treaties concluded with respect to specific rivers are more appropriate in this respect.

In this article, we will use the international river basins of the Meuse and Rhine as examples to elaborate on possible forms of the administrative cooperation required by the WFD and the Floods Directive.¹⁶ Treaties have been adopted to facilitate cooperation among the riparian states of the Rhine and Meuse. These treaties also serve to implement the Helsinki Convention, to which they expressly refer in the preamble. The treaties provide for the creation of an international commission to supervise their implementation. The parties to the Meuse Convention are EU Member States only. The 2002 Meuse Treaty regulates the cooperation between Belgium, Germany, France, Luxembourg and the Netherlands for the entire Meuse river basin.¹⁷ The Meuse Treaty is expressly intended to create a multilateral structure for the execution of the obligations arising from the WFD.¹⁸

The 1999 Rhine Convention regulates the cooperation concerning a part of the Rhine river basin, and has been ratified by Member States (Germany, France, Luxembourg and the Netherlands) as well as a non-Member State (Switzerland) and the EU.¹⁹ In this respect, the 1976 Agreement for the Protection of the Rhine against Chemical Pollution and its Annex of 1991 are also relevant as this Agreement was concluded between the same parties as the Rhine Convention, with the exception of the EU.²⁰ The Rhine Convention is often regarded as an example of successful transboundary cooperation between riparian states. Interestingly enough, some see the WFD as an impediment to the development of further measures by the International Commission for the Protection of the Rhine (ICPR). The reason for this is, supposedly, that the EU Member States concerned have started to focus more on the execution of the WFD on their own territory, than on making new arrangements in the ICPR to tackle transboundary problems.

The treaties for the Rhine and Meuse lay down a number of principles that govern the cooperation between the parties to the treaty. These principles are largely derived from the Helsinki Convention. The 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention) is also relevant in this respect.²¹ One of the most fundamental principles is the obligation of states to refrain from causing significant transboundary (environmental) damage. This is not an absolute obligation, but a due diligence requirement, the gravity of which depends on the nature of the activities (higher if hazardous), the particular factual circumstances and the capacity of the state concerned. The details of this general principle can be found in the obligations of states to take measures aimed at the prevention, control and reduction of transboundary water pollution. These measures are to be implemented taking into account principles such as the precautionary principle and the polluter pays principle.

The riparian states also cooperate on a more informal basis. The coordination regarding the Rhine river basin takes place in the Rhine Coordination Committee, which is responsible for the harmonisation of the implementation of the WFD. Bilateral harmonisation between countries

16 See for details on the obligation to cooperate with regard to the river basins of the rivers IJssel, the Bug and the Evros Delta J. Verwijmeren *et al.* (eds.), *Many Rivers to Cross, Transboundary co-operation in river management*, 2007 and for international cooperation within international watercourses under international law O. McIntyre, *Environmental Protection of International Watercourses under International law*, 2007.

17 In force since 1 December 2006; *Tractatenblad* (Netherlands Treaty Series; hereafter *Trb.*) 2003, 75.

18 Art. 4 Para. 3 of the Meuse Convention.

19 In force since 1 January 2003; *Trb.* 1999, 193.

20 In force since 1 February 1979; 1124 *UNTS* 405. The Additional Protocol entered into force on 1 November 1994; 1840 *UNTS* 372.

21 Not yet in force; 36 *ILM* 719 (1997). The rules contained in the Convention are in part a reflection of customary international law.

such as the Netherlands and Germany also takes place within the Permanent Dutch-German Border Waters Commission (PBWC).²² Bilateral harmonisation between the Netherlands and the Walloon province in Belgium take place in the Walloon-Dutch Water Consultations. Bilateral harmonisation between the Netherlands and Flanders take place in the Dutch-Flanders Integrated Water Consultations (DFIWC) and four transboundary river basin committees created in 1994. The Trilateral Wadden Consultation between Denmark, Germany and the Netherlands is also relevant for the implementation of the WFD.

2.2. European forms of regional cooperation

Treaties are less suitable for regional transboundary cooperation (smaller rivers) than they are for major rivers. Here, other instruments are better suited for the purpose of cooperation. More informal ways of cooperation are also possible, for example for the exchange of information, the execution of specific measures or a joint formulation of policy. Countries can make use of the INTERREG funds to improve the cooperation with respect to transboundary water management.²³ Informal cooperation takes place within the Euregions and river basin committees such as the Euregions Rhine-Meuse North and Rhine-Waal.

The cooperation can also be given a more permanent character. For instance, a bilateral treaty²⁴ provides the basis for the conclusion of agreements with foreign partners, including decentralised government bodies, as part of the transboundary cooperation between the Netherlands and Germany. As another example, the cooperation between Luxembourg, Belgium and the Netherlands can be based on a trilateral treaty,²⁵ which provides the framework for the creation of public bodies or common organs and, in particular, for the establishment of administrative agreements.²⁶ In addition to these administrative types of cooperation, cooperation in the Wadden area takes place in the form of a (private law) society called Euregion Wadden. As a final example, there is a foundation for the Euregion Meuse-Rhine.

A more generally applicable and more intensive form of cooperation between water authorities can perhaps be found in the Regulation on European Grouping for Territorial Cooperation.²⁷ From the point of view of the river basin approach, it is preferred that local government bodies be able to work together closely on the execution of the WFD. The Regulation provides for the creation of a European Grouping for Territorial Cooperation (EGTC) by local government bodies. Local government bodies of non-Member States, too, can join an EGTC by concluding an agreement.²⁸ This can be a suitable instrument for local government bodies to execute policies together.²⁹ One has to bear in mind, however, that even though local government bodies may transfer duties to this EGTC, enforcement powers are excluded.³⁰ The fact is that the

22 The PBWC was created by virtue of art. 64 of the so-called 1960 Dutch-German Border Convention (*Verdrag van 8 april 1960 tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland nopens het verloop van de gemeenschappelijke landgrens, de grenswateren, het grondbezit in de nabijheid van de grens, het grensoverschrijdende verkeer over land en via binnenwateren en andere met de grens verband houdende vraagstukken*), *Trb.* 1960, 68.

23 Example: INTERREG IV A the Netherlands-Germany 2007-2013.

24 The 1960 Dutch-German Border Convention, *supra* note 22.

25 La Convention Benelux concernant la coopération transfrontalière entre collectivités ou autorités territoriales / Benelux-Overeenkomst inzake grensoverschrijdende samenwerking tussen territoriale samenwerkingsverbanden of autoriteiten, <http://www.benelux.be/fr/dos/dos02a.asp>

26 Public bodies should be distinguished from common organs; the former are legal entities which may be vested with regulatory and administrative powers, whereas the latter are not legal entities. The domestic laws of the parties concerned apply in both cases.

27 Consideration no. 11 Preamble to Regulation 1082/2006/EC of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), *OJ L* 210, 31.7.2006, p. 19. This has some resemblance to the Dutch instrument of a joint arrangement.

28 Consideration no. 16 Preamble to the EGTC Regulation.

29 Art. 7 Paras. 1 & 2 EGTC Regulation.

30 See consideration no. 13 Preamble to the EGTC Regulation.

Regulation precludes any duties vested in the EGTC in relation to the execution of administrative powers and duties with respect to safeguarding the general interest of the state or any other government body, such as policing and regulatory powers, justice and foreign affairs policy.³¹ According to the preamble to the EGTC Regulation, the powers exercised by a regional or local government body in connection with its official authority, particularly the policing and regulatory powers, are not allowed to be part of the agreement.³² This means that the only purpose served by the creation of an EGTC is the execution of operational water management duties.

One of the problems with transboundary cooperation in general is that the powers of the government bodies on both sides of the border are not compatible. This can be demonstrated by the responsibility for water management. Dutch water management, for example, is largely vested in the district water boards, which are public bodies with a legal personality. Water management powers in Germany, on the other hand, take place in the *Wasserbehörde* at *Bundes-*, *Landes-*, *Bezirks-* and *Kreis* level, whereas Flanders is no stranger to the phenomenon of water district boards but these are incomparable with their Dutch counterparts with respect to their legal form and administrative duties and powers.³³ This makes the creation and establishment of arrangements more difficult.

2.3. Transboundary district water boards?

The creation of transboundary district water boards (water authorities under public law) as an institutional structure that can be used to shape transboundary water management is currently also being considered in light of the obligation for international river basins to cooperate under the WFD.

Due to the obligations arising from the WFD and the problems which may arise between European directives and international treaties, Hey and Van Rijswick are in favour of a European institutional organisation for transboundary administrative cooperation within river basins.³⁴ Ideally, the obligations prevailing in a river basin area would be the responsibility of this transboundary cooperation partnership, which could also be held liable if the obligations arising from the WFD are not met or not met in due time. The time seems to have now come to develop ideas on transboundary institutions which would facilitate transnational river basin management.

3. Implementation and enforcement of transboundary cooperation

The WFD and the Floods Directive expect Member States to formulate one river basin management plan and one flood risk management plan for each river basin district, incorporating measures to achieve the objectives arising from the WFD and the Floods Directive for the entire river basin.³⁵ The WFD and the Floods Directive, however, do not compel Member States in an international river basin district to make a joint plan, not in the least if non-Member States are also involved. If efforts to make a single plan for an international river basin district fail, each Member State may adopt a plan for the part of the river basin on its territory, incorporating the measures needed to achieve the objectives of the WFD and the Floods Directive.³⁶ Nevertheless,

31 Art. 7 Para. 4 EGTC Regulation.

32 Consideration no. 13 Preamble to the EGTC Regulation.

33 F. Maes *et al.* (eds.), *Integraal waterbeleid in Vlaanderen en Nederland*, 2003.

34 Hey *et al.* 2008, *supra* note 14.

35 Art. 3 Paras 4, 11 & 13 WFD and Arts. 9-12 Floods Directive.

36 Art. 13 WFD and Art. 12 Floods Directive.

Member States cannot avoid cooperating on the execution and enforcement of the WFD and the Floods Directive.

3.1. Coordination of measures

The WFD and the Floods Directive compel states in an international river basin district to coordinate the adoption of measures taken in the national part of the river basin in accordance with the principle of the loyalty principle,³⁷ the principle that pollution should be tackled at source³⁸ and the principle not to shift the responsibility to another party.³⁹ As far as third countries are concerned, Member States only have to endeavour to establish the appropriate coordination.⁴⁰ After all, harmonisation is essential if the objectives of the WFD and the Floods Directive are to be attained for the entire river basin. The Floods Directive even forbids Member States from taking measures to combat flood risks if this increases the flood risk in other states.⁴¹

Coordination between Member States aimed at taking suitable measures to combat water pollution is encouraged by the Common Implementation Strategy, which is adopted by water directors of the Member States and the Commission after informal consultation.⁴² It is to be expected that such a strategy will also be established to facilitate the implementation of the Floods Directive. Furthermore, the WFD provides for European programmes to combat water pollution by hazardous substances.⁴³

Nevertheless, there is a risk that Member States will fail to adequately harmonise their national measures for the implementation of the WFD. Due to the individual obligation to achieve a specific result, every Member State is, after all, under pressure to realise the WFD objectives by 2015 (or by 2027, after the extension of the terms). This may backfire on transboundary cooperation if the cooperation with other Member States does not get off the ground soon enough. Member States could then be tempted to take measures that will only affect their territory. It means that downstream Member States run the risk of the upstream Member States taking inadequate measures, as a result of which they will be faced with water which is so polluted that they are unable to achieve the WFD objectives downstream.

3.2. Invoking exemptions under the WFD

The WFD objectives are so ambitious that Member States in a river basin are likely to be incapable of realising them on their own. The WFD also provides for this situation (the Floods Directive does not). If the monitoring data or other information show that the objectives of Article 4 of the WFD will probably not be achieved in a particular water body, the Member States should ensure that:

- the causes of the failure are examined;
- the permits and consents concerned are examined and, if necessary, reviewed;
- the monitoring programmes are tested and, if necessary, adjusted; and
- any additional measures will be taken in order to achieve the objectives of Article 4 WFD, including the adoption of stricter environmental quality standards.⁴⁴

37 Art. 10 EC Treaty.

38 Consideration no. 40 Preamble to the WFD.

39 Art. 7 Para. 4 Floods Directive.

40 Consideration no. 35 Preamble to the WFD, Art. 3 Paras 4 & 5 and Art. 11 WFD.

41 Art. 7 Para. 4 Floods Directive.

42 Cf. EMEA guidelines for the Directive on Medicinal Products and the BREFs for the IPPC Directive.

43 Arts. 16 & 19 WFD.

44 Art. 11 Para 5 WFD.

It is striking that the WFD does not compel the Member States to cooperate with respect to examining the causes of water pollution and the decision on whether the permits and consents should be reviewed or that an exemption can be invoked.

After all, the WFD provides for five exemptions from the obligation to achieve a good ecological and chemical status of the surface water by 2015.⁴⁵ The Member States may, provided certain conditions are met, designate a body of surface water as artificially or heavily modified or realise new developments which should lead to a change or modification of a water body or set less stringent environmental conditions for specific water bodies. They may also extend the deadline for achieving the WFD objectives a number of times until 2027 at the latest or plead a temporary deterioration. And finally, a Member State may determine that the additional measures are not feasible if the causes of the pollution are the result of circumstances which were not foreseeable or exceptional due to natural causes or force majeure, particularly substantial floods or prolonged droughts.⁴⁶ This exemption, however, is subject to the rules applicable in the event of a temporary deterioration.⁴⁷ Member States cannot invoke an exemption just like that. They can only do so after having taken all feasible measures and if meeting the WFD objectives would be disproportionately expensive. Furthermore, it is established in the Court of Justice's case law that exemptions should be construed restrictively.⁴⁸

If an upstream Member State relies on an exemption, the downstream Member States may suffer the detrimental effects. That is why the WFD stipulates that Member States cannot invoke an exemption unilaterally. The WFD requires harmonisation between Member States in the same river basin district, either because the conditions for the exemption must be laid down in the river basin management plan and are subject to evaluation when the plan is updated, or because the measures must be incorporated into a programme of measures which must be made in addition to the river basin management plan. Furthermore, the WFD also restricts reliance on an exemption by stipulating that a Member State which relies on an exemption must ensure that achieving the objectives of the WFD in other water bodies in the same river basin district is not permanently impeded or compromised and is consistent with other Community provisions in this area.⁴⁹ It also requires that the present level of protection be maintained and that the status of the bodies of water does not deteriorate.⁵⁰ This means that Member States are restricted in their reliance on the exemptions of the WFD and have to take the interests of the other Member States into account.

3.3. Public participation

Citizens and environmental groups can also be involved in the production and updating of the river basin management plan. The WFD, and in its wake the Floods Directive, instructs Member States to encourage active participation by all parties involved in the execution of the directive, without giving any specific details for public participation in international river basin districts.⁵¹

45 Art. 4 Paras 3, 4, 5, 6 & 7 WFD.

46 Art. 11 Para. 5 WFD.

47 Art. 4 Paras 6 & 8 WFD.

48 Examples: ECJ 8 July 1987, Case 262/85, *Commission v. Italy*, ECJ 7 March 1996, Case C-118/94, *WWF Italy v. Regione Veneto*, ECJ 12 December 1996, Case C-10/96, *Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v. Région Wallonne*, ECJ 28 October 1999, Case C-6/98, *ARD v. Pro Sieben Media* and ECJ 20 October 2005, Case C-6/04, *Commission v. United Kingdom*.

49 Art. 4 Para. 8 WFD. Unfortunately, there are still many ambiguities surrounding the issue of what exactly is 'another body of water'. The case where a regional body of water is highly polluted without affecting the river into which it flows as the water is diluted could perhaps serve as an example.

50 Art. 4 Para. 9 WFD.

51 R. Macrory *et al.*, 'Participatory rights, transboundary environmental governance and EC law', 2002 *CMLRev.*, p. 504.

Nonetheless, the WFD and the Floods Directive expect Member States to take public participation seriously. Although, on the one hand, Member States are only required to encourage public participation in the production, reviewing and updating of the plans, the WFD compels Member States, on the other hand, to publish the timetable, the work programme, an interim overview of significant water management issues identified in the river basin and copies of the draft river basin management plan and to allow the public at large to comment on them, whereas the Floods Directive compels Member States to publish a risk assessment, maps and management plans with respect to floods.⁵² To enable active participation and consultation, Member States must allow a period of at least six months during which written comments are invited. Background documents and information only need to be made available on request.

In view of the river basin approach of the WFD and the Floods Directive, the provisions on public participation should be interpreted in such a way as to include transboundary public participation.⁵³ Without transboundary participation, the general public in other Member States are shunted off and that would violate the tenor of the Aarhus Convention. The provisions on participation as laid down in the Directive on Public Participation do not apply to the production and updating of the plans for the implementation of the WFD and the Floods Directive.⁵⁴ The provisions on transboundary public participation in this directive may serve as an example, though. It would mean that Member States would have to consult each other as to whether the participation should become a transboundary affair. If they decide to do so, they should make arrangements that enable them to approach the general public in both Member States. A similar arrangement arises when the EIA Directive is applied to decisions regarding specific measures in a river basin management plan, if these could potentially affect the environment in another Member State.⁵⁵

3.4. Sharing information

For cooperation to be effective and in order to hold another Member State accountable for its performance, it is essential that measurement methods are compatible with each other and that Member States disclose information on the status and level of the water. The WFD makes this possible by subjecting the way in which Member States monitor the water quality to certain requirements and by laying down standard technical specifications and measurement methods.⁵⁶ This is necessary because it enables the use of these data for coordinating the production and updating of the river basin management plan.⁵⁷ The Floods Directive does not contain any monitoring requirements, but it does instruct the Commission to make arrangements for the standardisation of statistical and cartographical data, which will obviously be beneficial to the compatibility and, as a result, the exchange of data.⁵⁸ Both directives instruct the Member States to report their progress in attaining the objectives to the Commission on a regular basis.⁵⁹ Subsequently, the Commission must report to the European Parliament and the Council on a

52 Art. 14 WFD & Art. 14 Floods Directive, respectively.

53 Macrory *et al.* 2002, *supra* note 51, pp. 506-507.

54 Art. 2 Para. 5 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, *OJ L* 156, 25.6.2003, p. 17.

55 Art. 7 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, *OJ L* 73, 14.3.1997, p. 5.

56 Arts. 8 & 21 WFD.

57 See Art. 5 WFD.

58 Art. 15 Floods Directive.

59 Art. 15 WFD and Art. 15 Floods Directive.

regular basis.⁶⁰ It is clear that these provisions mainly serve supervisory purposes, but they also aim to satisfy the need for information within a particular river basin.

Although the Helsinki Convention instructs Member States to establish warning and alarm procedures and to provide mutual assistance in case of calamities,⁶¹ the WFD unfortunately does not offer the Member States any guidelines to ward off calamities. It provides for neither an alarm system, nor for mutual assistance when emergency measures are adopted.⁶² It is regrettable that the WFD has not implemented this obligation because it means that it is up to the parties to a bilateral or multilateral treaty regarding an international river basin to provide for this. If cooperation is not up to standard, measuring points will be needed at the border to enable the adoption of timely measures.

The experience gained through the exchange of information on the risk of high tides as part of the INTERREG IIIC network Flood Awareness & Prevention Policy in Border Areas ('FLAPP') is positive.⁶³ In the past, measures to combat floods in transboundary river basins encountered problems owing to the differences in the legal systems of the countries involved and due to cultural differences. Experience with flooding of the Meuse (Belgium/the Netherlands), the Elbe (the Czech Republic/Germany), the Tisza (Romania/Hungary), the Danube (Hungary/Austria) and the Douro (Spain/Portugal) made it clear that transboundary cooperation is necessary. The FLAPP network was set up so as to become acquainted with each other and to learn from each other by exchanging experiences and by examining 'best practices' regarding flood risk management. The network has 35 partners in 12 different European countries.

4. Enforcing compliance of transboundary cooperation

There are different ways of enforcing compliance if a (Member) State fails to meet its obligations under the WFD or the Floods Directive, or when it shows little willingness to harmonise its programme of measures with the other Member States in the river basin. International treaties provide for some remedies, depending on the parties. The WFD and the Floods Directive have vested the Commission with a special duty with respect to the European river basins. Not only can the Commission demand compliance with the Treaty by way of procedures regarding violations of the Treaty in its capacity as the guardian of the Treaty, but it can also be used by Member States as a mediator. In addition, Member States may consider solving their dispute by instigating international proceedings or by bringing the case before the European Court of Justice. Decentralised government bodies can lodge a complaint with their Member State or the Commission, but they can also consider instituting legal proceedings abroad.

4.1. International dispute settlement procedures

All relevant water treaties provide for dispute resolution between Member States with respect to the interpretation or application of the treaty concerned. Compliance with these treaties should first of all be ensured through the usual diplomatic methods for dispute resolution: negotiations, good offices, mediation, and fact-finding or a conciliation procedure. Employing a commission

60 Art. 18 WFD and Art. 16 Floods Directive.

61 Arts. 9 (g), 14 and 15 Helsinki Convention.

62 Regrettably, the supply of information to the general public suffers from the same shortcoming. After all, the WFD and the Floods Directive do not instruct Member States to inform the general public in the event of calamities. This shortcoming is remedied, however, by Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC, *OJ L* 41, 14.2.2003, p. 26.

63 See for more information: www.flapp.org

created by the treaty for a particular river is also one of the possibilities. Generally speaking, the outcome of these methods of dispute resolution is not legally binding. In order to achieve a legally binding result, the parties to a treaty can use arbitration or the courts if diplomatic methods have failed. The Helsinki Convention, for example, provides for the dispute to be submitted to an arbitral tribunal or to the International Court of Justice if both parties have agreed to such a course of action.⁶⁴ The Rhine treaties provide for compulsory arbitration. This option was used by the Netherlands to resolve its dispute with France with respect to the settlement of costs incurred in countering chloride dumping.⁶⁵

The option of arbitration or the courts is restricted for EU Member States, because they are required to submit their mutual disputes on the interpretation or application of Community law to the European Court of Justice by virtue of Article 292 of the EU Treaty. Member states do not have the discretion to opt for binding international legal proceedings and this cannot be circumvented by disguising the dispute as a Helsinki Convention dispute. After all, this is a mixed treaty which includes not only the Member States but also the EC as such. This means that the treaty is part of the Community's legal system, which makes the European Court of Justice exclusively competent to try disputes on its interpretation and application and to assess whether a Member State has complied.⁶⁶ This also applies to other treaties which the EU has joined such as the Rhine Treaty.⁶⁷

The Member States' discretion to resolve their disputes on the application or interpretation of these water treaties through international legal proceedings is therefore very restricted. The only exception is a dispute about an issue that is in no way connected to the application or interpretation of Community law. This assessment is made by a competent Community institution. The Member States are required, in any case, to inform and consult Community institutions (the European Commission in particular) prior to their submission of the dispute to this body.⁶⁸ It is a different matter when a dispute involves a non-Member State, because such a dispute can only concern the interpretation or application of an international treaty such as the Helsinki Convention or a treaty on cooperation within a particular river basin. In such cases going to an international court or arbitral tribunal is the only option, apart from diplomatic methods, for dispute resolution.

4.2. European procedures

The WFD and the Floods Directive provide for the Commission to act as a mediator if Member States fail to agree on the execution of the WFD. Member States can call in the Commission at an early stage. It so happens that the WFD stipulates that the Commission can lend its assistance by facilitating the assignation of a water body to a river basin at the request of the Member States concerned.⁶⁹ When problems arise with the production of the programme of measures as part of the river basin management plan, a Member State can call on the Commission's assistance.⁷⁰ And finally, a Member State may also call in the Commission in the event of a transboundary problem, which is a problem with consequences for its own water management but which it is

64 Art. 22 Helsinki Convention.

65 The Rhine Chlorides Arbitration concerning the Auditing of Accounts (Netherlands-France), Award of 12 March 2004 (*PCA Award Series* 2008).

66 ECJ 30 May 2006, Case C-459/03, *Commission v. Ireland ('MOX plant')*.

67 Art. 4 of the Protocol of Signatories of the Rhine Convention stipulates this expressly.

68 *Commission v. Ireland ('MOX plant')*, *supra* note 66, Paras 179-182.

69 Art. 3 Para. 4 & Art. 7 WFD.

70 Art. 3 Paras 3 & 4 WFD.

unable to solve.⁷¹ The Commission's help can therefore also be called in with respect to transboundary water pollution. Although the directives provide for mediation by the Commission, a Member State (or its representatives) can always discuss cases of transboundary pollution or floods at the river basin district meetings, the water directors' meetings or at a meeting of the WFD Regulatory Committee.⁷²

When a Member State calls on the Commission's assistance in a dispute on a transboundary problem, the procedure is as follows. First of all, the Member State submits the problem to the Commission and any other Member States involved. It can put forward suggestions for the resolution of the problem. Subsequently, the Commission should give its response to the report or recommendations within six months.⁷³ The WFD and the Floods Directive do not prescribe any formal requirements with respect to the Commission's reply to a request for help from a Member State, apart from the obligation to respond within six months in the event of a transboundary problem. The WFD and the Floods Directive do not say anything on the status of the Commission's reply. According to the European Court of Justice's case law, the Commission can only advise the Member States on how to tackle a problem as the WFD and the Floods Directive do not give the Commission any legal powers to make a binding decision.⁷⁴ However, the Commission's reply is an authoritative argument because (as will be elaborated below) it can decide to institute proceedings with respect to a violation of the Treaty against a Member State which fails to meet its obligations under the WFD or the Floods Directive.⁷⁵

Obviously, a downstream Member State that is unable to meet its obligations under the WFD owing to water pollution originating in another Member State, also runs the risk that the Commission will instigate compliance proceedings. A Member State can only try to shift the responsibility to a foreign country if it can prove that its failure to comply with the WFD objectives can be attributed to another Member State. By placing measuring points at the border which generate monitoring data, the Member State could prove its point. This will possibly enable a Member State to defend itself against compliance proceedings by the Commission. The WFD does not say, however, that a Member State is exonerated from meeting its obligations under the WFD if the reason for this failure originates in transboundary pollution.⁷⁶

A Member State that suffers damage as a result of transboundary water pollution or floods may choose to institute proceedings for non-compliance before the European Court of Justice against the Member State that fails to comply with its obligations under the WFD or the Floods Directive.⁷⁷ The proceedings before the Court should be preceded by mediation by the Commission. This introductory procedure resembles the procedure under the WFD and the Floods Directive described above. The Commission has only three months to come up with solutions for the dispute by virtue of the procedure under Article 227 of the EC Treaty, after which the complaining Member State can bring the case before the European Court of Justice on grounds of non-compliance. The WFD and the Floods Directive do not say that the procedure before the European Court of Justice can be followed after the completion of the dispute resolution

71 Art. 12 WFD & Art. 8 Para. 5 Floods Directive.

72 Cf. ECJ 30 March 2000, Case C-178/97, *Banks*. Art. 21 WFD (with reference to Decision 1999/468) provides for the creation of a regulatory committee. Art. 16 Floods Directive has a reference to this.

73 Art. 12 WFD & Art. 8 Para. 5 Floods Directive.

74 Cf. CFI 26 November 2002, joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, *Artegoda and others v. Commission ('Artegoda I')* and ECJ 24 July 2003, Case C-39/03 P, *Commission v. Artogoda and others ('Artegoda II')*, and CFI 31 January 2006, Case T-273/03, *Merck Sharp & Dohme and others v. Commission*.

75 Arts 226 & 228 EC Treaty.

76 The Marine Strategy Framework Directive, for example, has provided for this.

77 Cf. ECJ 9 August 1994, Case C-359/92, *Germany v. Council*.

procedure. It is obvious, however, that the Member State does not have to submit the problem to the Commission after having followed the WFD/Floods Directive procedure. It is likely that the lack of coordination between the WFD/Floods Directive procedure and the procedure under Article 227 of the EC Treaty will turn out to be an entirely theoretical problem, as in practice Member States are usually very reluctant to summon another Member State before the European Court of Justice.⁷⁸ As another option, a Member State can also choose to submit its dispute with another Member State directly to the European Court of Justice by virtue of Article 239 of the EC Treaty. This can only be done, however, if the other Member State also wants to take legal action.

Although Member States are not completely toothless, it may be reasonably expected that they will leave it to the Commission to demand compliance with the obligations arising from the WFD by instituting compliance proceedings. The Commission, after all, in its capacity as the Treaty's guardian should take action against a Member State that fails to comply with its obligations under Community law by applying the procedures of Articles 226 and 228 of the EC Treaty. The Commission has the discretionary power to apply this instrument when it becomes aware of any abuse, thanks to complaints from Member States, decentralised government bodies or citizens or owing to the monitoring and reporting obligations under the WFD and the Floods Directive. The Commission can use this to increase the pressure on Member States to observe the obligations under the WFD and the Floods Directive, particularly since the Commission can request the Court of Justice to impose a penalty as well as penalty payments in the case of continuous non-compliance.⁷⁹

4.3. Domestic administrative procedures

A completely different approach to enforcing compliance in case of transboundary disputes on water management can be found in allowing national authorities to institute proceedings in another (Member) State. Although the European Court of Justice expressly mentioned this as a form of dispute resolution between Member States, it did not make it mandatory for Member States to incorporate this into their domestic laws of procedure.⁸⁰ The European Court's decision therefore does not alter the fact that local government bodies are unable to institute proceedings in German administrative disputes due to the protective norm criterion, as the Court expressly made this choice subject to domestic procedural law.

Thanks to the Aarhus Convention, local government bodies may have more remedies at their disposal in the courts of other Member States and other states which have joined the Convention. As it is, decentralised government bodies can demand environmental information and participate in the decision-making processes in environmental matters by virtue of the Aarhus Convention, which has been converted into two directives and implemented in the Member States' domestic legislation. Furthermore, they can take legal action in the event of a refusal to provide environmental information or in order to safeguard their participation rights. And finally, they can take legal action against environmental decisions pursuant to the Aarhus Convention, provided they can demonstrate that they have an interest in the decision or that it violates a right. Even though this right has not yet been converted into a directive, it should have been incorpo-

⁷⁸ Cf. ECJ 12 September 2006, Case C-145/04, *Spain v. United Kingdom ('Gibraltar')* and ECJ 16 May 2000, Case C-388/95, *Belgium v. Spain*.

⁷⁹ ECJ 12 July 2005, Case C-304/02, *Commission v. France*.

⁸⁰ *Banks*, *supra* note 72.

rated into domestic law.⁸¹ The convention also provides for a privileged position for environmental organisations, but not for decentralised government bodies. That is why it is not certain whether local governments – which are not specifically responsible for the promotion of environmental interests – will be regarded as interested parties in all Member States.

5. When cooperation fails: compensation

Previously, a number of legal instruments have been discussed that can be used to shape transboundary river basin management and to demand compliance. Below we will describe how a Member State can recover damages from the responsible party when the compliance procedures have failed to produce the envisaged result. In addition to the fact that this is obviously beneficial to the injured Member State, the recovery of the water cost incurred is an application of the principle that ‘the polluter pays’. This is one of the underlying principles of the WFD⁸² and, in light of the river basin approach of the directive, is unlikely to be restricted to domestic cases only. If the polluter cannot be made to pay beforehand, remedies must be sought afterwards. Here we will discuss the situation when damage is recovered from a foreign government body (*not* a foreign private party) by a water authority which has suffered this damage.

There are several ways to institute a procedure for damages and many competent courts to hear such a claim. Claims can be based on international law as well as on the domestic law of states. One option for an injured state is to use one of the available international dispute settlement mechanisms (see *supra* Section 4.1) to claim damages from a state that can be held responsible under international law for transboundary environmental pollution. Below we will discuss the possible remedies against a state through domestic proceedings before the private law courts. Before we proceed, we would like to point out that legal proceedings between states will not exactly lead to warm political relations between the parties. This may prevent a government body from starting these proceedings in the first place. Usually, retaining a good relationship will be considered more important than defending one’s rights. However, in future this path may indeed be taken. The goals of the WFD are set high and many Member States indicate that they will not be able to achieve the objectives in time. Should they be condemned by the European Court of Justice while not meeting the water quality standards is not (totally) attributable to them, they will have no choice but to try and recover the damage from the party that caused it.

Private law provides alternatives to claims for compensation in the event of transboundary water pollution. The injured authority may institute civil proceedings (such as an action based on tort) before the courts of a government body responsible for the damage. It can also take legal action before its own courts. This article will now address the latter form of relief and discuss the relevant aspects where private international law is concerned: the court’s competence, the applicable law and the executability and recognition of a decision. We will not go into the merits of a claim for damages as it differs from one country to the next depending on the applicable tort law. What we will do in this section is briefly discuss the meaning of EC law for a claim for damages. After all, this law equally applies to all Member States.

81 See for the remedies provided by the Aarhus Convention: N. de Sadeleer *et al.* (eds.), *Access to justice in environmental matters and the role of NGOs; empirical findings and legal appraisal*, 2005, R. Widdershoven, ‘Rechtsbescherming in het milieurecht in Europees perspectief’, 2004 *M&R* 31, pp. 530-540 and A. Keessen, ‘Reducing the Judicial Deficit in Multilevel Environmental Regulation: the Example of Plant Protection Products’, 2007 *EELR* 18, pp. 26-36.

82 Art. 174 Para. 2 EC Treaty in conjunction with consideration no. 11 Preamble to the WFD.

5.1. The court's jurisdiction

A domestic court must address the issue of its jurisdiction before it can order a foreign state to pay compensation. This jurisdiction is governed by both private international law and public international law. We will discuss both aspects here. Although in court, the public international law component should be addressed before its private international law counterpart,⁸³ we will reverse the order here in order to make this topic easier to understand.

5.1.1. Private international law jurisdiction

For issues regarding the international law on jurisdiction in Europe, the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) is the source to look for.⁸⁴ This regulation is largely based on the older Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and should be interpreted accordingly.⁸⁵ The European Court of Justice's earlier case law on the Brussels Convention will therefore still apply.⁸⁶ In addition to this regulation, the so-called Parallel Convention should also be considered. This convention applies to the relations between Finland, Norway, Austria, Iceland, Sweden and Switzerland. The provisions relevant with respect to claims for damages are materially similar to those of the Brussels I Regulation, which is why we will not pay further attention to this convention. If the regulations mentioned previously do not apply (substantively, procedurally or temporally), the domestic court which is called upon must apply its own customary international rules on jurisdiction. A discussion of these results will obviously be ignored here.

The Brussels I Regulation applies only, according to its Article 1, in civil and commercial matters. This is an autonomous concept of European law.⁸⁷ The European Court of Justice specified the definition of a civil matter in a series of cases.⁸⁸ In this case law, the European Court of Justice addresses the issue of a government body which acts as a plaintiff and it introduces the concept of a public authority 'acting in the exercise of its public powers.' When a government body is the plaintiff, the Court has said, we do not speak of a civil matter if the institution of the proceedings by this government body is an act in the exercise of its public powers. To establish whether this is the case, the first thing to do is to determine the subject of the dispute and, consequently, the nature of the legal relation. An analysis of this case law⁸⁹ shows that it can be rather difficult to determine whether acts can be qualified as 'acts in the exercise of its public powers'. There seems to be a trend in the case law which shows an increasing emphasis on the criterion of the 'exclusivity' of the exercise of power: if a government body exercises rights which a private party does not have when it takes legal action to claim damages, it acts in the exercise of its public powers.

So when a government body makes a claim for compensation for transboundary water pollution, it needs to be determined whether it exercises rights that private parties do not have. As far as the institution of the claim is concerned, it suffices when it is based on private law. It can then be qualified as a 'civil or commercial matter' and is covered by the Regulation, even if

83 J. Spiegel, *Vreemde staten voor de Nederlandse rechter. Immunitet van jurisdictie en van executie*, 2001, p. 9.

84 Regulation 44/2001/EC, *OJ L* 12, 16.1.2001, p. 1.

85 Consideration no. 19 Preamble to the Brussels I Regulation.

86 L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, 2002, p. 215.

87 P. Jenard, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968', *OJ C* 59, 5.3.1979, p. 1.

88 ECJ 14 October 1976, Case 29/76, *Eurocontrol*, ECJ 16 December 1980, Case 814/79, *Rüffer*, ECJ 21 April 1993, Case C-172/91, *Sonntag*, ECJ 14 November 2002, Case C-271/00, *Steenbergen*, and ECJ 15 May 2003, Case C-266/01, *Préservatrice Foncière*.

89 J. van Kempen, *Interstatelijke civiele sancties wegens grensoverschrijdende milieuvervuiling. Hindernissen en kansen*, 2007, pp. 77-81.

it is a government body that institutes the proceedings and even if only a government body can institute this claim.⁹⁰ After having determined that the subject-matter is covered by the Regulation (*i.e.* provided the claim is based on private law), the nature of the legal relationship needs to be established. The origin of the legal relationship between the parties needs to be established as well as the reason why the party which caused the damage allegedly owes money to the party which suffered it.

The suffering party may have incurred damage because its right to a damaged (polluted) matter has been violated. For example, a water authority is often the owner of the land under the surface waters which it manages. When the water bottom is polluted as a result of polluted water flowing over it (which is often the case), there is damage. If this authority subsequently decontaminates the polluted ground, this constitutes another type of damage. The decontamination cost can be qualified as the damage suffered by the water authority.

As far as the last-mentioned category is concerned, civil law environmental disputes are not very likely to be covered by the Regulation, as the underlying legal framework that governs the actions of a plaintiff-government body in such a case is public law by nature.⁹¹ The ruling in the *Rüffer* case⁹² in particular could throw a spanner in the works here. In this case, the Dutch state removed a sunken ship from an international watercourse, which was the State's duty under Dutch public law. When the State sought to recover the expenses from the German owner, the Regulation⁹³ was declared not to be applicable: even though the instrument used was one of private law by nature, the legal relationship underlying the claim was governed by public law.⁹⁴ Private parties would not be able to recover these costs as they would not have incurred them, according to the Court.⁹⁵

The likelihood of the Regulation being applicable is greater if a plaintiff-government body's claim is based on a violation of its property rights than on the grounds of the government body's duty to protect the environment (such as the implementation legislation of European water directives). Neither the *institution* of the claim for damages, nor the *origin* of the cost can be based on rights that private parties do not have, if the Regulation is to be applicable. Even though – according to Briggs – the Court changed its course in the early part of this decade by broadening the interpretation of Article 1,⁹⁶ the two-phase argument still holds true and a government body seeking redress runs the risk of the Regulation not being applicable. Moreover, the circumstances of the *Rüffer* case are most comparable to the recovery of the cost resulting from the decontamination of a polluted water bottom. The other rulings mentioned, which would impel a wider construction of Article 1, are unrelated to environmental law and have no underlying public law framework with respect to the nature of the legal relationship.

Government bodies acting as a defendant are subject to the same requirement.⁹⁷ The Brussels I Regulation applies only if the defendant did not act in the exercise of its public authority when it caused the damage. Consequently, when a foreign government body exercised powers not available to private parties when it caused the water pollution, the court's jurisdiction

90 A. Briggs, *Civil Jurisdiction and Judgments*, 2005, pp. 48-49.

91 G. Betlem, 'Overheidsacties en het begrip "burgerlijke en handelszaken" uit de EEX-Verordening', 2002 *Overheid en Aansprakelijkheid*, pp. 35-40.

92 ECJ 16 December 1980, Case 814/79.

93 At the time this was still the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

94 Betlem 2002 *supra* note 91, pp. 35-40.

95 This seems to be an odd argument; after all, private persons can also remove a wreck.

96 Briggs 2005 *supra* note 90, pp. 48-49. He points to the following rulings: ECJ 14 November 2002, Case C-271/00, *Steenbergen*, ECJ 15 January 2004, Case C-433/01, *Blijdenstein*, ECJ 5 February 2004, Case C-265/02, *Frahuil* and ECJ 1 October 2002, Case C-167/00, *Henkel*.

97 ECJ 21 April 1993, Case C-172/91, *Sonntag*.

in the plaintiff's country cannot be based on the Brussels I Regulation. A licence to discharge waste, for example, can only be granted by a government body. Therefore, the Regulation will not apply. If, however, a government body *de facto* dumps hazardous substances into the water, it may be argued that anyone else can do the same thing, which implies that these acts are within the scope of the Regulation.⁹⁸

If applicable, the Regulation provides for the jurisdiction of the court. According to the main rule (Article 2), the court of the residence of the defendant (*forum rei*) has jurisdiction to hear the dispute. In addition, Article 5 provides for a number of alternative courts with jurisdiction. This case is governed by Paragraph 3, which provides for obligations arising from tort. The court of the place where the act leading to the damage occurred, the *locus delicti*, has jurisdiction in the event of tort. The location of the *locus delicti* is not a trivial matter in transboundary water pollution cases. These types of water problems are characterised by the fact that the act causing the damage occurs at one place, while the damage itself occurs at another place.⁹⁹ The place where the act causing the damage is carried out is called *Handlungsort* or the *locus acti*. The place where the damage occurs is called the *Erfolgort* or the *locus damni*.

The *Potash mine* ruling¹⁰⁰ clarified the meaning of the *locus delicti* in these types of cases. The European Court of Justice considered in this case: 'That where the place of the happening of the event which may give rise to liability in tort, delict or quasidelict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred", in article 5 (3) of the convention, must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it'. According to the Court, the courts of the *Handlungsort* as well as those of the *Erfolgort* have jurisdiction and it is at the plaintiff's discretion which one to choose.

If the Brussels I Regulation does not apply, its enforcement and execution rules do not apply either. This means that a ruling against a foreign government body may not be recognised by the courts of that country, while the options for execution will also be more limited.¹⁰¹ Clearly, the applicability of the Regulation is of great interest to a plaintiff. A plaintiff-government body should therefore seek to base its claim in tort on civil law grounds where possible. It will make it easier to bring the subject of the dispute under the scope of the Regulation, while the risk of exercising rights that private parties do not have are slim. A plaintiff-government body should build its case on the violation of its property rights (as far as possible), rather than on its duties with respect to environmental protection. It also means that plaintiff-government bodies can better complain about damage resulting from *de facto* acts (something private parties can do, too) than about granting a licence (evidently a typical government act) which has led to harmful acts.

5.1.2. The court's jurisdiction in public international law: state immunity

In addition to the rules on private international law described above, a foreign government has an extra option at its disposal to contest the jurisdiction of the court of the plaintiff: it can rely on its immunity from jurisdiction in international law.

The immunity of a state from jurisdiction is a direct consequence of the *par-in-parem principle*: there is no jurisdiction between equals. This principle is part of customary international law. Most of the customary rules with respect to the immunity of states have been codified in the

98 An elaboration of these arguments (though in a different context) can be found in Van Kempen 2007, *supra* note 89, pp. 49-50.

99 See for example Strikwerda 2002, *supra* note 86, p. 188.

100 ECJ 30 November 1976, Case 21/76, *Mines de Potasse d'Alsace*.

101 Also according to Betlem 2002, *supra* note 91, p. 35.

United Nations Convention on Jurisdictional Immunities of States and their Property, which was adopted in 2004 by the General Meeting of the United Nations. (UN Convention).¹⁰² This convention has not yet become effective, but is regarded as an authoritative reflection of customary international law with respect to this subject. In addition to this customary international law, the European Convention on State Immunity (ECSI) is of importance. The ECSI was ratified by Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Austria, the United Kingdom and Switzerland. Legal claims submitted before the courts of those countries are governed by the rules of the ECSI. Relying on immunity from jurisdiction in another country will have to be judged by applying the customary rules as reflected in the UN Convention.

As international law concerning state immunity is diverse and ambiguous, the court may consider applying the rules arising from the ECSI to other states. As this is very much a clouded issue on which there is little clarity from an international point of view, the court is likely to opt for a ready-made solution.¹⁰³ The ECSI does not provide for any rules to enforce this, however.¹⁰⁴ In any event, the court will not grant immunity from jurisdiction to a Non-Member State in more cases than the ECSI provides for.¹⁰⁵

While the principle of absolute immunity prevailed in the past, the theory of restrictive immunity (in customary law as well as in the ECSI) is applied today.¹⁰⁶ This new theory distinguishes between typical acts of government (*acta iure imperii*) and civil law acts (*acta iure gestionis*). According to the restrictive theory, a state can, in principle, only seek immunity from jurisdiction for acts that are *iure imperii*, whereas a state is equal to a private party as far as *acta iure gestionis* are concerned, which means that it is not entitled to immunity. The qualification of government acts as either civil law acts or typical government acts is not trivial, as illustrated by the following quote by Wittich: ‘However, this distinction [between *acta iure imperii* and *acta iure gestionis*], while widely accepted, is only begging the question as to how it is to be made.’¹⁰⁷ There are no generally accepted criteria and courts tend to take a case-by-case approach by looking at the context and the situation of each individual case.¹⁰⁸ To make the distinction anyway, most domestic courts focus on the nature of the act rather than its purpose.¹⁰⁹ The following example shows the difference between both approaches: the dumping of polluted substances (something anyone can do, in principle) because the substances had to be removed as part of a maintenance operation of a dam owned by a government (an objective which is typical of a government body).¹¹⁰

In the ECSI, this simple rule of international law is complicated by using elements of private international law to establish a connection between the state where the proceedings take place and the dispute and thus to enable the recognition of this jurisdiction in other Member States in order to enforce the ruling.¹¹¹ If a Member State cannot rely on the immunity by virtue of the ECSI, it must comply with a ruling against it.¹¹² The ECSI is based on a so-called ‘negative

102 UN Doc. A/RES/59/38 (2004).

103 W. Belinfante, ‘Het Europese verdrag inzake de immuniteit van Staten’, 1973 *Mededelingen Nederlandse Vereniging van Internationaal Recht* 68, p. 15.

104 *Explanatory Report*, no. 7.

105 Belinfante 1973, *supra* note 103, pp. 8, 27.

106 M. Shaw, *International Law*, 2008, pp. 701-708.

107 S. Wittich, ‘The definition of commercial acts’, in: G.Hafner *et al.* (eds.), *State Practice Regarding Immunities*, 2006, p. 21.

108 *Ibid.*, p. 47.

109 P. Kooijmans, *Internationaal publiekrecht in vogelvlucht*, 2000, p. 62. See for Dutch examples also Hoge Raad (Supreme Court) 28 May 1993, *NJ* 1994, p. 329 and Hoge Raad (Supreme Court) 25 November 1994, *NJ* 1995, p. 650, legal consideration. 3.3.6.

110 This specific example was relevant in the German town of Iffezheim. For more information on this, see Van Kempen 2007, *supra* note 89, pp. iii-iv and, particularly regarding the concept of a ‘typical government act’: pp. 45-50.

111 *Explanatory Report* no. 10 (1).

112 Art. 20 Para. 1 ECSI.

list approach', which means that immunity is granted, unless one of the examples on the list apply (Articles 1 up to and including 14).¹¹³ Although this arrangement has been criticised,¹¹⁴ transboundary water pollution does not seem to be covered by any one of these cases. Article 11 comes closest, but does not cover torts with multiple *loci* but only tortious activity in a country with negative effects *in that country*. Therefore, the ECSI does not provide any arguments for a rejection of the reliance on immunity in cases of transboundary water pollution, meaning that the court of the plaintiff does not have jurisdiction.

The negative list of the ECSI is not exhaustive, though.¹¹⁵ If a case of transboundary water pollution does not appear on the list, Article 24 ECSI may provide relief. According to that Article, the court may apply the views prevailing in its country if the case concerned is not described in any of the cases mentioned on the list. Article 24 may be relied on, for example, if the elements referred to in Article 11 do not match the domestic rules on jurisdiction.¹¹⁶ But the exact content of the prevailing views with respect to the reliance on immunity from jurisdiction in a case of transboundary water pollution depends on the specific country and is often very unclear.¹¹⁷

A state may relinquish its immunity autonomously and consent to the jurisdiction of another state. This may be done expressly by an (international) agreement or by granting express consent after the dispute has arisen (Article 7 UN Convention and Article 2 ECSI). Immunity can also be relinquished implicitly.

5.2. Applicable law

On 11 January 2009 the Rome II Regulation will become operative.¹¹⁸ The main rule of this Regulation can be found in Article 4: the *lex loci damni* (which means the law of the state of the injured party) will apply, regardless of where the event causing the damage occurred. In addition, there is a special rule for environmental damage to the effect that the injured party may choose to base its claim on the *lex loci acti* (the law of the state of the responsible party).¹¹⁹ Here, too, the applicability of the Regulation is a problem. According to Article 1, the Rome II Regulation, just like the Brussels I Regulation, is applicable to (non-contractual obligations in) civil and commercial matters. The preamble states that the scope of the Rome II Regulation should match the Brussels I Regulation. As far as the applicability of the Rome II Regulation is concerned, the same remarks made previously with respect to the applicability of the Brussels I Regulation apply.

Furthermore, Article 1 of the Rome II Regulation literally excludes *acta iure imperii* from its applicability. This means that, in accordance with the wishes of the European Parliament, the liability of government bodies is excluded from the Regulation's scope in order to prevent them from becoming subject to foreign laws. The Parliament is of the opinion that this is especially important for those Member States where, for purposes of obligation, acts under the headings of both *iure gestionis* and *iure imperii* are governed by the same regime.¹²⁰ It is not clear whether

113 Art. 15 EOIS.

114 Spiegel 2001, *supra* note 83, pp. 86-87 and C. Schreuer, *State Immunity: Some Recent Developments*, 1988, p. 61.

115 B. Hess, *Staatenimmunität bei Distanzdelikten. Der private Kläger im Schnittpunkt von zivilgerichtlichem und völkerrechtlichem Rechtsschutz*, 1992, p. 219.

116 *Explanatory Report* no. 96.

117 See for more information and an effort to find out about this for the Netherlands: Van Kempen 2007, *supra* note 89, pp. 44-49.

118 Regulation 864/2007/EC of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31.7.2007, p. 40.

119 Art. 7 Rome II.

120 Comments in the European Parliament during the first reading of the Commission's proposal, A6-0211/2005.

this means the same as we stated previously with respect to the jurisdiction of the court under international law. As only seven out of twenty-seven EU members have joined the ECSI, it seems unlikely that the rules laid down in the Convention will be applied. The ECSI is a product of the Council of Europe and not of the EU. So the distinction mentioned in the Rome II Regulation is probably the general, vaguer, concept derived from customary international law, which requires the European Court of Justice to fill in the details.

5.3. Effects of EU law on the assessment of the claim for damages

As we discussed previously, a plaintiff-government body can seek redress for the damage it has suffered by virtue of provisions on damages under its domestic law, which warrant the compensation of the damage. After all, this is the applicable law. The rules on redress, however, are different in each country. In addition to this, a plaintiff-government body can also seek compensation based on European rules for compensation due to a violation of Community law.

Liability for violations of EU law

In the *Francovich* case¹²¹ the European Court of Justice acknowledged the principle that Member States are responsible for the damage suffered by private parties as a result of violations of Community law that can be attributed to the Member State and, consequently, that the Member State should pay damages. The *Francovich* ruling, however, concerned a case between private parties and their own government; so it did not apply to the relationship between government bodies and it was not transboundary.

One of the criteria for *Francovich* liability is that the violated norm of Community law must be aimed at granting rights to *private parties*. In view of this formulation one could say that Member States cannot rely on *Francovich* liability. According to Marchik, however, there is no reason why injured private parties should be treated any differently than injured states.¹²² In this context he refers to a European Court of Justice ruling¹²³ which says that ‘a judgment by the Court under articles 169 [new: 226] and 171 [new: 228] of the Treaty may be of substantive relevance for determining the basis of the liability that a Member State can incur *vis-à-vis* other Member States, the Community or private parties as a result of its non-compliance.’

Both Articles stipulate that Member States must observe their obligations arising from the EU Treaty, and that the Commission can bring an action as a result of their non-compliance before the European Court of Justice and that Member States must implement the rulings of the European Court of Justice in this respect. Marschik deduces from this that Member States, too, may claim *Francovich* damages. It is unclear whether Marschik is right about this and whether EU law intends to grant rights to Member States that they can use against other Member States. There are hardly any practical examples to illustrate such a claim for damages between Member States.

The rulings which elaborate on the *Francovich* liability¹²⁴ lay down that this liability is only meant as a minimal level of harmonisation based on case law. If the *Francovich* liability is not recognised in a certain case, domestic laws on liability may do so. One may wonder whether the principle that domestic laws provide redress for an extensive liability also applies to transboundary cases. European rulings do not give any clues on this. Suppose an act causing damage in

121 ECJ 19 November 1991, joint cases C-6/90 and C-9/90, *Francovich and Bonifaci*.

122 A. Marschik, *Subsysteme im Völkerrecht. Ist die Europäische Union ein „Self-Contained Regime“?*, 1997, p. 233.

123 ECJ 7 February 1973, Case 39/72, *Commission v. Italy*.

124 ECJ 5 March 1996, joint Cases C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame* and ECJ 8 October 1996, joint Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer*.

country A is allowed according to the domestic laws of country A and also according to European law, but that it is not allowed according to the domestic laws of country B, where the damage occurs. Is it then acceptable for a court of country B to deliver a judgment against an authority of country A for breaking the rules? This is not so much an issue related to European law, but rather to private international law. In international proceedings, the applicable law is determined according to the rules of private international law. It is not unusual in these proceedings that a choice is made between two legal systems which are different in substance with respect to liability issues. Private international law may designate the substantive law of country B, regardless of the substance of its laws. This means that an extension of domestic liability is certainly not excluded.

The Environmental Liability Directive

In addition to any liability under the Francovich rules, Member States could seek the application of the wider range of options for redress provided by a specific European regulation: the Environmental Liability Directive.¹²⁵ This directive does not provide any rules, however, on how Member States can tackle transboundary cases.¹²⁶ All it says is that Member States should cooperate, which includes the exchange of information, in order to ensure the adoption of the required measures aimed at the protection and the limitation of damage.¹²⁷ When a Member State identifies damage within its borders which has not been caused on its territory, however, it has very limited possibilities for redress. The directive stipulates that damage can be reported to the Commission and other Member States, and that recommendations for the adoption of preventive or remedial measures can be made. It can also ‘seek, in accordance with this directive, to recover [its] costs’.¹²⁸ So, this is not about the recovery of costs, but only about a *request*.¹²⁹ To sum up, we can say that the directive does not directly contribute to an improvement of redress regarding transboundary water problems.

6. Conclusion

It is essential for good transboundary water management that all parties cooperate. Parties must gain experience with transboundary water management and win each other’s trust. Furthermore, the exchange of information is of major importance for government bodies as well as citizens. Cooperation can take place at a regional level and at the level of major rivers. In the latter case, international treaties are often used. These are not suitable, however, for cooperation at a regional level. At the regional level, the creation and establishment of arrangements is difficult because of incompatible powers of government bodies on both sides of the border. This makes cooperation troublesome.

The WFD and the Floods Directive provide for a coordination mechanism that helps Member States to tackle the transboundary impact of water pollution and flooding. Member States which form a river basin district are required to harmonise the measures to be adopted with each other, and the same applies if they want to rely on an exemption under the WFD. Yet the obligation to harmonise fails to cover all possible situations. It is telling that the WFD has set specific monitoring requirements and wants to standardise these throughout Europe, but does not

125 Directive 2004/35/EC, *OJL* 143, 30.4.2004, p. 56.

126 E. Brans, ‘De EU-Richtlijn Milieuaansprakelijkheid’, 2005 *Bouwrecht*, p. 25.

127 Art. 15 Para. 1 European Liability Directive.

128 Art. 15 Para. 3 European Liability Directive.

129 Brans 2005, *supra* note 126, p. 26.

provide for the obligation of Member States to inform each other when the standards are breached or in the event of a calamity. This means that the current practice, where harmonisation, detection and alarm systems operate well in some districts and fail in others, can essentially remain as it is. As a result, the monitoring of the water quality at the border remains important in order to adopt adequate measures in the event of transboundary water pollution.

If cooperation does not lead to the intended results, one may consider the use of instruments provided by European law to enforce compliance or to participate in administrative procedures (participation, complaints, appeals) in neighbouring countries. There are quite a few hurdles which lie ahead, though. Nonetheless, a Member State can hold another Member State responsible if the latter fails to take adequate measures to combat water pollution. After all, Member States can rely on the principle that pollution should be tackled at source.¹³⁰

Moreover, a Member State can rely on the Commission's assistance when consultations fail to result in a joint approach to water pollution. The Commission can act as a mediator in such a case. Although mediation by the Commission does not result in binding arrangements, the Commission does have strong leverage when the problem is caused by an upstream Member State's failure to comply with the obligations under the WFD. In such cases, the Commission can bring a matter before the European Court of Justice to demand compliance and, if need be, demand a penalty and penalty payments via a second procedure. Although Member States can also institute proceedings due to non-compliance by virtue of Article 227 of the EC Treaty after mediation by the Commission, they are not actually likely to make use of this instrument as it is a politically sensitive thing to do.

Finally, civil actions may be the last resort to recover the costs incurred due to transboundary pollution from the responsible Member State. However, this may not be beneficial to cooperation either. If a national government seeks redress for damage, a court in that country must deem itself to have jurisdiction, national law must be applicable and that national private law will have to determine that any damages are due. Apart from all the legal complications involved, a Member State will be reluctant to start interstate civil proceedings in view of the political implications. Therefore, actions by the Commission are the most likely option in the event of non-compliance with the WFD or the Floods Directive.

130 See Preamble WFD.