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FINE-TUNING THE CONCEPT OF ENVIRONMENTAL DAMAGE AND THE EXTENT OF THE ENVIRONMENTAL LIABILITY

The Court of Justice of the European Union (ECJ) has further defined the concept of environmental damage and the extent of environmental liability foreseen in the directive on environmental liability (Directive 2004/35/EC).

By decision of 1 June 2017 ([case C-529/15 – Folk](#)), the ECJ clarified some provisions of the directive (implemented and applied across the EU and which many national proceedings have been based on) with regard to the following aspects:

- Concept of environmental damage: Authorisation granted under national law cannot exclude a significant adverse effect on the environment from being classified as environmental damage merely because it is covered by the authorisation.
- Environmental liability: When a competent national authority grants authorisation without examining whether the applicable requirements have been complied with, a national court may declare the authorisation unlawful.

However, the national judge is not required to verify that the conditions to determine whether environmental damage (within the meaning Directive 2004/35) has arisen are met.

- Access to justice in environmental matters: Persons affected or likely to be affected by environmental damage must always have access to justice in environmental matters. Although it is for member states to determine who is entitled to the right to a review procedure, those affected or likely to be affected by

environmental damage may not be excluded.

The case decided by the ECJ originated from an Austrian dispute: an individual holding fishing rights for a river brought a damages action for the environmental damage caused by the operation of a hydroelectric power station located upstream.

The claim was dismissed on the basis that the operation of the hydroelectric power station had been authorised by a decision in compliance with Austrian law governing matters relating to water.

The claimant appealed before the Austrian administrative court arguing that the application of Austrian law would lead to the exclusion of environmental damage in every case covered by an environmental authorisation. The Austrian administrative court thus referred the matter to the ECJ.