

‘Fissures between state and federal regulatory frameworks: some examples from EU environmental law.’



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Introduction: the structure of this presentation.

- This presentation is part of a Work Package under the broad SMART research project. This work package is designed to deal with public liability regarding sustainability issues.
- The presentation is framed by a number of propositions described in the following slide.
- The themes of the presentation are described after that.

Propositions framing this presentation.

- Sustainability is a broad concept addressed in many ways in the SMART project but for the purposes of this presentation is more focussed on environmental regulation.
- Environmental regulation in turn addresses a range of different issues which are of concern to policy makers.
- Within the European Union much environmental regulation is created at pan-national level, ie at European Union level and indeed at international level.
- Accordingly EU law has developed many different principles which are relevant. These include, and range from, specific rules such as *the polluter pays principle* (Waste Management Directives) and general overarching principles such as *transparency and good governance..* (Aarhus Convention).

Themes of this presentation

- The environment can only be protected effectively by international and if possible global agreement on regulatory standards.
- While environmental regulation is driven in Europe by the EU in a pan national way, the targets of regulation, whether individuals or business entities such as companies, are subject to 28 different domestic legal jurisdictions.
- There is therefore a dissonance between the pan European approach to the regulation of environmental sustainability and the more individualised approach of states when it comes to regulation of business and corporations generally. Insolvency (bankruptcy) is an example of this dissonance and variance.

Conclusion

- Environmental law as determined by EU and international law is exceedingly complex. Interpretation and implementation even more so.
- The range of domestic member state rules relating to companies and other types of business entities are also complex and varied.
- Challenges created simply by virtue of the nature of the regulatory ecology. These challenges are possibly infinite and unresolvable.

The case study.

- First begin with a legal framework.
- Second present some particular issues when the particular rule - the pan national (EU) rule interfaces with domestic rules relating to businesses generally.
- Third, the gaps and fissures...

Legal Framework (1): the complexity of environmental regulation.

- Domestic Law
- EU Law, for instance the Waste Management Directives
- In addition International Law: for example, ***UN Aarhus Convention***:
- [HERE](#)
- This is a convention on access to information, public participation on decision making and access to justice on environmental matters.
- Ratified by EU (2005) and recognised by ECJ...therefore part of all domestic law. (although for example Ireland only ratified as a state in 2012).

Legal Framework (2): What has Aarhus brought

- *Environmental Information Directive (2003/4/EC)*
- *Public participation Directive (2003/35/EC)*
- Article 9(3) of Aarhus - a general right to enforce environmental law- not EU Directive on this, but ECJ has a role here
- Variation in approach of member states, civil law and common law countries, 28 different states

Legal Framework (3): The specific rule: waste management

- 2008/98/EC on Waste and Directive 94/62/EC on Packaging and Packaging Waste. Proposals aim to phase out landfilling by 2025 for recyclable waste (including plastics, paper, metals, glass and bio-waste) in non-hazardous waste landfills, corresponding to a maximum landfilling rate of 25%.
- Article 1, to lay down ‘measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use’. Also relevant to the particular case law is the Landfill Directive, Council Directive 99/31/EC.

EU WASTE DIRECTIVES AND CORPORATE LAW : LYNCH-FANNON : [2016] 6 ENV. LIABILITY 1

Four particular issues when the pan-national EU rules on waste management are interpreted in the domestic business law context.

1. Disclaimer of licences.
2. Preservation of funds originally created as a condition of the grant of a licence.
3. The problem with corporate groups.
4. Making directors personally liable.

Legal Framework (4) :Domestic legal framework for businesses

- Professor Sir Roy Goode, observed some time ago that, even though some of these issues had emerged in case law in the United States and in other jurisdictions, the law in England and Wales and related jurisdictions such as Ireland had not taken account of foreseen difficulties when implementing these waste management directives.

Disclaimer of licences.

- *Minister for the Environment v Irish Ispat Ltd* [2005] 2 IR 208
- *Re Celtic Extraction Ltd.* [2001] Ch. 475.
- Licences can be disclaimed under the insolvency provisions.
- Ability to do this and/or consequent liabilities must be specifically addressed in the context of insolvency law and the provision must be designed to strike an appropriate balance between the ‘polluter pays’ principle and the legitimate expectations of other creditors.

Preservation of funds for clean up.

- *Re Irish Ispat Ltd* [2005] 2 IR 339 – following disclaimer clean up costs not part of the costs of the liquidation. These costs rank with unsecured creditors.
- *EPA v Greenstar Holdings Ltd.* [2014] IEHC 178 – no ring fencing of funds, receiver entitled to funds in account.
- Funds representing “adequate provisions, by way of financial security or any other equivalent” which are identified as a condition of the original grant of the licence must be ring fenced under the provisions of the legislation and protected as such. Escrow, specific account, other devices such as trusts.

Arcane domestic law: Trust Claims

- The Quistclose trust
- *Barclays Bank Ltd. v Quistclose Investments Ltd.* [1970] AC 576.
- *Re Kayford Ltd.* [1975] 1 All. E. R. 604.
- *Re Farepak Food and Gifts Ltd.* [2006] All E R 265
- Bridge: “The Quistclose Trust”, *Current Issues in Insolvency Law* (Stevens and Sons; London 1991)

The problem with groups....

- “It is proposed, for the purposes of considering the applicable E.U. and Irish provisions relevant to the preliminary issue for the most part, to ignore the multiple Greenstar companies involved and to refer to one company as “Greenstar” as if it were the holder of the licence, the operator of the landfill and the collector of the charges imposed and determined pursuant to s. 53A(4)(c) of the 1996 Act.” Finlay Geoghegan in *EPA v Greenstar Holdings Ltd.* [2014] IEHC 178
- This approach will not survive a robust legal argument to the contrary without legislative clarification.

Personal liability- shattering the corporate veil.

- Civil liability of directors ...on a 'fall back' basis. Edwards J in *EPA v. Neiphin Trading* [2011] 2 IR 575 . “.....the courts do not have jurisdiction under ss. 57 and 58 to pierce the corporate veil and impose so called "fall back" liability on directors personally for environmental cleanup.” This is the correct approach unless specifically altered in legislation.

Personal liability- shattering the corporate veil- can't be done without specific authority...

“while there can be no doubt as to the incorporation of the ‘polluter pays’ as a hard law principle of European Union law in instances where it has been expressly implemented by means of binding secondary legislation or a binding instrument (i.e. by means of a Directive, decision or regulation), it is doubtful as to whether it has any meaningful legal effect where it is not covered by binding secondary legislation or a binding instrument”

Personal liability- shattering the corporate veil- and why?

- However, as regards criminal liability s. 9 Waste Management Act 1996 (as amended) – a new frontier....
- Directors' guilt can be used twice (ineffective)
- Members' guilt -here the guilt is used twice to punish the same interests twice???

Conclusion (1)

Fisher *et al* (2009) identify four particular issues that have given rise to challenges in environmental law scholarship...

- the speed and scale of legal/ regulatory change,
- the interdisciplinary nature of the subject, the
- heavy reliance in environmental law on a diverse range of governance arrangements and the
- multi-jurisdictional nature of the subject.

Fissures and unresolved problems: a lawyer's game...

- Complexity of regulatory framework.
- Pre-existing complexity of domestic framework.
- Specialist principles of environmental law versus broader traditional principles of business law.
- Problems created by the law itself.