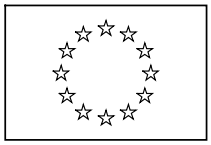

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.1.2002
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2002/0021(COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on environmental liability with regard to the prevention and remedying of environmental damage

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

From the Seveso accident of July 1976 to the Baia Mare and Baia Borsa accidents in January and March 2000, whereby rivers were heavily polluted in Romania[1], a long list could, be drawn up of instances where the environment has been heavily polluted or has otherwise significantly suffered[2]. In such cases, there is clearly a need to ensure that the damaged environmental assets are restored; a better solution would be, of course, that the damage does not even occur, so that prevention is also a valuable objective in this context. When an environmental damage nevertheless occurs, the question inevitably arises of "who should foot the bill?". The principle according to which the polluter should pay is at the root of Community environmental policy[3]; it shows that in many cases the operator who causes damage should be held liable, i.e. be financially responsible.

The Commission has therefore decided to submit the present proposal to the European Parliament and the Council of the European Union so that a comprehensive Community scheme aiming to prevent and remedy environmental damage is eventually adopted.

In so doing, the Commission is fulfilling the commitment it has made in its White Paper of 2000 on environmental liability and in the Commission's Sustainable Development Strategy which foresees that « *EU legislation on strict environmental liability [should be] in place by 2003*. »[4] and is starting to implement an action foreseen by the Sixth Environmental Action Programme[5].

2. OVERVIEW OF THE PROPOSAL

The proposal aims to establish a framework whereby environmental damage would be prevented or remedied. Environmental damage is to be defined in the context of this proposal by reference to biodiversity protected at Community and national levels, waters covered by the Water Framework Directive and human health when the source of the threat to human health is land contamination. The proposal leaves it open to Member States to decide when the measures should be taken by the relevant operator or by the competent authorities or by a third party on their behalf. Institutional and procedural detailed arrangements as to how the prescribed results will be achieved are left to a very large extent to the Member States in line with the subsidiarity and proportionality principles. The proposal determines, however, certain rules on the restoration objectives to be achieved and how to identify and choose the

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1 See the Report of the International task Force for Assessing the Baia Mare Accident (December 2000).

2 One can also refer to the heavy pollution of the Rhine river caused by a fire at the Basle Sandoz plant in 1986 and the collapse of a waste retention dam of the Aznalcollar mining complex, on 25 April 1998, in Spain, which has lead to a flow of toxic waters and mud towards the Doñana National Park. Oil spills caused by tankers wrecks are also numerous from the Torrey Canyon and Amoco Cadiz cases in 1967 and 1978 respectively to the Erika wreck in 1999.

3 See Article 174(2) of the EC Treaty.

4 COM(2001) 264 final of 15 May 2001, p. 13 : « *Action at EU level : (...) EU legislation on strict environmental liability in place by 2003*. »

5 See Article 3(8) of the Common position adopted by the Council on 17 September 2001 with a view to the adoption of a Decision of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme.

appropriate restorative measures so that a minimum common basis is shared by Member States in that respect and enable them to ensure in an effective manner the implementation of the proposed regime.

Whenever possible, in accordance with the « polluter pays » principle, the operator, who has caused the environmental damage or who is faced with an imminent threat of such damage occurring, must ultimately bear the cost associated with those measures. Had the measures been taken by the competent authorities or by a third party on their behalf, the cost of so doing must then be recovered from the operator. When the damage has been caused by certain activities that can be considered as posing a potential or actual risk to man and the environment, the operator should be strictly liable subject to the possibility to avail himself of certain defences; those activities are listed in an Annex to the proposal. In the specific case of biodiversity damage caused by activities other than those listed in the aforementioned Annex, the operator should only be liable if he is at fault or has been negligent. In certain cases where no operator can be held liable, Member States must adopt all necessary measures to ensure that the needed preventive or restorative measures are actually financed through any source that would seem fit to them and can thus be taken. Again the institutional and procedural detailed arrangements as to how the prescribed results will be achieved are left, to a very large extent, to the Member States in line with the subsidiarity and proportionality principles.

Given that environmental assets (biodiversity and waters to a great extent) are often not subject to proprietary rights that would serve as incentives to proper implementation and enforcement of the proposed regime, provisions are made to allow qualified entities, alongside those persons who have a sufficient interest, to request the competent authority to take appropriate action and possibly challenge their subsequent action or inaction.

Finally, appropriate provisions concerning transboundary damage, financial security, relation with national law, reviewing the regime and temporal application of the regime are made.

In practical terms, when environmental damage occurs, Member States are required to ensure that the damage is remedied. This involves assessing the gravity and extent of the damage and determining the most appropriate restorative measures to be taken, in co-operation insofar as possible with the operator liable for the damage under the proposal – the operator of the activity having caused the damage.

The competent authority may require the operator to take the necessary restoration measures, in which case they will be financed directly by the operator. Alternatively the competent authority may implement those measures itself or have them implemented by a third party. A combination of the two approaches is also possible.

When the restoration has been implemented by the competent authority or by a third party on its behalf and one or several operators are liable for the damage under the proposal, the competent authority must, in conformity with the polluter pays principle, recover the restoration costs from the liable operators.

The operators potentially liable under the directive for the costs of remedying the environmental damage are the operators of the activities listed in Annex I having caused the environmental damage. Operators of activities outside Annex I may also be liable under the directive for the costs of remedying bio-diversity damage, but only when they are found to be negligent.

The insolvency of operators is one factor that may hinder cost recovery in line with the polluter pays principle by competent authorities, but the impact of this may be limited by adequate financial insurance of potential damage.

Where one of the exemptions foreseen in Article 9(1) applies, the scheme provided by this proposal will not apply and the matter will be left to national law. In certain cases, the operator will not be able to rely on the exemption if he has been negligent. In those cases, the scheme will apply as described above.

Since the proposal aims to pursue environmental objectives, it is based on Article 175(1) of the EC Treaty. Concerning the legal basis, the fact that the proposal contains provisions on judicial review should not affect the choice of the legal basis since judicial review provisions are merely accessory to the environmental objectives pursued and is needed to ensure that the system will function properly. It is also to be noted that the judicial review provisions do not fall under any of the areas of action identified in Article 65 of the EC Treaty which only concerns judicial co-operation in civil matters having cross-border implications.

3. WHY THERE IS A NEED FOR COMMUNITY INTERVENTION

Community action is needed to address effectively and efficiently site contamination and the loss of biodiversity in the Community.

Site contamination is a problem since it may pose a threat to human health and the environment as a result of releases of contaminants to ground or surface waters, uptake by plants, direct contact by people and fire or explosion of landfill gases. Some 300,000 sites in the Community have already been identified as definitely or potentially contaminated[6]. It has not been possible to quantify the risks posed by this contamination but the costs associated with its clean-up give a sense of the significance of the problem. Estimates published by the European Environment Agency put partial clean-up costs (just for some Member States or regions and some sites) at between EUR 55 and 106 billion[7] - between 0.6% and 1.25% of the EU GDP. This is a big figure, but one that represents a cumulative effect over many years rather than yearly impacts[8].

There is thus quite a significant environmental problem which in great part arose because in most Member States liability for environmental damage has only recently been enacted – thus most of the clean-up expenditures associated with the sites contaminated in the past is likely to end up being paid with public money since the original polluters cannot easily be held liable. Liability should in the future ensure that those who contaminate clean-up the pollution or pay for the clean-up and, by doing so, encourage (more) socially-efficient prevention by potentially liable parties.

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6 *Management of contaminated sites in Western Europe*, EEA, June 2000.

7 Austria, EUR 1.5 billion, 300 priority sites ; Flandres, EUR 6.9 billion, total clean-up costs; Denmark, EUR 1.1 billion, total clean-up costs; Finland, EUR 0.9 billion, total clean-up costs; Ger./Bav, EUR 2.5 billion, total clean-up costs; Ger/SaA EUR 1.6-2.6 billion, large scale clean-ups; Ger/SchH EUR 0.1 billion, 26 priority sites; Ger/Thür EUR 0.2 billion, 3 large scale projects; Italy, EUR 0.5 billion, 1250 priority sites; Spain, EUR 0.8 billion, partial clean-up; Sweden, EUR3.5 billion, total clean-up costs; UK, EUR 13-39 billion, 10000 ha contaminated land (from *Management of contaminated sites in Western Europe*, EEA, June 2000).

8 It is to be noted that the proposed regime being prospective only, cost associated with the clean-up of these sites will not fall under this proposal since these sites have been contaminated before the adoption of this proposal.

Liability rules are thus necessary to prevent further contamination and to ensure that the polluter pays principle is applied when contamination arises in spite of the preventive measures adopted.

However, the key issue in the present context is not whether liability rules are desirable - after all many Member States have already enacted them, albeit with different approaches - but whether it is desirable to enact rules at Community level rather than leaving the issue entirely to the national level. Action at Community level is necessary because:

- Not all Member States have adopted legislation to address the problem[9]. Thus without Community action there is little guarantee that the polluter pays principle will be effectively applied across all the Community. Failure to apply it may perpetuate the inefficient patterns of behaviour that resulted in the present stock of historic pollution.

- Most Member States' dedicated legislation does not mandate national authorities to ensure that orphan sites[10] contaminated after the entry in force of the legislation are actually cleaned up[11]. Thus national legislation does not ensure that the environmental objective – clean-up – is attained.

- Without a harmonised framework at Community level, economic actors could exploit differences in Member States' approaches to engage in artificial legal constructions (e.g. spin-off risky operations to legally distinct and undercapitalised companies, move 'front offices' within the Community to exploit liability loopholes without changing much in terms of preventive behaviour) in the hope of avoiding liability – such behaviour would defeat the ultimate purpose of Member States' liability rules and lead to wasteful allocation of resources[12].

In the specific case of biodiversity, robust indicators of the extent and significance of damage to biodiversity and the rate of biodiversity loss which we have been experiencing in the last years are still being developed. However, the European Commission's proposal for a European Union Sustainable Development Strategy, adopted on 15 May 2001, recognised that the loss of biodiversity in the Community has accelerated dramatically in recent decades making it one of the severe or irreversible threats to the future well-being of European society that warrants priority action.

The two main Community legal instruments dedicated to the protection of biodiversity are the Habitats and the Wild Birds Directives[13]. These directives lack liability provisions applying the polluter pays principle and thus encouraging efficient preventive behaviour by private

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9 Portugal and Greece are amongst the countries without specific legislation on contaminated sites.

10 Sites where the responsible parties cannot be found or are insolvent.

11 Were national competent authorities required to clean-up orphan sites, they would be encouraged to ensure that workable financial assurance mechanisms be put in place. Thus the mandate not only ensures clean-up but it also encourages the setting up of funding mechanisms consistent with the polluter pays principle.

12 The absence of signs of such behaviour in the US (see the study on the Preventive Effect of Environmental Liability done in the context of the economic assessment of the draft proposal) can conceivably be explained by the existence in the U.S. of a harmonising federal law which, while allowing the states ample freedom to tackle local problems, also ensures the different States' approaches do not undermine or weaken each other.

13 Council Directive Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7) and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979, p. 1).

(and public) parties. Currently few, if any, Member States fill this void by imposing liability for biodiversity damage on private parties. Thus, Community action to protect and restore biodiversity is warranted on two main grounds: ensuring socially-efficient means are used to finance the remedying of damage to biodiversity in the Community and, by doing so, encourage efficient prevention.

4. THE ECONOMIC ASSESSMENT OF THE PROPOSAL, ITS BENEFITS AND COSTS

The economic assessment discusses the key efficiency-related issues raised by the proposal: its benefits and costs, including the distribution of the costs by economic actors and the expected impact on industry competitiveness, the effect on prevention, the financial assurance of potential liabilities and the assessment of natural resource damage. The economic impact of the proposal being primarily in changing the distribution of costs, rather than imposing additional aggregate costs, we will use below the term "financial expenditures" instead of "costs" whenever the use of the term costs could be misleading. The findings of the assessment are presented here.

The main benefit expected from the proposal is improved enforcement of environmental protection standards in line with the "polluter pays" principle. This should bring an indirect but not less important benefit: a move towards more efficient levels of prevention. The environmental benefits should be achieved cost-effectively and consistently with principles of social and economic efficiency.

Liability requires parties responsible for damage to remedy it. Damage is defined with reference to existing protection standards built in environmental legislation. Thus liability enforces existing standards and is a powerful deterrent against non-compliance.

Because potential polluters are made liable for the costs of remedying damage they may cause, liability gives good incentives for avoiding damage. When EUR 1 spent on prevention is likely to avoid damage whose restoration costs more than EUR 1, the parties responsible for the potential damage are encouraged to invest in prevention rather than pay for the higher restoration cost. Therefore the proposal should lead the economy towards socially efficient prevention levels environment-wise.

Enforcing existing standards and moving towards more efficient levels of prevention are worthwhile goals in themselves. Enforcement mechanisms are a necessity for the legislation objectives to hold. Moreover, liability, properly designed, is a complement rather than a substitute to other policy tools, as we argue below. In this context, the proposal should pass a cost-effectiveness test[14] – the proposal's objectives should be pursued in full consistency with the principles of economic efficiency and social fairness and the implementation costs should be minimised.

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[14] Although we did not attempt to perform a quantified cost-benefit test given that the proposal does not impose significant additional aggregate costs, there are reasons to believe that the benefits of cleaning up contamined land are quite significant. A recent assessment of the benefits of cleaning up the stock of contamined land in the Netherlands (see Howarth *et al*: *Valuing the Benefits of Environmental Policy, the Netherlands*, RIVM report 481505 024, March 2001) puts their annual value at between EUR 3.4 billion (2000 prices) and EUR 842 million. These estimates only measure owner benefits reflected in the change of land value and thus only capture some social benefits. This suggests that the estimates are a conservative value of the benefits of clean-up. For reference, the financial expenditures estimated for the present proposal for the whole of the EC (base case) are in the order of EUR 1.5 billion.

The proposal has indeed been developed consistently with principles of economic efficiency and social fairness. Firstly, the proposal does not apply to emissions allowed in permits and damage that cannot be predicted on the basis of the state of scientific and technical knowledge at the time emissions are released or activities take place. Secondly, whenever liability is invoked to ensure that clean-up or remedying of damage takes place, the aim is to secure efficient solutions – e.g. when natural resource damage occurs the restoration purpose set in the proposal is to achieve equivalent solutions rather than replicate, irrespective of the cost, the situation pre-incident.

The proposal should, however, generate sizeable financial expenditures and these were estimated and are presented below, after a brief presentation of the findings of the studies commissioned on prevention, financial assurance and the valuation of environmental damage.

The effect on prevention

The study (http://www.europa.eu.int/comm/environment/liability/preventive.htm) conducted on this topic suggests that the positive incentives provided by liability for efficient levels of prevention should prevail provided there is a consistent, and consistently applied, liability policy at Community level. Significant differences among liability standards at State level (as in the U.S.) or Member State level (as in the Community) could significantly weaken the positive effects of liability on prevention were it not for the existence of a common framework (the federal liability law in the U.S., the proposed directive in the Community). Thus the study suggests Community action is necessary.

The financial assurance of environmental liabilities

Financial assurance of environmental liability is beneficial for all stakeholders: for public authorities and the public in general, it is one of the most effective, if not the only, way of ensuring that restoration actually takes place in line with the polluter pays principle; for industry operators, it provides a way of spreading risks and managing uncertainties; for the insurance industry, it is a sizeable market. However, when the White Paper on Environmental Liability was adopted in February 2000, many stakeholders questioned whether the liabilities that would be created by a Community proposal on this subject were insurable. The Commission undertook to clarify this issue.

As far as insurance for clean-up costs is concerned, coverage has been available in the Community for quite some time, though it may not always be marketed under the same name – common names are environmental liability insurance, environmental impairment liability insurance, environmental clean-up and liability insurance. The supply of this type of insurance products is well established in the market and its conditions relatively standardised[15].

Therefore the insurance industry already covers well the market for environmental clean-up costs in Europe. Insurance is typically a globalised industry – thus it is well aware of the trends in different parts of the world and is able to transfer quickly what it learns in one market to other markets. Environmental liabilities, including liability for clean-up costs, were

[15] Details on the coverage being offered can even be found on the internet. For example, a well-known insurer active in the European market lists online the characteristics of its 'Environmental Impairment Liability' offering, including its prices ("minimum for a USD 1,000,000 limit is USD 5,000").

enacted in the U.S. already some 20 years ago, prompting the supply of insurance coverage[16]. The products initially developed for, and the experience accumulated in, the U.S. market could thus be quickly transferred to the EU market when EU countries began imposing liability for environmental clean-up costs.

That being said, clean-up cost insurance in the EU is likely to be less of a commodity today than it is in the U.S. since the European market is still smaller and more fragmented. Prices are therefore likely to be higher. However, the U.S. experience suggests prices will come down quickly once harmonised regulatory requirements are introduced and insurers gain more experience (consider that the average annual premium for coverage of a new underground storage tank in the U.S., purchased on the private market, was USD1000 in 1989. In 1997, the average was USD 400). As our research shows (see http://www.europa.eu.int/comm/environment/liability/insurance_us.htm), prices of approximately 1.0 to 1.5 percent of the amount assured are currently common in the U.S. The prices for larger firms with good environmental records are comparatively lower.

All in all, there could be little reasonable doubt that liability for the clean-up of environmental contamination was insurable, and insured, in the Community[17], at the time the White Paper was adopted. However whether or not liability for biodiversity damage was insurable was more controversial. This type of liability was little known in the Community, and it was sometimes argued it could not be valued and insured.

Given this background, the Commission conducted a study focused on the issues associated with natural resource damage – a concept similar to biodiversity damage – liability in the U.S. Indeed in that country liability for damage to natural resources has been enacted at the same time as liability for clean-up costs, more than 20 years ago, which makes the U.S. a good test case for the insurability of biodiversity damage. The conclusions of the study show that the fears that biodiversity damage is uninsurable are misplaced.

The study (http://www.europa.eu.int/comm/environment/liability/insurance_us.htm) gives two key insights. First, the liabilities created by the Commission's proposal, including biodiversity damage, can be financially assured. As a matter of fact, natural resource damage liability is currently financially assurable in the U.S. and the associated insurance markets have developed over time with little problems[18]. Thus there are good reasons to believe that the same will happen in the EU vis-à-vis biodiversity damage. All the more so given that the Commission's proposal reaches a better compromise between the environmental, social and economic aims of society than the U.S. approach (as shown below in the point on the differences between Superfund and this proposal).

The second key insight given by the study is that effective regulatory incentives for operators to financially assure their potential liabilities are crucial to ensure the success of liability policies aimed at ensuring the prevention and remedying of environmental damage in line

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16 The depth and immense variety of the products offered by insurers specialised in environmental risks suggests that the market supply of insurance products quickly follows, and even anticipates, regulatory requirements in this field.

17 Except, of course, for cases where the occurrence and timing of the contamination and associated liabilities are known in advance with certainty, as always with insurance products.

18 U.S. law even requires financial assurance of part of the liabilities for natural resource damage. Our study shows that the private insurance market responded quickly to the introduction of the regulatory requirements with the supply of novel insurance products. Thus the regulatory requirements were successfully implemented and enforced.

with the polluter pays principle. This proposal follows this up by creating a Community framework enabling the setting-up of such regulatory incentives consistently throughout the EC while leaving Member States discretion in terms of the means to implement the framework.

A second study was conducted on the general issues (http://www.europa.eu.int/comm/environment/liability/insurance_gen.htm) associated with environmental liabilities. The study discusses usefully the economic model of liability, as well as the Dutch and Belgian cases. It also provides useful evidence that clean-up liability is currently insurable in the EU market.

An important policy question discussed in the insurance studies is whether liability should be limited (to specified amounts). Limits have advantages, but also disadvantages. (Lowered) limits will reduce compliance costs and improve insurability. But (lowered) limits will also reduce deterrence and make cost recovery more difficult. The U.S. experience, where environmental liability is generally subject to limits[19], suggests that if a conclusion is to be drawn it is that the limits may in some cases be too low. On these grounds this proposal does not set any limit to liability. However, this does not prevent Member States from setting up limited financial assurance requirements when implementing the proposal.

The assessment of natural resource damage

The valuation of natural resource damages remains controversial though a necessity to achieving the environmental aims of this proposal. The difficulties perceived in, and the controversy associated with, the assessment of natural resource damage were addressed by retaining a valuation approach that favours restoration over monetary measures - largely because restoration costs are easier to estimate, rely on fewer untested economic valuation methodologies, and are verifiable *ex post*.

Remedying/restoration is aimed at putting in place equivalent alternatives to the damaged resources rather than necessarily replicating them. Consequently, the proposal gives an explicit preference to the least cost option amongst alternatives likely to deliver similar environmental benefits. The option retained in the proposal was developed with the help of a study on the valuation and remedying of damage to natural resources (http://www.europa.eu.int/comm/environment/liability/biodiversity.htm) and is inspired by the cost-effective approach that has been successfully tried and tested over a long period under the U.S. Oil Pollution Act 1990[20] (for a summary of this approach see http://www.europa.eu.int/comm/environment/liability/tp_enveco.pdf). The U.S. insurance market, confronted with this same valuation approach, has developed with little difficulty, as explained above.

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[19] Though the limits are generally set for 'releases of hazardous substances' or incidents involving a release. In practice, contamination and damages are often caused by more than one release which makes the U.S. liability limits less significant for individual operators than what it might appear to be the case.

[20] 33 U.S.C. 40.

Potential financial expenditures associated with the draft directive

The estimate of the financial expenditures with the proposal was derived from the U.S. CERCLA[21] (also known as Superfund) model[22] since:

- Superfund has a long history and has generated valuable and publicly available data on the number of contaminated sites, costs of clean-up per types of site, distribution of contaminated sites by industry, rate at which new, contaminated sites are identified and number of incidents involving natural resource damage and associated costs. Crucially, there is some data on the number of sites that were contaminated before the entry in force of the law and after its entry in force[23]. Thus it was relatively straightforward to derive financial expenditures estimates from the U.S. case.

- The U.S. and EU economies are likely to have similar environmental contamination intensities – after one controls for the different size of the economies – because both entities are essentially at the same stage of economic development and share similar environmental protection requirements.

- There are different sources of data and analysis for the U.S. data which were confronted with each other and peer-reviewed over time. This process improved available U.S. data and made them eventually more robust.

- In contrast, European data is essentially unrevised, single-source material – thus subject to wider margins of error. Moreover, it is only available for some Member States or regions, clean-up cost estimates are partial and do not always identify the number of sites they are associated with. There is little available data on incidents of natural resource damage and associated costs. Available data is not ventilated by type of sites, industry responsible or date of contamination, making it essentially impossible to derive meaningful estimates of clean-up costs for a non-retrospective proposal like this one.

Perhaps even more important, CERCLA is sufficiently similar in terms of objectives and means to this proposal to make it a good reference model for the purposes of cost extrapolation – possibly the best available model given that existing European models differ more significantly from this proposal. There are also a number of important differences between Superfund and this proposal, but it was possible to identify the key differences and their likely cost impact.

CERCLA is a law which mandates the U.S. Environmental Protection Agency (EPA) to identify contaminated sites that warrant clean-ups, and then to either initiate these clean-ups

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21 42 U.S.C. 103. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) has been in operation for more than 20 years and there is a relative abundance of cost data on its implementation.

22 Our model also includes cost data on the U.S. States' liability programmes based on CERCLA. For a comprehensive analysis of CERCLA see http://www.europa.eu.int/comm/environment/liability/comp.htm, a study conducted as part of the economic assessment of this proposal.

23 See footnote 24 below.

and then compel the parties responsible for the contamination to pay for the clean-ups through a liability process, or compel the responsible parties to undertake these clean-ups directly[24]. Corrective action in relation to contaminated sites is driven mainly by the threat their contamination poses to public health or welfare (e.g. the well being of their surrounding communities), as well as to the environment, including natural resources. This closely matches the objective and means proposed in this proposal.

Under CERCLA, as in this proposal, responsible parties are also liable for natural resources damage (NRD). The competent authorities are directed to remedy this damage, either through direct restoration or through replacement of the damaged resource by an equivalent one. As with the clean-ups, the competent authorities can either initiate the restoration and then compel the parties responsible for the contamination to pay for the restoration through a liability process, or compel the responsible parties to undertake the restoration directly.

As far as the differences between CERCLA and the proposal are concerned, the most salient one is that CERCLA is a retrospective programme, i.e. it (also) creates liability for waste legally disposed of before its entry in force. For the purposes of this analysis and since our proposal is not retrospective, CERCLA was stripped off its retrospectiveness, i.e. only the costs associated with the clean-up of sites contaminated by wastes disposed of after the entry into force of the programme were considered.

On that basis, the estimates for the annual financial expenditures associated with the proposal are given in the table inserted at the end of this point[25], *abstracting from all the differences between CERCLA and the proposal but retrospectiveness (the impact of the other differences will be discussed subsequently)*.

The table presents three scenarios, a base case, a high case and a low case. The first is based on the split between the financial expenditures associated with 'old contamination' (contamination caused by activities that preceded the enactment of Superfund) and 'new contamination' (contamination caused by activities that took place after its enactment) in the National Priorities List sites of Superfund, as recently identified. This split is roughly 1/3 for 'new contamination' and 2/3 for 'old contamination'. The high case assumes the 'old' sites and the 'new' sites are split about evenly. The low cases assumes liability policies do have a strong and relatively swift effect slowing down the generation of newly contaminated sites. In this case, the share of 'new' sites is assumed to stabilise at 20% of all sites.

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[24] When the responsible parties cannot be identified or are insolvent, the cost of clean-up was initially covered by funds raised from a trust fund created from excise taxes on petroleum and specified chemical feedstocks and a corporate environmental income tax (since 1996 the Fund has been fed only by general government revenues as the taxes were discontinued). It is this trust fund that explains why CERCLA is also know as "Superfund".

[25] Essentially derived from *Footing the Bill for Superfund Clean-ups*, Katherine Probst *et al*, Resources for the Future, 1995. RFF has also published a more recent study (July 2001) on the future of Superfund cost by Katherine Probst *et al*, *Superfund's Future, What Will It Cost?*; which we have also used. The latter study points to the relative stability and resilience of the expenditures associated with Superfund overtime and thus suggests our estimation approach is well-founded. New contaminated sites have been added at a roughly constant and significant rate and thus we assumed the clean-up costs will remain roughly constant overtime.

There are good reasons to assume the base case is the more plausible one for the foreseeable future[26], but the high and low cases provide a useful sensitivity analysis of our findings.

This may still look like high expenditures, but the associated costs would not disappear in the absence of Community liability legislation. These costs are real, materialised in environmental damage that would still happen without liability. If anything, social costs would be higher without a proper liability regime, given the absence of efficient incentives towards prevention.

The total expenditure (base case) above should be below 1.5% of the total expenditure in the Community with environmental protection, i.e. below 0.02% of gross domestic product (GDP). And as a measure of the personal effort required, it is enlightening to consider that the cost per person is lower than EUR 4 (EUR 3 if the population of the 12 Candidate Accession Countries is factored in.

So far we assumed that the only relevant difference between Superfund and this proposal was on retrospectiveness. However, there are several other key differences. Some of them may change the total amount of the financial expenditures estimated above. The others are only likely to change the distribution of the expenditures amongst economic actors but not their total amount. For the sake of clarity the differences that may affect the overall expenditures will be presented below separately from the ones that only impact their distribution.

There are four key differences which may change the total expenditures vis-à-vis our estimates. Firstly, Superfund does not cover the clean-up of contamination caused by permitted releases of hazardous substances. It provides a defence against potential liabilities for damage, caused by facilities or projects operating within the terms of their permits or licences, to natural resources identified and authorised in environmental impact statements. And it does not apply to damage caused by the application of registered pesticide products.

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[26] A very high proportion of Superfund's costs is indeed associated with wastes deposited before its entry into force. There is little reason to believe that this would change materially in the near future in spite of the intuitive attraction of the assumption that the share of the expenditures associated with 'new' sites is likely to increase significantly soon. This is explained by the way contaminated sites are 'discovered' and (some of them) eventually included in Superfund. Katherine Probst *et al* put it this way in their 2001 book *Superfund's Future: What Will It Cost*: "Information pertaining to contaminated sites is incomplete and inconclusive for a number of reasons. In part, it is not in the interests of property owners to disclose information about site contamination to regulators; such information could reduce the value of their property and make them liable for clean-up costs. Nor is it in the interest of most federal or State program managers to help create a comprehensive and public list of contaminated sites if they do not have adequate resources to address them". This suggests that not only is the process of discovery of new contamination slow but also that, with roughly constant public funding for Superfund, many identified sites remain unlisted for clean-up for a long time. This overall picture appears to be corroborated by information provided in a General Accounting Office Report of November 1998, *Hazardous Waste: Unaddressed Risks at Many Potential Superfund Sites*, i.e. that at that time 85% of the sites potentially eligible for inclusion in the National Priorities List (Superfund) had already been discovered before 1990. 42% had been 'discovered' before 1985. The same report considers that, as of October 1997, 1789 already identified sites were potentially eligible for placement on Superfund. RFF estimates that from 2001 through 2009 each year 23 to 49 sites will be added to Superfund. If we take the mid-point of this range (36) and assume that all the 1789 sites would eventually be placed on Superfund it would take almost 50 years just to clear this potential, already identified backlog.
Obviously, sometime in the future all contaminated sites will be 'new' sites. But for the purposes of this analysis, the base case still appears to be the more relevant, firstly because the discussion above suggests the 1/3-2/3 split is likely to prevail for a very long time and secondly because the introduction of liability provisions is likely to lead to better prevention and thus lower levels of contamination in the future (assumption that is reflected in the low case).

The proposal has exemptions and defences of comparable reach[27] and goes beyond Superfund in that it does not cover unforeseeable damage on the basis of the state of scientific and technical knowledge at the time the emission was released or the activity took place. Besides reducing total expenditures, the additional exemption proposed by the Commission should also strike a better balance between environmental goals, on the one hand, and economic and social, on the other. In particular, the Commission's proposal should better preserve incentives for innovation since, unlike Superfund, it does not penalise innovative activities retrospectively.

Secondly, the proposed valuation approach to biodiversity relies less on monetary valuation than Superfund's[28]. Indeed, the Commission's proposal relies more on restoration, whose costs are easier and cheaper to estimate than monetary estimates of the value of natural resources. Unlike Superfund, the Commission's proposal also gives an explicit preference to least cost options. Thus this difference should also lower the expenditures of this proposal vis-à-vis our estimates (and Superfund).

Third, while our estimates assume that all clean-up expenditures will be additional expenditures newly mandated by the proposal, as was originally the case of Superfund, in fact Member States already have in place clean-up liability legislation though the coverage and strictness of the national programmes do not match this proposal's and vary significantly from Member State to Member State[29]. In any case, the impact of this consideration also goes clearly in the sense of lowering the implementation expenditures of the proposal vis-à-vis our previous estimates.

Fourth, the proposal attaches liability for damage caused by activities while Superfund is hazardous substance-based. The former approach is apparently wider than the latter but in practice the two approaches should yield similar results and, all else the same, have similar expenditures. This is so because the (negative) impact of most activities on public health and the environment is essentially driven by the release of hazardous substances. Activities (and their level) may have an impact on biodiversity beyond that associated with the release of hazardous substances. However, this should not have a material impact on the expenditures of this proposal given that, on the one hand, the exemptions allowed under the Habitats and Water Framework Directives apply and, on the other, the costs with biodiversity damage are projected to be a small part of total costs.

Thus, taking into account the four key differences between the proposal and Superfund likely to have an impact on the overall magnitude of expenditures, the conclusion is that their combined impact is to lower the expenditures associated with the proposal vis-à-vis the estimates presented in the table above which represent then a ceiling unlikely to be reached in any event.

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27 Except in the case of pesticides. However, much of the associated damage may well qualify as diffuse damage which is not covered by this proposal.

28 The U.S. Department of the Interior has recently proposed changing Superfund's approach. Superfund's newly proposed valuation approach is more in line with the Commission's proposal and less controversial.

29 For example, the existing Member States laws do not impose on public authorities a generalised obligation to clean-up and restore even when no liable party can be found or is able to pay. The proposal also covers environmental damage in a much more systematic way than existing national approaches

There are two other significant differences with (only) a distributional impact. The first one is that in Superfund liability attaches to a wide range of potentially responsible parties, from the generators and transporters of hazardous substances to the operators of waste disposal sites. The Commission proposal only attaches liability to the operators. This will not change total expenditures vis-à-vis the Superfund benchmark (given that when there are no private responsible parties the competent authority must still ensure that restoration takes place) but will increase the competent authorities' expenditure share.

The second difference of this type is that Superfund has joint and several liability for the cases where the same damage is caused by several operators, whereas this proposal allows Member States to apply either joint and several or proportional liability[30]. The estimates derived above are thus based on joint and several liability. This liability standard is sometimes considered to facilitate cost recovery from private liable parties and thus to be associated with higher levels of clean-up and restoration (and expenditures) than proportionate liability. However, given that this proposal places a residual obligation on Member States to ensure that clean-up and restoration takes places, the (total) expenditures of a proportional standard should be the same as the expenditures of a joint and several one. However, the latter case should normally increase the expenditure share of the private parties while the opposite should happen with a proportionate standard.

The assessment made also touches on the issue of the direct impact of the costs on industry external competitiveness. This is not likely to be significant. Firstly, liability is unlikely to affect all firms in any given industry systematically. Firms that adopt cost-efficient preventive practices are unlikely to be saddled with significant liability-related costs and therefore their international competitiveness will be unscathed. In other words, individual firms may be affected but not whole industry sectors since within each industry sector there will be unaffected firms. These unaffected firms are then likely to take over the business lost by their competitors affected by liability. This being said, in sectors where the pollution content cannot be lowered because it is based on the use of the best available technologies and practices, the impact of liability may be systematic and translate into sector-wide cost differentials (all else the same[31]) vis-à-vis third countries with less strict internalisation policies.

Secondly, even with the significantly larger cost impact of Superfund, the U.S. industries with higher clean-up costs[32] did not experience any significant deterioration of their international competitiveness. The chemical industry provides a good illustration of why this may be the case. While this industry faces the largest share (25%) of Superfund's clean-up costs, much larger than the second industry sector more affected, these costs are still a very small part of the industry profits (around 2%[33]). There are industries where the relative impact of clean-up costs on profits or value added is more significant, the better illustration being the mining industry. But this is more the result of persistent poor profitability probably associated with structural factors than of the impact of environmental expenditures.

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30 Except for operators who can prove the part of the damage that they are responsible for. These operators can only be held liable for the costs associated with that part of the damage.

31 All else is, however, rarely the same and the costs associated with environmental protection policies are often irrelevant in comparison with other cost differentials (e.g. labor costs, infra-structure availability).

32 Chemicals, mining, primary metals, lumber and wood products, fabricated metal products excluding machinery and petroleum refinery.

33 Profits data for 1991 and 1992.

Annual Financial Expenditures associated with the proposal (million EUR, 2000 prices)[34] [35]		
	Base Case	High Case / Low case
Clean-up Competent Authorities (CA)[36]	355	573 / 131
Clean-up Private Parties (PP)[37]	540	872 / 348
Total clean-up[38]	895	1445 / 578
Biodiversity damage[39]	70	115 / 46
Transaction costs, PP[40]	140	232 / 93
Administrative Costs CA[41]	350	559 / 223
Total expenditures[42]	1455	2350 / 940

* The meaning of each cost category and the way the associated expenditures were derived is explained in the footnotes associated with the table

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34 U.S. data was corrected controlling for the difference between the U.S. GDP and the GDP of the EU 15+12 Accession Countries.

35 U.S. federal Superfund data is based on the estimated average clean-up costs of the 1134 sites on the National Priorities List (worst contaminated sites) in 1994, after controlling for inflation. Since our proposal is non-retrospective, the costs associated with sites contaminated by activities that took place before the entry into force of Superfund were removed. For straddle sites, i.e. sites where the damaging activities took place before and after the entry in force of Superfund, 50% of the costs were also removed.

36 Includes the expenditures on clean-up by the competent authorities that cannot be recovered from private liable parties (mainly due to 'orphan' sites). On top of the federal Superfund expenditures, (U.S.) State-level expenditures on clean-up of contaminated sites were also factored in by using data from *An Analysis of State Superfund Programs: 50-State Study, 1998 Update*, 1998, Environmental Law Institute. Available information on (U.S.) State-level expenditures does not allow ventilating them by competent authorities and private parties, thus all the State-level expenditures were allocated to the competent authorities.

37 Includes clean-up expenditures paid for by private responsible parties.

38 The sum of the clean-up expenditures paid for by competent authorities and private parties.

39 Expenditures associated with restoring biodiversity damage shouldered by the CA and private parties. The most recently available U.S. data (from several reports by the U.S. General Accounting Office and the National Oceanic and Atmospheric Agency) on known and currently foreseen cases of natural resource damage puts the respective expenditures (upper bound) at 8% of the total clean-up costs. Consequently we applied a factor of 8% to the total clean-up expenditures to derive the expenditures associated with biodiversity damage.

40 Mainly legal costs paid by private responsible parties. The estimate is based on the average Superfund transaction costs, i.e. 21% of the total of private parties' clean-up and transaction costs.

41 The day-to-day expenditures for CA of operating the scheme (including expenditures associated with emergency interventions that cannot be recovered from private responsible parties). Derived by scaling down Superfund administrative expenditures in line with the reduction of clean-up expenditures in a non-retrospective scheme.

42 The sum of all categories of expenditures.

5. PUBLIC CONSULTATION

The preparatory works leading to this proposal rely, *inter alia*, on a number of previous initiatives on the occasion of which wide debates have been held with interested parties. One can mention in that respect the Commission Green Paper in 1993 (COM(93) 47 final), a Joint Hearing with the European Parliament that year, a Parliament Resolution asking for a Community Directive and an Opinion of the Economic and Social Committee in 1994 and the White Paper on Environmental Liability on 9 February 2000[43]. Interested parties have also been consulted on a working document released in July 2001[44]. In light of the public consultation, the proposals set out in the working document have been revised. For further information on the public consultation process and its outcome, see the Annex to the Explanatory Memorandum.

It is clear, however, that not all suggestions made by the various interested parties could have been taken into account. In the first place, industry and environmental non-governmental organisations (NGOs) have opposite views on the subject and, even more importantly, suggestions, which could not be reconciled with the objectives of the proposal and the reasons why the proposal is deemed necessary, could not be taken on board.

As explained above, the Commission is of the opinion that a Community liability instrument is needed. The Commission also believes in the context of environmental damage that there is a need for allowing public interest groups and NGOs to act on behalf of the environment given the absence of proprietary interest in relation, for example, to biodiversity.

Conversely, the Commission is of the opinion that a certain number of suggestions made by environmental NGOs could not be incorporated in this proposal. This is so concerning in particular the scope of the proposed regime. The Commission when it proposes a new legislative initiative must take into account all the interests in presence, and strike an appropriate balance between all of them in light of the environmental objectives pursued and the wider socio-economic context. Opting for a fully retrospective regime or a regime where the usual principles in terms of burden of proof and causal link would have been significantly altered was not deemed to be advisable.

As far as traditional damage (personal injury and damage to goods) is concerned, it is not covered by the proposal although the White Paper on Environmental Liability suggested otherwise. There are a variety of reasons for that evolution. Firstly, it does not appear necessary to cover traditional damage under the proposed scheme, at least in the first place, to achieve ambitious environmental objectives and implement to meaningful extent the "polluter

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[43] COM(2000) 66 final. The White Paper has elicited numerous comments from Member States and a wide range of interested parties alike (Summaries of those comments can be found at the following site: http://europa.eu.int/comm/environment/wel/main/index.cfm). The White Paper was also the subject of Opinions from the Economic and Social Committee (Opinion of 12 July 2000 (OJ C 268, 19.9.2000, p. 19) and the Committee of the Regions (Opinion of 14 June 2000 (OJ C 317, 6.11.2000, p. 28). The European Parliament has not adopted an official position on the White Paper but the Committee on the Environment, Public Health and Consumer Policy has adopted on 12 September 2000 an Opinion for the Committee on Legal Affairs and the Internal Market on the White Paper on Environmental Liability (doc. PE 290.139). The Environment Council has also debated the issue of environmental liability in April and December 2000 (See Council Press Release No 486 of 18.12.2000) (Document No.: 14668/00).

[44] The integral text of the submissions received (in principle in their original language), for which no request for confidentiality has been made, can be found at the following site: http://europa.eu.int/comm/environment/liability/followup.htm.

pays" and preventive principles. Secondly, traditional damage can only be regulated through civil liability[45]. National legal systems (legislation and case law) are quite developed with respect to traditional damage, which constitute their subject matter by excellence. Having said that, recent and future developments at international level on that subject are likely to require the Commission to consider afresh the matter, at least if the Community wishes to adhere to those international civil liability instruments supplementing international environmental agreements. It is to be noted, however, that those various sectoral international initiatives[46] do not always appear as fully consistent among themselves so that it seems difficult at this stage to formulate a general position as to how those initiatives should be considered by the Community. Further reflections are needed on that subject in light of the developments taking place at the international level.

With respect to financial security, the proposed regime does not make it compulsory. The closed scope of dangerous activities, the limitation to certain natural resources and the limitation to significant damage are all aspects which contribute to making the risks to be covered by the regime better calculable and manageable. The proposed regime allows the necessary flexibility for the first years of its implementation, since it clearly entails a certain number of novelties for insurers and other financial security providers.

It is to be noted in relation to the definition of biodiversity for the purpose of the proposal that the definition of "biological diversity" in Article 2 of the Convention on Biological Diversity could not be considered at this stage as providing a suitable basis for the proposed regime, including as far as liability to be attached to genetically modified organisms is concerned. The Convention's definition goes beyond habitats and species and subsumes the idea of "variability" so that it could be argued that damage to biological diversity would encompass injury to "variability among living organisms". Such an approach raises delicate questions as to how such damage would be quantified and what would be the threshold of damage entailing liability[47]. This is being said without prejudice to any further development on that

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45 See the study dedicated to review recent developments in environmental liability law in the Member States and on environmental liability in some OECD countries (http://europa.eu.int/comm/environment/liability/legalstudy.htm), which highlights that, in most countries, contaminated sites and, where it exists, damage to biodiversity have up to now been mainly matters for public/administrative law, while harm to persons and property is subject to private, civil law adjudication. The Commission is of the opinion that it might be difficult to provide for a common legal framework both for civil and public/administrative liability. This reason also explains why the proposal does not cover traditional damage.

46 There is one sectoral instrument that has been signed but is not in force yet: the 1999 Basle Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal. There are several other ongoing or future initiatives: a potential joint liability instrument under the 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents (TEIA Convention) and 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Protection Convention) and (a) possible (in the medium term) liability instrument(s) under the Convention on Biological Diversity and the Cartagena Protocol on Biosafety. For the sake of completeness, reference can be made to the only existing horizontal international environmental liability regime, which is the 1993 Lugano Convention on Civil Liability for Damage resulting from Activities dangerous to the Environment. This Convention is, however, not yet in force and there is no likelihood that the Community would adhere to it in the near future.

47 It is to be noted that similar questions are raised within the context of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (see the Note by the Executive Secretary on "Liability and redress for damage resulting from the transboundary movements of living modified organisms. Review of existing relevant instruments and identification of elements" [UNEP/CBD/ICCP/2/3 – para. 77, page 24] - http://www.biodiv.org/biosafety/mtg-iccp-02.asp).

issue notably in the context of the implementation of the Convention on Biological Diversity and the Protocol on Biosafety.

The Commission is aware, in any event, that legislating, especially in such a field, can only be an iterative process where the experience gained in the implementation of the scheme and new legal and technical developments on the subject should be reviewed and lead to the regime being improved where appropriate.

6. CONTENT OF THE PROPOSAL

6.1. Article 1 - Subject matter

The proposal aims to establish a framework based on environmental liability whereby environmental damage would be prevented or remedied.

6.2. Article 2 - Definitions

Appropriate definitions should be given to notions instrumental to the good interpretation and application of the scheme foreseen by the proposal.

Environmental damage should be defined whenever possible by reference to the relevant provisions of Community environmental law – the Habitats and Water Framework Directives – so that common criteria could be used and uniform application could be promoted. Account should nevertheless be taken of specific situations where the aforementioned Directives allow for certain derogations to the level of protection afforded to the environment. Biodiversity should also be defined by reference to areas of protection or conservation that have been designated in pursuance of national or sub-national legislation on nature conservation. Environmental damage should also cover those situations where serious potential or actual harm to human health exists when this serious harm results from land contamination.

Damage to water, soil and habitats consecutive to the accidental or deliberate release of substances or materials or radiations, into the air should be included in the notion of damage since such airborne elements could cause environmental damage within the meaning of this Directive.

6.3. Article 3 – Scope (in conjunction with Annex I)

Occupational activities which present a risk for human health and the environment should be covered. Those activities should be identified, in principle, by reference to the relevant Community legislation which provides for regulatory requirements, including, where appropriate, registration or authorisation procedures, in relation to certain activities or practices considered as posing a potential or actual risk to man and the environment.

In that context, the proposal should cover, with respect to dangerous substances or preparations, organisms and micro-organisms , and plant protection and biocidal products, their manufacture, use and release into the environment.

Due regard should also be given to the relevant provisions of Community transport legislation which identify dangerous or polluting goods relevant for the purpose of this proposal; it is appropriate in that context to extend those relevant provisions to other transport modes in the absence of more specific Community provisions. However, considering the existence of specific Community legislation on plant protection and biocidal products and genetically

modified organisms and micro-organisms, all transport activities concerning those elements should be covered irrespective of their possible coverage under the aforementioned relevant Community transport provisions. The circumstance that all modes of transport are not at present regulated by Community transport legislation or that transport is to a large extent not regulated by the specific legislation on plant protection, biocidal products or genetically modified organisms and micro-organisms is irrelevant for the purpose of this proposal since transporting those products, organisms and micro-organisms poses a risk, actual or potential, for man or the environment.

This proposal should also apply, in relation to biodiversity damage, to any occupational activities other than those already directly or indirectly identified by reference to Community legislation as posing an actual or potential risk for man or the environment.

There are a certain number of international conventions dealing with the issue of civil liability in relation to specific fields such as oil pollution and nuclear damage. Most Member States are parties to these conventions which, even though they do not necessarily provide for the same requirements than those of this proposal, present the advantages of ensuring a global or regional harmonisation. As far as those conventions display shortcomings, the Community should, in accordance with its task of promoting measures at international level to deal with regional or world-wide environmental problems (Article 174(1) of the EC Treaty), try to improve the existing international arrangements. In the wake of the Erika oil spill, the Community has committed itself to improving maritime safety and the functioning of the International Oil Pollution Compensation Fund as far as liability issues are concerned[48]. When the review of the operation of the IOPC Fund undertaken under the auspices of the International Maritime Organisation is completed, the Community will have to determine if the results achieved in that context are satisfactory or not; in the latter case, consideration should be given to a specific Community initiative on that subject.

Therefore, express account should be given to existing Euratom legislation and relevant international conventions in the field of nuclear damage, oil pollution damage and damage caused by the carriage of hazardous and noxious substances and dangerous goods.

Where Community law already establishes a regulatory framework one of the purposes of which is to prevent the occurrence of accidents[49], these detailed regulatory requirements should not be disrupted by the proposed regime which aim is to supplement the existing arrangements and not to substitute them.

The proposed regime, which does not provide for additional rules of conflict of law when it specifies the powers of the competent authorities, is without prejudice of the rules on international jurisdiction of courts as provided, *inter alia*, in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[50].Given the scope of the proposal and the exclusion therefrom of traditional damage, no question of compatibility should arise in relation to laws relating to the protection of workers' health and safety at work. The same

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48 See COM(2000) 802 final of 6.12.2000.

49 See Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ L 257, 10.10.1996, p. 26) and Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (OJ L 10, 14.1.1997, p. 13).

50 OJ L 12, 16.1.2001, p. 1.

holds true with respect to the relevant Community legislation in the field of product liability[51] and product safety,[52] which do not cover damage to the environment. The legislation on product liability and product safety is, therefore, fully applicable. In the absence of potential overlapping, there is no need to provide for a specific provision in the proposal aiming to clarify the relation between the proposal and those laws.

It should lastly be made clear that the proposal does not apply to diffuse pollution, to activities the sole purpose of which is to serve national defence.

6.4. Article 4 - Prevention

Next to the general preventive effect attached to the proposed regime[53], there is also a need to set up a regulatory framework for the taking of specific preventive measures when an imminent threat of environmental damage arises. Prevention in this context implies that the competent authority either requires the operator to take the necessary preventive measures or takes itself such measures immediately or, in any case, when the operator does not take the necessary measures. Where an operator is aware or should be aware of an imminent threat, he should act immediately without waiting for the competent authority to require him to do so. Should the preventive measures taken by the operator be ineffective, the relevant operator should inform the competent authority of the situation.

6.5. Article 5 – Restoration (in conjunction with Annex II)

Restoration in the context of the proposed regime implies that the competent authority either requires the operator to take the necessary restorative measures or takes itself such measures immediately or, in any case, when the operator does not take the necessary measures. Restoration should take place in an effective manner ensuring that the restoration objectives are achieved in compliance with the minimum criteria according to which restoration measures should be identified and chosen. As a rule, the value of the damage should be that of the restorative measures so that no monetary valuation is needed. However, competent authorities should be entitled to use, where appropriate, monetary valuation techniques. Research undertaken within the framework of Community research and development programmes can provide valuable information and tools with respect to the characterisation and valuation of environmental damage. The active co-operation of the operator and other interested parties, if need be, is likely to contribute to the cost-effectiveness of the measures to be taken.

Several instances of environmental damage might occur within a short period of time. In such a case, the competent authority should be entitled to decide which instance of environmental damage must be remedied first. To make that decision, the competent authority should have regard, *inter alia*, to the nature, extent, gravity and possibilities of natural recovery of the different instances of environmental damage concerned.

6.6. Article 6 – Additional provisions in relation to prevention and restoration

In light of the importance of the need to ensure appropriate prevention and restoration, Member States should ensure that the necessary restorative or preventive measures are taken

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51 OJ L 210, 7.8.1985, p. 29. Directive amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (OJ L 141, 4.6.1999, p. 20).

52 Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ L 228, 11.8.1992, p. 24).

53 That is the prevention effect attached to liability from an economic viewpoint (see section 2 above).

when the "polluter pays" principle cannot be implemented. In such cases, Member States should adopt whatever provisions they deem fit in conformity with their legal systems provided that they ensure effectively that the necessary preventive or restorative measures are financed. Such alternative financing schemes should in any case be without prejudice to the liability of the operator should he be identified later on or regain sufficient financial means to bear the cost of the measures taken.

6.7. Article 7 – Cost recovery

Community action should further the implementation of the "polluter pays" principle, as is foreseen by Article 174(2) of the EC Treaty. The operator causing environmental damage or creating an imminent threat that such a damage occurs should therefore be, in principle, financially responsible. When the preventive or restorative measures are taken by the competent authority or by a third party on its behalf, the cost should be recovered from the operator.

6.8. Article 8 - Cost allocation in relation to certain biodiversity damage

Where biodiversity damage has been caused by an operator in the course of another occupational activity than one of those identified by this proposal as posing an actual or potential risk for man or the environment, that operator should not be financially responsible if he was not at fault or negligent.

6.9. Article 9 – Exemptions and defences

This Directive should not cover damage or imminent threat thereof which is the result of certain events beyond his control or of specific emissions or events which are allowed by the applicable laws and regulations or have been authorised by a permit The same approach is also applicable when the damage has been caused by emissions or activities which were not considered harmful according to the state of scientific and technical knowledge at the time the emission was released or the activity took place. There might be cases, however, where it is justified that, although the operator should not bear the cost of prevention or restoration, Member States are nevertheless required to take action in relation to the damage in question. Where damage has been intentionally caused by a third party, Member States should be required to ensure that the damage in question is remedied, being understood that the third party having caused the damage should bear the cost. Similarly, when damage has been caused by the fact of having to comply in compulsory manner with rules or orders emanating from public authorities, Member States should also be required to ensure that restoration is carried out. Insolvency practitioners fulfil a task of great importance to the benefit of the collectivity of creditors and should not, therefore, be personally financially responsible insofar as they act in accordance with the relevant national provisions and are not at fault or negligent.

6.10. Article 10 – Cost allocation in relation to certain preventive measures

It is clear that the operators must always bear the cost of the measures which they must take in any case because they are required to do so by laws and regulations (other the proposed regime) or the permit which governs their activities.

6.11. Article 11 - Cost allocation in multiple party causation cases

Several operators may cause the same damage. In such cases, Member States should either provide for joint and several liability or for apportionment on a fair and reasonable basis of

the financial responsibility. If an operator can establish that he has only caused part of the damage, this operator should only be obliged to bear the cost related to that part of the damage.

6.12. Article 12 – Limitation period for recovery

Competent authorities should be entitled to recover cost from the operator during a period of five years from the date on which the preventive or restorative measures have been carried out.

6.13. Article 13 - Competent authority

From one Member State to another, the powers necessary to implement and enforce the proposed regime might be given either to courts or quasi-judicial bodies or to administrative authorities. In line with the principle of subsidiarity, Member States should be free to maintain their institutional arrangements insofar they are compatible with the achievement of the proposal's objectives. Some of the tasks to be carried out, namely establishing which operator has caused the damage or the imminent threat of damage, assessing the importance of the damage and determining the restorative measures, should, however, be carried out in any case by administrative authorities or by third parties on their behalf, since those tasks require particular expertise and ways of proceeding which are not always and entirely compatible with the manner judicial bodies operate. This does not imply, however, that the findings of the competent authority in those different respects may not be reviewable by courts should the operator contests their exactness. Provisions enabling the operator to avail himself of legal remedies should be foreseen. The operator should be associated to the procedure since his knowledge of the activity that has caused the damage would usually be useful.

6.14. Article 14 – Request for action

Environmental protection is a diffuse interest on behalf of which individuals will not always act or will not be in a position to act. It is therefore appropriate that qualified entities be given a special status to ensure the good functioning of the proposed regime. Persons adversely affected or likely to be adversely affected by environmental damage and qualified entities should therefore be entitled to request that the competent authority take action in certain conditions and circumstances. The operator should be given the opportunity to let his views known with respect to the request of action and the accompanying observations. The competent authority should inform the applicant of the outcome of the request for action within appropriate time-frames.

6.15. Article 15 – Judicial review

It is important to ensure that the action or inaction of public authorities could be reviewed in case the rules set out in the proposed regime would be breached.

6.16. Article 16 - Financial security

Insurance or other forms of financial security compulsory are usually acknowledged as increasing the efficiency of liability. The use of insurance or other forms of financial security should therefore be encouraged.

6.17. Article 17 – Co-operation between Member States

In case of transboundary damage, the Member States concerned should actively co-operate to prevent or remedy the damage

6.18. Article 18 – Relation with national law

Member States should remain free to maintain or adopt more stringent provisions than those set out in the proposed regime. In addition, Member States should be able to address the issue of "double recovery".

6.19. Article 19 – Temporal application

The proposed regime should have no retrospective effect. Appropriate arrangements are needed for the situation where it is likely that the damage was caused before the date of implementation of the regime but there is no certainty. In any case, Member States remain free to regulate damage not covered by the proposed regime.

6.20. Article 20 – Review (in conjunction with Annex III)

Member States should report to the Commission on the experience gained in the application of the proposed regime so as to enable the Commission to consider, taking into account the impact on sustainable development, whether any review is appropriate. Minimum guidance as to the contents of the national reports should be specified.

6.21. Articles 21 to 23 – Implementation, Entry into force and Addressees

Those provisions are standard ones in Directives.

Annex - *Public consultation*

The European Commission adopted a White Paper on Environmental Liability on 9 February 2000[54]. The objective of the White Paper was to explore how the polluter pays principle, one of the key environmental principles in the EC Treaty, can best be applied to serve the aims of Community environmental policy. The White Paper explores how a Community regime on environmental liability can best be shaped. Having explored different options for Community action, the Commission concludes that the most appropriate option is a Community framework directive on environmental liability.

The background to the White Paper includes a Commission Green Paper in 1993 (COM(93) 47 final), a Joint Hearing with the European Parliament that year, a Parliament Resolution asking for a Community Directive and an Opinion of the Economic and Social Committee in 1994.

The White Paper has elicited numerous comments from Member States and a wide range of interested parties alike[55]. The White Paper was also the subject of Opinions from the Economic and Social Committee[56] and the Committee of the Regions[57]. The European Parliament has not adopted an official position on the White Paper[58]. The Environment Council has also debated the issue of environmental liability in April and December 2000[59].

On 25 July 2001, the Environment Directorate-General released a working paper which set out the principles on which the future regime could be based. The working paper was sent to:

- the Member States;
- the EEA States;
- the accession countries;
- certain international organisations (EFTA and UNEP);
- European associations of local and regional authorities (CEMR – Council of European Municipalities and Regions and ARE – Assembly of the European Regions);
- European environmental NGOs (EEB – European Environmental Bureau, WWF – World Wildlife Fund, Greenpeace, BirdLife, Friends of the Earth and International Friends of Nature) and consumers association (BEUC);
- European industrial and professional federations and associations: Union of Industrial and Employer's Confederations of Europe (UNICE), European Chemical Industry Council (CEFIC), Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises

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54 COM(2000) 66 final.

55 Summaries of those comments can be found at the following site: http://europa.eu.int/comm/environment/wel/main/index.cfm.

56 Opinion of 12 July 2000 (OJ C 268, 19.9.2000, p. 19).

57 Opinion of 14 June 2000 (OJ C 317, 6.11.2000, p. 28).

58 The Committee on the Environment, Public Health and Consumer Policy has adopted on 12 September 2000 an Opinion for the Committee on Legal Affairs and the Internal Market on the White Paper on Environmental Liability (PE 290.139).

59 See Council Press Release No 486 of 18.12.2000 (Document No.: 14668/00).

(UEAPME), European Round Table of Industrialists (ERT), Centre européen des Entreprises à Participation Publique et des Entreprises d'Intérêt Economique Général (CEEP), Network for Industrially Contaminated Land in Europe (NICOLE), European Association of BioIndustries (EuropaBio), Fédération Européenne des Activités du Déchet et de l'Environnement (FEAD), Liaison Group of the European Mechanical, Electrical, Electronic and Metalworking Industries (ORGALIME), EU Committee of the American Chamber of Commerce in Belgium, Comité des Organisations Professionnelles Agricoles de l'UE & Comité de la Coopération Agricole de l'UE (COPA / COGECA), Contaminated Land Rehabilitation Network for Environmental Technologies (CLARINET), Comité Européen des Assurances (CEA), Fédération Bancaire de l'UE, International Association of Oil and Gas Producers (OGP), European Petroleum Industry Association (EUROPIA), Union Pétrolière Européenne Indépendante (UPEI), International Tankers Owners Pollution Federation (ITOPF), European Environmental Law Association (EELA), European Property Federation (EPF), European Atomic Forum (FORATOM).

Meetings (5) were organised with Member States, accession countries, environmental NGOs, the industry and local and regional authorities.

Comments were also invited through publication of the working document on DG Environment website.

Belgium, Denmark, France and the Netherlands have sent written comments. Poland has also submitted written comments. Four environmental NGOs (BirdLife International, WWF EPO – World Wildlife Fund European Policy Office, EEB – European Environmental Bureau and Friends of the Earth Europe) have sent common comments. ECSA – European Community Shipowners' Association, ICS – International Chamber of Shipping and INTERTANKO – International Association of Independent Tanker Owners have also submitted common comments. In addition, the following interested parties have sent comments: AFEP-AGREF – Association française des entreprises privées; AVENTIS; BDI – Bundesverband der Deutschen Industrie; BERGKAMP Lucas (Prof. & Partner, HUNTON & WILLIAMS); BIPAR – European Federation of Insurance Intermediaries ; BNFL – British Nuclear Fuels Plc; CBI – Confederation of British Industry; CEA – Comité européen des assurances; CEEP – European Centre of Enterprises with public participation and of enterprises of general economic interest; CEFIC – European Chemical Industry Council; CEMBUREAU – The European Cement Association; CEMR – Council of European Municipalities and Regions; CLECAT – European Organisation for Forwarding and Logistics; CODACONS – Coordinamento di Associazioni per la Tutela dell'Ambiente e dei Diritti di Utenti e Consumatori; ECGA – European Carbon and Graphite Association; EELA – European Environmental Law Association; EFCA – European Federation of Engineering Consultancy Associations; ELO – European Landowners Organisation; EPF – European Property Federation; ERT Environmental Group – European Round Table of Industrialists; ESA – Environmental Services Association; EURELECTRIC – Union of the Electricity Industry; EuroGeoSurveys – Association of Geological Surveys of the European Union; EUROMINES – European Association of Mining Industries; EUROPIA - European Petroleum Industry Association ; FBE – European Banking Federation; FEAD – European Federation of Waste Management and Environmental Services; FIEC – European Construction Industry Federation; FLA – Finance and Leasing Association; FORATOM – European Atomic Forum; Freshfields Bruckhaus Deringer; IBEC – Irish Business & Employers Confederation; IFAW – International Fund for Animal Welfare; IoD – Institute of Directors; ITOPF – International Tanker Owners Pollution Federation; IV – Industriellenvereinigung; Leaseurope; MEDEF – Mouvement des entreprises de France; Leaseurope ; NFU – National Farmers' Union;

NICOLE – Network for Industrially Contaminated Land in Europe; NIREX Ltd; Nordic Family Forestry; OGP – International Association of Oil and Gas Producers; RUIZ Marta (lawyer); SMMT – The Society of Motor Manufacturers and Traders; Suez; Syngenta International; Thames Water ;TVO – Teollisuuden Voima; UEAPME – Union européenne de l'artisanat et des petites et moyennes entreprises; UEPC – Union européenne des promoteurs-constructeurs; UIC – Union des industries chimiques; UKELA - UK Environmental Law Association (with separate submissions from the Scottish Law Working Party of UKELA); UNICE – Union of Industrial and Employers' Confederation of Europe; VCI – Verband der Chemischen Industrie; VDEW – Verband der Elektrizitätswirtschaft; VDMA – Verband Deutscher Maschinen- und Anlagenbau; WKÖ – Wirtschaftskammer Österreich; ZVEI – Zentralverband Elektrotechnik- und Elektronikindustrie.

Outline of the main views of the interested parties

The main views of the interested parties can be summarised as follows[60]:

Member States

- On the whole, the reliance on public law mechanisms has been welcomed, although some regrets have been expressed that civil liability and traditional damage are not covered any longer.

- The need for as a precise legal regime, including definitions, as possible has been underlined.

- The need to ensure the full implementation of the "polluter-pays" principle and the importance of carefully considering the new role to be played by public authorities in relation to "orphan damages" (i.e. when the polluter cannot pay for making good the damage) have been stressed, notably in relation with the potential financial consequences for public authorities.

- Attention has been drawn to the particular situation of the owner or occupier of the land affected by environmental damage caused by a third party.

- Concerns have been expressed about proposals departing from the environmental area, which touch upon issues more relating to company law or civil procedure.

- Reference was made to the need to clarify the relation with international conventions; in addition, mention was made of different initiatives at international level in the field of civil liability in the light of which the need for the Commission to pursue its reflections on the subject was underlined.

- Doubts have been expressed with respect to the inclusion of interim losses.

- The future Community regime should not prevent Member States to adopt more stringent provisions.

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[60] The integral text of the submissions received (in principle in their original language), for which no request for confidentiality has been made, can be found at the following site: http://europa.eu.int/comm/environment/liability/followup.htm.

Accession countries

- On the whole, the proposals set out in the working document have not raised objections; some comments made even suggest that proposals should be more comprehensive.

- Some concerns have been expressed with respect to the potential financial consequences for public authorities.

Industry and professional associations

If industry welcomes the fact that traditional damage (personal injury and damage to property) is left out and the fact that no direct action should be given to NGOs against operators, the same concerns as were already expressed in the past, have been repeated. The main points being that industry:

- insists on the need to have clear and precise provisions in general and definitions in particular;

- is generally opposed to any alleviation/reversal of the burden of proof;

- is generally opposed to joint and several liability;

- wishes to see strict liability restricted to a limited number of activities (some industry representatives consider that there is no reason to depart from fault-based liability);

- insists that complying with a permit/state-of-the-art/development risk should be retained as defences;

- is generally opposed to granting any kind of privileged status to NGOs as far as access to justice is concerned;

- is concerned about the difficulties relating to the evaluation of environmental damage;

- is worried about the difficulty operators could encounter in finding appropriate insurance coverage, though it welcomes that financial security is not made compulsory;

- invites the Commission to take account of the existing international conventions in the relevant fields (e.g. oil pollution, nuclear damage);

- is worried about the use of economic valuation techniques;

- Industry is also concerned by the new proposals in the working document on "piercing the corporate veil".

Environmental non-governmental organisations

- The Commission's intention to present a legislative proposal soon is welcomed but there is a fear that the level of ambition is not high enough. More particularly, comments from environmental NGOs point in the following directions:

- In general, they suggest a wide-ranging review of the minimalist approach set out in the Working Paper to consider new developments in the field of genetically modified

organisms (GMOs), integrated products policy (IPP), the review of the Community's policy in the field of dangerous chemicals and the need to follow up the *Erika* tanker oil spill.

- They consider that the scope of strict liability is too limited (all potentially dangerous activities should be covered or, at the very least, those activities they have listed in their comments).

- They insist that biodiversity damage outside protected areas and damage to protected areas under international conventions to which the Community and Member States are contracting parties should be covered. Liability should also apply to species protected by national legislation and all types of areas protected at national and sub-national levels. Liability should apply to all bird species protected under the Wild Birds Directive.

- They consider that, if the distinction between strict and fault-based liability is to remain, it is imperative that the fault based liability regime is also extended to pollution of water resulting from activities which may be classified as non-dangerous. (in the case, e.g. of water pollution by sewage sludge or waste water).

- They insist that soil contamination harmful for the environment and potentially harmful to human health should be covered.

- They consider that traditional damage should be covered.

- They request that the significance thresholds be substantially lowered so that the future regime be applicable to cases which fall in between the trivial and sensational.

- They ask that the Commission look for solutions to historical damage, especially in the case of contaminated soils.

- They recommend that 'compliance with a public order' does not allow licensed or authorised activities to be exempt from liability including commercially grown genetically modified crops.

- They welcome joint and several liability in cases where apportionment is not feasible.

- They welcome liability of controlling legal persons and persons providing financial security.

- They consider that citizens and affected groups should have legal standing and that they should be able to bring direct actions against operators at least in certain cases; there should be appropriate financial relief for citizens (i.e. alleviation of court costs and damages claims) who bring cases against polluters, especially where imminent damage could occur.

- They recommend that financial security should be made obligatory at Community level.

- They welcome in general restoration conditions for damage.

- They consider that the burden of proof should be alleviated.

- One NGO also recommends that monetary valuation techniques used where comparable restoration is not possible should include stated preference techniques; it supports also a retroactive regime.

Local and regional authorities

- Concerns have been expressed about the fact that the planned regime would lay down demanding obligations on public authorities in the implementation of the regime, especially when no polluter may be held liable.

- Concerns have also been expressed about the fact that the action of public authorities could be challenged by qualified entities.

On the basis of the comments made by interested parties, the proposals set out in the working document have been reviewed.

The following points can be made in that respect (in the order of the Articles of the proposal):

- The notion of "professional and commercial activities" has been replaced by that of "occupational activities" to ensure more clarity in the intended scope of application.

  This change stems from the comment that the notion of "professional and commercial activities" could be interpreted as not covering non-profit making activities carried out in the course of a occupational activity and occupational activities carried out by public enterprises or bodies, while the intention is to cover such non-profit making activities.

- The relation with international conventions has been clarified.

  This change stems from the request to clarify the relation between the international and the Community levels. International conventions, in relation to which the Directive should apply without prejudice to, have been listed.

- The extent to which instructions from public authorities might be used as a defence has been further specified.

  This change stems from the comment that the notion of "compliance with an order from a public authority" or "compliance with a compulsory measure" might be interpreted as exempting from liability activities subject to permit or authorisation, while the intention is not to retain regulatory compliance as a defence.

- The choice is now left to Member States to choose between joint and several liability or fair and equitable apportionment of liability where it is not possible to apportion liability on the basis of the best available evidence.

  This change stems from the comment that joint and several liability was not always the standard rule in Member States in a public law context.

- The possibility is now given to member States to prioritise damages in the circumstances where too many of them would occur at the same time (but this flexibility should not allow them to leave certain damage unremedied).

  This change stems from the comment that exceptional circumstances might happen for which allowance should be made.

- Provisions on limitation periods have been reviewed.

  This change stems from the comment that limitation periods play a different role in a public law context than in civil liability law. It is now made clear that no limitation period is attached to the possibility for competent authorities to take or order the taking of restorative measures; conversely, a limitation period applies with respect to the time period given to competent authorities to instigate cost recovery proceedings.

- The role and powers of public authorities in the implementation of the future regime have been clarified.

  This change stems from the comment that the circumstances and conditions in which competent authorities should be obliged to act further to a request for action should be specified.

- Provisions on the role of NGOs and on judicial review procedures have been reviewed so as to make them more operational.

  This change stems from the comment that it is not always possible in practice to adopt a final decision as to which restorative measures should be taken within four months. It is now made clear that the competent authorities should act within a reasonable time frame that is consistent with the proper achievement of the proposal's objectives. Moreover, there is a duty to inform within four months the person who or qualified entity that has lodged a request for action.

- The right of Member States may adopt more stringent provisions is reinstated.

  This right flows directly from Article 176 of the Treaty but, further to questions put by several interested parties for whom this situation was not known, it is repeated in the proposal for reasons of legal clarity.

- Provisions relating to the temporal application of the regime have been reviewed.

  This change stems from the comment that a full reversal of the burden of proof might lead to unfair situations. It is now made clear that the competent authority has to adduce some convincing evidence in the first place before it can be required from the operator to rebut the adduced evidence.

In addition to these specific changes, various issues on which attention was drawn, such as the need for precision and clarity in general, the full implementation of the "polluter pays" principle, the issue of insurability, have been particularly borne in mind.

With comparison with the working documents, some proposals set out therein have been dropped. This is the case with respect to provisions aiming to extend liability to certain natural and legal persons ("piercing the corporate veil") and provisions on summary judicial proceedings aiming to avoid fund dissipation by a polluter.

This change stems from the consideration that those provisions are not absolutely necessary – insofar as the States are required to take subsidiary action – and, for some of them, unprecedented both in Community and national law, and have therefore raised serious objections given the interference with national law on civil procedure.

It should also be mentioned that some of the concerns which have been expressed are unfounded. NGOs point out that the proposed regime will not apply to "unclassified chemicals" but the proposal does not require that the chemicals have been classified at Community level; the relevant Community legislation[61] requires that chemicals manufacturers, pending classification at Community level[62], must on their own initiative make a provisional assessment of the dangerous properties of chemicals substances and classify, label and package them accordingly. They have also pointed out that not only sites designated under national legislation but also sites designated under sub-national (regional or provincial) regulations should be covered. It has always been intended so.

Concerning the legal basis, the fact that the proposal contains provisions on judicial review should not affect the choice of the legal basis since judicial review provisions are merely accessory to the environmental objectives pursued and is needed to ensure that the system will properly function. It is also to be noted that the judicial review provisions do not fall under any of the areas of action identified in Article 65 of the EC Treaty which only concerns judicial co-operation in civil matters having cross-border implications.

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61 Article 6 of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances as amended by Council Directive 92/32/EEC of 30 April 1992.

62 That is until such time where the chemicals concerned have been introduced into Annex I to Council Directive 67/548/EEC as amended.

2002/0021 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on environmental liability with regard to the prevention and remedying of environmental damage

[Text with EEA relevance]

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the Economic and Social Committee[2],

Having regard to the opinion of the Committee of the Regions[3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[4],

Whereas:

(1) There are currently many contaminated sites in the Community posing significant health risks and the loss of biodiversity has dramatically accelerated over the last decades. Failure to act could result in increased site contamination and greater loss of biodiversity in the future. Preventing and remedying, in so far as is possible, environmental damage contributes to implementing the objectives and principles of the Community's environment policy as set out in Article 174 of the Treaty.

(2) The prevention and remedying of environmental damage should be implemented through the furtherance of the principle according to which the polluter should pay, as indicated in Article 174(2) of the Treaty. One of the fundamental principles of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage will be held financially liable in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.

(3) Since the objective of the proposed action, namely to establish a common framework for the prevention and remedying of environmental damage at a low cost to society, cannot be sufficiently achieved by the Member States and can therefore be better

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1 OJ C […], […], p. […].
2 OJ C […], […], p. […].
3 OJ C […], […], p. […].
4 OJ C […], […], p. […].

achieved at Community level by reason of the scale of the proposed action and the implications in respect of other Community legislation, namely Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds[5], Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora[6], and 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[7], the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(4) Notions instrumental to the correct interpretation and application of the scheme provided for by this Directive should be defined. When the notion in question derives from other relevant Community legislation, the same definition should be used so that common criteria can be used and uniform application promoted.

(5) Biodiversity should also be defined by reference to areas of protection or conservation that have been designated in pursuance of national legislation on nature conservation. Account should nevertheless be taken of specific situations where Community directives or equivalent national provisions allow for certain derogations from the level of protection afforded to the environment.

(6) This Directive should apply, as far as environmental damage is concerned, to occupational activities which present a risk for human health and the environment. Those activities should be identified, in principle, by reference to the relevant Community legislation which provides for regulatory requirements in relation to certain activities or practices considered as posing a potential or actual risk for man or the environment.

(7) This Directive should also apply, in relation to biodiversity damage, to any occupational activities other than those already directly or indirectly identified by reference to Community legislation as posing an actual or potential risk for man or the environment.

(8) Express account should be taken of the Euratom Treaty and relevant international conventions and of Community legislation regulating more comprehensively and more stringently the operation of any of the activities falling under the scope of this Directive. This Directive, which does not provide for additional rules of conflict of laws when it specifies the powers of the competent authorities, is without prejudice to the rules on international jurisdiction of courts as provided, *inter alia*, in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[8]. This Directive should not apply to activities carried out in the interest of national defence.

(9) Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one (or more) identifiable

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5 OJ L 103, 25.4.1979, p. 1. Directive as last amended by Commission Directive 97/49/EC (OJ L 223, 13.8.1997, p. 9).

6 OJ L 206, 22.7.1992, p. 7. Directive amended by Directive 97/62/EC (OJ L 305, 8.11.1997, p. 42).

7 OJ L 327, 22.12.2000, p. 1.

8 OJ L 12, 16.1.2001, p. 1.

actors (polluters), the damage needs to be concrete and quantifiable, and a causal link needs to be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with the activities of certain individual actors.

(10) Since the prevention and remedying of environmental damage is a task directly contributing to the pursuit of the Community's environment policy, public authorities should be entrusted with special responsibilities to ensure the proper implementation and enforcement of the scheme provided for by this Directive.

(11) In order for the system to be effective, the competent authority should take action itself in cases where the operators responsible do not or are not able to take the necessary measures either to prevent environmental damage or to remedy such damage.

(12) Restoration of the environment should take place in an effective manner ensuring that the relevant restoration objectives are achieved. Appropriate guidelines should be defined to that end, the proper application of which should be supervised by the competent authority.

(13) Appropriate provision should be made for those situations where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that all the necessary restorative measures are taken at the same time. In such a case, the competent authority should be entitled to decide which instance of environmental damage is to be remedied first.

(14) According to the "polluter pays" principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or restorative measures. In cases where a competent authority has to act itself or through a third party in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator. It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring.

(15) Member States should ensure that the necessary preventive or restorative measures are taken when the polluter pays principle cannot be implemented. In such cases, Member States should adopt whatever provisions they deem fit in conformity with their legal systems provided that they ensure effectively that the necessary preventive or restorative measures are financed.

(16) Where biodiversity damage has been caused by an operator in the course of an occupational activity other than one of those identified by this Directive as posing an actual or potential risk for man or the environment, that operator should not be obliged to bear the cost of preventive or restorative measures taken in pursuance of this Directive where it is not established that the operator was at fault or negligent.

(17) Appropriate account should be taken of situations where the damage in question or imminent threat thereof is the result of certain events beyond the operator's control or of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place, or where persons act in their capacity as insolvency practitioners and are not otherwise at fault or negligent, or

where operators merely comply with the regulatory requirements imposed on their activity. In that context, there may be situations in which it is justifiable that, although the operator should not bear the cost of preventive or restorative measures, Member States should nevertheless be required to take action.

(18) Operators should bear the costs relating to preventive measures when those measures should have been taken as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities or the terms of any permit or authorisation.

(19) Appropriate provision should be made to take account of cases where several operators have caused the damage including the possibility for Member States to either provide for joint and several liability or for apportionment on a fair and reasonable basis of the financial responsibility.

(20) Competent authorities should be entitled to recover the cost of preventive or restorative measures from an operator for a reasonable period of time from the date on which those measures were effected.

(21) It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should carry out appropriate investigations and remain in charge of specific tasks entailing expert knowledge and appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which restorative measures should be taken.

(22) Persons adversely affected or likely to be adversely affected by environmental damage should be entitled to ask the competent authority to take action. Environmental protection is, however, a diffuse interest on behalf of which individuals will not always act or will not be in a position to act. Qualified entities should therefore be given a special status so that they can properly contribute to the effective implementation of this Directive.

(23) In order to facilitate requests for action, appropriate procedures should be provided for, and the competent authority should be under an obligation to inform the interested party when it is not possible to take a decision within a reasonable period or time.

(24) The relevant persons and qualified entities should have access to procedures for the review of the competent authority's decisions, acts or failure to act.

(25) Where environmental damage affects or is likely to affect several Member States, those Member States should co-operate with a view to ensuring proper and effective preventive or, as the case may be, restorative action in respect of any environmental damage.

(26) Member States should encourage the use by operators of any appropriate insurance or other forms of financial security in order to provide effective cover for financial obligations under this Directive.

(27) This Directive should not prevent Member States from maintaining or enacting more stringent provisions in relation to the prevention and remedying of environmental damage; nor should it prevent the adoption by Member States of appropriate measures

in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under this Directive and by a person whose property is affected by damage.

(28) Damage caused before the expiry of the deadline for implementation of this Directive should not be covered by its provisions and appropriate provision should be made for cases where it is not clear whether or not the cause of the damage occurred after that date.

(29) Member States should report to the Commission on the experience gained in the application of this Directive so as to enable the Commission to consider, taking into account the impact on sustainable development, whether any review of the Directive is appropriate,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

The purpose of this Directive is to establish a framework, based on environmental liability, for the prevention and remedying of environmental damage.

Article 2

Definitions

1. For the purpose of this Directive the following definitions shall apply:

(1) "baseline condition" means the condition of the natural resources and services that would have existed had the damage not occurred, estimated on the basis of historical data, reference data, control data, or data on incremental changes (such as the number of dead animals), alone or in combination, as appropriate;

(2) "biodiversity" means natural habitats and species listed in Annex I to Directive 79/409/EEC, or in Annexes I, II and IV to Directive 92/43/EEC, or habitats and species, not covered by those Directives, for which areas of protection or conservation have been designated pursuant to the relevant national legislation on nature conservation;

(3) "conservation status" means:

(a) in respect of a natural habitat, the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat;

(b) in respect of a species, the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that species;

(4) "costs" means costs which are justified by the need to ensure the proper and effective implementation of this Directive including administrative, legal, and enforcement costs, the costs of data collection and other general costs and monitoring and supervision costs;

(5) "damage" means a measurable adverse change in a natural resource and/or measurable impairment of a natural resource service which may occur directly or indirectly and which is caused by any of the activities covered by this Directive;

(6) "imminent threat" means a sufficient likelihood that environmental damage will occur in the near future;

(7) "insolvency practitioner" means a person appointed in accordance with the relevant national law for the purposes of insolvency, liquidation, winding up or analogous proceedings;

(8) "natural resource" means biodiversity, water and soil, including subsoil;

(9) "operator" means any person who directs the operation of an activity covered by this Directive including the holder of a permit or authorisation for such an activity and/or the person registering or notifying such an activity;

(10) "person" means any natural or legal person;

(11) "land contamination" or "soil and subsoil contamination" means the direct or indirect introduction, as a result of human activity, of substances, preparations, organisms or micro-organisms harmful to human health or natural resources into soil and subsoil;

(12) "preventive measures" means any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage;

(13) "occupational activity" includes non-profit making activity and the rendering of services to the public;

(14) "qualified entity" means any person who, according to criteria laid down in national law, has an interest in ensuring that environmental damage is remedied, including bodies and organisations whose purpose, as indicated by the articles of incorporation thereof, is to protect the environment and which meet any requirements specified by national law;

(15) "recovery" means the return of damaged natural resources and/or services to baseline condition;

(16) "restoration" means any action, or combination of actions, to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services, including:

(a) primary restoration, which is any action, including natural recovery, that returns damaged natural resources and/or impaired services to baseline condition;

(b) compensatory restoration, which is any restorative action taken in relation to natural resources and/or services in a different location from that in which the relevant natural resources and/or services have been damaged and any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until the return of damaged natural resources and/or impaired services to baseline condition;

(17) "services" (or "natural resources services") means the functions performed by a natural resource for the benefit of another natural resource and/or the public;

(18) "environmental damage" means:

(a) biodiversity damage, which is any damage that has serious adverse effects on the conservation status of biodiversity;

(b) water damage, which is any damage that adversely affects the ecological status, ecological potential and/or chemical status of the waters concerned to such an extent that this status will or is likely to deteriorate from one of the categories defined in Directive 2000/60/EC with the exception of adverse effects where Article 4(7) of Directive 2000/60/EC applies;

(c) land damage, which is any damage that creates serious potential or actual harm to public health as a result of soil and subsoil contamination;

(19) "value" means the maximum amount of goods, services, or money that an individual is willing to give up to obtain a specific good or service, or the minimum amount of goods, services, or money that an individual is willing to accept to forgo a specific good or service. The total value of a habitat or species includes the value derived by individuals from their direct use of the natural resource, for example, swimming, boating, or birdwatching, as well as the value attributed by individuals to the habitats and species irrespective of direct uses. This excludes loss of financial income to individuals;

(20) "waters" mean all waters covered by Directive 2000/60/EC;

(21) "emission" means the release in the environment of substances, preparations, organisms or micro-organisms.

2. Biodiversity damage within the meaning of paragraph 1(18)(a) does not include adverse effects which result from an act by the operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) of Directive 92/43/EEC or in accordance with any other provisions of national law which have equivalent effect in relation to habitats and

species protected under national legislation on nature conservation but not covered by Directives 79/409/EEC or 92/43/EEC, provided that those national provisions offer at least equivalent guarantees, including in terms of the compensatory measures required.

Biodiversity damage does not include adverse effects which result from an act by the operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 9 of Directive 79/409/EEC or Article 16 of Directive 92/43/EEC.

Article 3

Scope

1. This Directive shall apply to environmental damage caused by the operation of any of the occupational activities listed in Annex I, and to any imminent threat of such damage occurring by reason of any of those activities.

2. This Directive shall apply to biodiversity damage caused by the operation of any occupational activities other than those listed in Annex I, and to any imminent threat of such damage occurring by reason of any of those activities.

3. This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation is regulated by any of the following agreements:

   (a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;

   (b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;

   (c) the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;

   (d) the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;

   (e) the Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

4. This Directive shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the operation of the activities covered by the Treaty establishing the Atomic Energy European Community or caused by an incident or activity in respect of which liability or compensation is regulated by any of the following agreements:

(a) the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963;

(b) the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, and the Vienna Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage;

(c) the Joint Protocol of 21 September 1988 Relating to the Application of the Vienna Convention and the Paris Convention;

(d) the Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

5. This Directive shall apply without prejudice to more stringent provisions of Community legislation regulating the operation of any of the activities falling within the scope of this Directive and without prejudice to Community legislation containing rules on conflicts of jurisdiction.

6. This Directive shall not apply to environmental damage or to an imminent threat of such damage caused by pollution of a widespread, diffuse character, where it is impossible to establish a causal link between the damage and the activities of certain individual operators.

7. This Directive shall not apply to activities the sole purpose of which is to serve national defence.

8. Subject to Article 11(3), this Directive shall not give private parties a right of compensation for any economic loss sustained in consequence of environmental damage or of an imminent threat of such damage.

Article 4

Prevention

1. Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the competent authority shall either require the operator to take the necessary preventive measures or shall itself take such measures.

2. Without prejudice to any further action which could be required by the competent authority under paragraph 1, Member States shall provide that, when operators are aware of an imminent threat or ought to be aware of such an imminent threat**,** those operators are required to take the necessary measures to prevent environmental damage from occurring, without waiting for a request to do so by the competent authority.

3. Member States shall provide that where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the relevant operator, operators are to inform the competent authority of the situation.

4. If the operator fails to comply with the obligations laid down in paragraph 1 or 2, the competent authority shall take the necessary preventive measures.

Article 5

Restoration

1. Where environmental damage has occurred the competent authority shall either require the operator to take the necessary restorative measures or shall itself take such measures.

2. If the operator fails to comply with a request issued under paragraph 1, the competent authority shall take the necessary restorative measures.

3. The necessary restorative measures shall be determined in accordance with Annex II.

4. Where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary restorative measures are taken at the same time, the competent authority shall be entitled to decide which instance of environmental damage must be remedied first.

   In making that decision, the competent authority shall have regard, *inter alia*, to the nature, extent and gravity of the various instances of environmental damage concerned, and to the possibility of natural recovery.

Article 6

Additional provisions in relation to prevention and restoration

1. Subject to Article 9(1), Member States shall ensure that the necessary preventive or restorative measures are taken:

   (a) where it is not possible to identify the operator who caused the damage or the imminent threat of damage;

   (b) where the operator can be identified but has insufficient financial means to take any of the necessary preventive or restorative measures;

   (c) where the operator can be identified but has insufficient financial means to take all of the necessary preventive or restorative measures; or

   (d) where the operator is not required under this Directive to bear the cost of the necessary preventive or restorative measures.

2. Measures taken in pursuance of paragraph 1(a), (b) and (c) shall be without prejudice to the liability of the relevant operator under this Directive and without prejudice to Articles 87 and 88 of the EC Treaty.

Article 7

Recovery of costs

1. Subject to Articles 8, 9 and 10 the competent authority shall recover from the operator who has caused the damage or the imminent threat of damage the costs it has incurred in relation to the taking of preventive or restorative measures under this Directive.

2. The competent authority shall also recover from the operator who has caused the damage or the imminent threat of damage the costs of assessing environmental damage and, as the case may be, the costs of assessing an imminent threat of such damage.

Article 8

Cost allocation in relation to certain biodiversity damage

Subject to Article 10, in the cases referred to in Article 3(2), where it is not established that the operator who has caused the damage or the imminent threat of damage is at fault or has been negligent, that operator shall not be required to bear the cost of preventive or restorative measures taken pursuant to this Directive.

Article 9

Exceptions

1. Subject to Article 10, this Directive shall not cover environmental damage or an imminent threat of such damage caused by:

   (a) an act of armed conflict, hostilities, civil war or insurrection;

   (b) a natural phenomenon of exceptional, inevitable and irresistible character;

   (c) an emission or event allowed in applicable laws and regulations, or in the permit or authorisation issued to the operator;

   (d) emissions or activities which were not considered harmful according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

2. Paragraph 1(c) and (d) shall not apply if the operator has been negligent.

3. Subject to Article 10, an operator shall not be required to bear the cost of preventive or restorative measures taken pursuant to this Directive when the environmental damage or imminent threat of such damage occurring is the result of:

   (a) an act done by a third party with intent to cause damage, and the damage or imminent threat in question resulted despite the fact that appropriate safety measures were in place;

(b) compliance with a compulsory order, instruction or other legally binding or compulsory measure emanating from a public authority.

4. Where the operator is a person acting in his capacity as an insolvency practitioner, that person shall not be personally obliged to bear the costs relating to prevention or restoration under this Directive insofar as that person acts in accordance with the relevant national provisions governing insolvency, liquidation, winding up or analogous proceedings, and is not otherwise at fault or negligent.

Article 10

Cost allocation in relation to certain preventive measures

1. Member States shall ensure that in all circumstances operators bear any costs relating to preventive measures which they were required to take as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities, including the terms of any permit or authorisation.

2. Article 4 shall not be taken into consideration for the purpose of defining the legislative, regulatory and administrative provisions referred to in paragraph 1.

Article 11

Cost allocation in cases of multiple party causation

1. Subject to paragraph 2, where the competent authority is able to establish with a sufficient degree of plausibility and probability that one and the same instance of damage has been caused by the actions or omissions of several operators, Member States may provide either that the relevant operators are to be held jointly and severally liable for that damage or that the competent authority is to apportion the share of the costs to be borne by each operator on a fair and reasonable basis.

2. Operators who are able to establish the extent to which the damage results from their activities shall be required to bear only such costs as relate to that part of the damage.

3. This Directive is without prejudice to any provisions of national law concerning the rights of contribution or recourse.

Article 12

Limitation period for recovery

The competent authority shall be entitled to initiate cost recovery proceedings against the operator who has caused the damage or the imminent threat of damage in relation to any measures taken in pursuance of this Directive during a period of five years from the date on which the measures in question were effected.

Article 13

Competent authority

1. Member States shall designate a competent authority or competent authorities responsible for fulfilling the duties provided for in this Directive.

   Where a Member State decides not to give the competent authority the power to issue binding decisions or the power to enforce any such decisions, that Member State shall ensure that a court or other independent and impartial public body is competent to issue and enforce such decisions.

2. Regardless of whether a decision referred to in the second subparagraph of paragraph 1 is issued by the competent authority, a court or some other independent and impartial public body, the duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which restorative measures should be taken in accordance with Annex II shall rest with the competent authority.

3. Member States shall ensure that the competent authority carries out appropriate investigations so as to fulfil its duties under this Directive, independently of any prior request for action lodged pursuant to Article 14.

   To that effect, the competent authority shall be entitled to require the relevant operator to supply any information and data necessary for the purpose of the investigation.

   Member States shall specify the detailed arrangements in accordance with which the competent authority may require such information and data.

4. Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or restorative measures.

5. Any decision taken pursuant to this Directive which imposes preventive or restorative measures shall state the exact grounds on which it is based. Such decision shall be notified forthwith to the operator concerned, who shall at the same time be informed of the legal remedies available to him under the laws in force in the Member State concerned and of the time-limits to which such remedies are subject.

Article 14

Request for action

1. Without prejudice to any investigation initiated by the competent authority of its own motion, persons adversely affected or likely to be adversely affected by environmental damage and qualified entities shall be entitled to submit to the competent authority any observations relating to instances of environmental damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

2. The competent authority shall be entitled to require that the request for action be accompanied by all relevant information and data supporting the observations submitted in relation to the environmental damage in question.

3. Where the request for action and the accompanying observations show in a sufficiently plausible manner that an instance of environmental damage exists, the competent authority shall consider any such observations and requests for action.

4. The competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.

5. The competent authority shall, as soon as possible or in any case within a reasonable time-frame having regard to the nature, extent and gravity of the environmental damage concerned, inform the relevant person or qualified entity of its decision to accede to or refuse the request for action and shall provide the reasons for that decision.

6. Where the competent authority is unable, despite due diligence, to take a decision on a request for action within the period referred to in paragraph 5, the competent authority shall, at the latest within four months of being called upon to act, inform the relevant person or qualified entity of the steps and measures which it has taken and which it proposes to take in order to ensure the application of this Directive within a time-frame which is consistent with the proper achievement of the purpose thereof.

Article 15

Review procedures

1. Any person who has lodged a request for action under this Directive, or any qualified entity which has lodged such a request, shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority.

2. This Directive shall be without prejudice to any provisions of national law which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

Article 16

Financial security

Member States shall encourage the use by operators of any appropriate insurance or other forms of financial security. Member States shall also encourage the development of appropriate insurance or other financial security instruments and markets by the appropriate economic and financial operators, including the financial services industry.

Article 17

Co-operation between Member States

Where environmental damage affects or is likely to affect several Member States, those Member States shall co-operate with a view to ensuring that proper and effective preventive action and, where necessary, restorative action is taken in respect of any such environmental damage

Article 18

Relationship with national law

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

2. This Directive shall not prevent Member States from adopting appropriate measures, such as the prohibition of double recovery, in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under this Directive and by a person whose property is affected by damage.

Article 19

Temporal application

1. This Directive shall not apply to damage caused by activities that have been carried out before the date referred to in Article 21(1). In particular, this Directive shall not apply to damage caused by waste the disposal of which took place lawfully in authorised disposal facilities before the date referred to in Article 21(1) or by substances released into the environment before the date referred to in Article 21(1).

2. Where the competent authority is able to establish with a sufficient degree of plausibility and probability that the environmental damage has been caused by an activity which has taken place after the date referred to in Article 21(1), this Directive shall apply unless the operator can establish that the activity that caused the damage in question took place before that date.

3. Paragraph 2 shall not apply to operators who, within one year of the date referred to in Article 21(1), have lodged with the competent authority a statement identifying any environmental damage that may have been caused by their activities before the date referred to in Article 21(1).

   Member States shall take the necessary measures to ensure that the statement submitted by the operators may be relied on with respect to its quality and veracity.

Article 20

Reports

Member States shall report to the Commission on the experience gained in the application of this Directive by [*date (five years after the date referred to in Article 22(1))*] at the latest. The national reports shall include the information and data set out in Annex III.

On that basis the Commission shall submit a report to the European Parliament and the Council together with any proposal which it may consider appropriate.

Article 21

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2005 at the latest. They shall forthwith inform the Commission thereof.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive and a correlation table between this Directive and the national provisions adopted.

Article 22

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 23

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

ANNEX I

ACTIVITIES REFERRED TO IN ARTICLE 3(1)

– The operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control[1].

– The operation of installations subject to authorization in pursuance of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants[2] in relation to the release into air of any of the polluting substances covered by the aforementioned Directive.

– The operation of installations subject to permit in pursuance of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community[3] in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

– The operation of installations subject to permit for discharging any of the dangerous substances in pursuance of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances[4] in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

– The operation of installations subject to permit, authorisation or registration in pursuance of 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[5] in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

Note: Directives 76/464/EEC and 80/68/EEC shall be repealed on 22 December 2013 in pursuance of Article 22 of Directive 2000/60/EC; as of 23 December 2013, the relevant provisions of Directive 2000/60/EC shall be entirely applicable. Consequently, Directive 2000/60/EC shall only be taken into account for the purpose of this Directive as of that date.

– Water abstraction and impoundment of water subject to prior authorisation in pursuance of Directive 2000/60/EC of the European Parliament and of the Council.

– Waste management operations, including the collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after-care of disposal sites, subject to permit or registration in pursuance of

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1 OJ L 257, 10.10.1996, p. 26.
2 OJ L 188, 16.7.1984, p. 20.
3 OJ L 129, 18.5.1976, p. 23.
4 OJ L 20, 26.1.1980, p. 43.
5 OJ L 327, 22.12.2000, p. 1.

Council Directive 75/442/EEC of 15 July 1975 on waste[6] and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste[7].

Those operations include, *inter alia*, the operation of landfill sites under Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste[8] and the operation of incineration plants under Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste[9].

– Manufacture, use, storage, transport within the perimeter of the same undertaking or release into the environment of dangerous substances as defined and within the scope of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances[10].

– Manufacture, use, storage, transport within the perimeter of the same undertaking or release into the environment of dangerous preparations as defined and within the scope of Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations[11].

– Manufacture, use, storage, transport or release into the environment of plant protection products or active substances used in plant protection products as defined and within the scope of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market[12].

– Manufacture, use, storage, transport or release into the environment of biocidal products or active substances used in biocidal products as defined and within the scope of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market[13].

– Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods as defined either in Annex A to Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with

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6 OJ L 194, 25.7.1975, p. 39. Directive as last amended by Commission Decision 96/350/EC of 24 May 1996 adapting its Annexes IIA and IIB (OJ L 135, 6.6.1996, p. 32).

7 OJ L 377, 31.12.1991, p. 20. Directive as amended by Council Directive 94/31/EC of 27 June 1994 (OJ L 168, 2.7.1994, p. 28).

8 OJ L 182, 16.7.1999, p. 1.

9 OJ L 332, 28.12.2000, p. 91.

10 OJ 196, 16.8.1967, p. 1. Directive as last amended by Commission Directive 2001/59/EC of 6 August 2001 adapting to technical progress for the 28th time Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ L 225, 21.8.2001, p. 1).

11 OJ L 200, 30.7.1999, p. 1. Commission Directive 2001/60/EC of 7 August 2001 adapting to technical progress Directive 1999/45/EC of the European Parliament and of the Council concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ L 226, 22.8.2001, p. 5).

12 OJ L 230, 19.8.1991, p. 1. Directive as last amended by Commission Directive 2001/103/EC of 28 November 2001 (OJ L 313, 30.11.2001, p. 37).

13 OJ L 123, 24.4.1998, p. 1. Directive as last amended by Commission Directive 2001/87/EC of 12 October 2001 (OJ L 276, 19.10.2001, p. 17).

regard to the transport of dangerous goods by road[14] or in the Annex to Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail[15] or as defined in Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods[16].

– Any contained use, including transport, of genetically modified micro-organisms as defined and within the scope of Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms[17].

– Any deliberate release into the environment or transport of genetically modified organisms as defined and within the scope of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC[18].

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14 OJ L 319, 12.12.1994, p. 7. Directive as last amended by Commission Directive 2001/7/EC of 29 January 2001 (OJ L 30, 1.2.2001, p. 43).

15 OJ L 235, 17.9.1996, p. 25. Directive as last amended by Commission Directive 2001/6/EC of 29 January 2001 (OJ L 30, 1.2.2001, p. 42).

16 OJ L 247, 5.10.1993, p. 19. Directive as last amended by Commission Directive 98/74/EC of 1 October 1998 (OJ 276, 13.10.1998, p. 7).

17 OJ L 117, 8.5.1990, p. 1. Directive as amended by Council Directive 98/81/EC of 26 October 1998 (OJ L 330, 5.12.1998, p. 13).

18 OJ L 106, 17.4.2001, p. 1.

ANNEX II

REMEDYING OF ENVIRONMENTAL DAMAGE

1. INTRODUCTION

This Annex sets out the rules to be followed by the competent authority in order to ensure the remedying of environmental damage.

2. RESTORATION OBJECTIVES

2.1. Remedying of environmental damage, in terms of biodiversity damage and water pollution, is achieved through the restoration of the environment as a whole to its baseline condition. Subject to point 3.2.3. below, this objective is achieved in principle through the return of damaged habitats, species and associated natural resources services or waters concerned to baseline condition and compensation for any interim losses incurred. Restoration is done through rehabilitating, replacing or acquiring the equivalent of damaged natural resources and/or services at the site originally damaged or at a different location.

2.2. Remedying of environmental damage, in terms of water pollution and in terms of biodiversity damage, also implies that any serious harm or serious potential harm to human health be removed should such a harm be present.

2.3. Where polluted soil or subsoil gives rise to a serious harm to human health or could pose such a risk, the necessary measures shall be taken to ensure that the relevant contaminants are controlled, contained, diminished or removed so that the polluted soil does not pose any serious harm or serious potential harm to human health which would be incompatible with the current or plausible future use of the land concerned. Plausible future use shall be ascertained on the basis of the land use regulations in force when the damage occurred.

2.4. Achieving the goal of this Directive also requires restoration to be undertaken to compensate for interim losses from the date of the damage until the baseline is restored.

3. RESTORATION

3.1. Identification of reasonable restorative options

Identification of primary restorative actions

3.1.1. The competent authority shall consider a natural recovery option, that is an option in which no human intervention would be taken to directly restore the damaged natural resources and/or services to, or towards, baseline condition.

3.1.2. The competent authority shall also consider options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame.

Identification of compensatory restorative actions

3.1.3. For each option, the competent authority shall consider compensatory restorative actions to compensate for the interim loss of natural resources and services pending recovery.

3.1.4. The competent authority shall ensure that compensatory restoration takes account of the time dimension by discounting the value attributable to natural resources and/or services.

3.1.5. To the extent practicable, when evaluating compensatory restorative actions, the competent authority shall first consider actions that provide natural resources and/or services of the same type and quality, and of comparable value as those damaged.

3.1.6. When determining the scale of restorative actions that provide natural resources and/or services of the same type and quality, and of comparable value as those lost, the competent authority shall consider the use of a resource-to-resource or service-to-service scaling approach. Under this approach, the competent authority determines the scale of restorative actions that will provide natural resources and/or services equal in quantity to those lost.

3.1.7. If it is not possible to use the first choice resource-to-resource or service-to-service scaling approaches, monetary valuation techniques towards the damaged site may be used to choose compensatory restoration actions.

3.1.8. If, in the judgement of the competent authority, valuation of the lost resources and/or services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time-frame or at a reasonable cost, the competent authority may estimate the monetary value of the lost resources and/or services and select the scale of the restoration action that has a cost equivalent to the lost value.

3.2. Choice of the restorative options

3.2.1. Once the competent authority has developed a reasonable range of restorative options, it shall evaluate the proposed options based on, at a minimum:

(1) The effect of each option on public health and safety;

(2) The cost to carry out the option;

(3) The likelihood of success of each option;

(4) The extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option; and

(5) The extent to which each option benefits to each component of the natural resource and/or service.

3.2.2. If several options are likely to deliver the same value, the least costly one shall be preferred.

3.2.3. When assessing the different identified restoration options, the competent authority is entitled to choose primary restoration actions that do not fully restore the damaged bio-diversity, water or soil to baseline. The competent authority is entitled to take this decision only if it compensates for the services, resources or value foregone at the primary site as a result of its decision by increasing compensatory actions to provide a similar level of services, resources or value as were foregone. These additional compensatory actions shall be determined in accordance with the rules set out in section 3.1. and the present section of this Annex.

3.2.4. The competent authority shall invite the operator to co-operate in the implementation of the procedures set out in this Annex so that those procedures can be properly and effectively carried out. The operator's participation may take the form, *inter alia*, of supplying appropriate information and data.

3.2.5. The competent authority shall also invite take the persons on whose land restorative measures should be carried out to submit their observations and shall take them into account.

3.2.6. On the basis of the above assessment, the competent authority shall decide which restorative measures shall be implemented.

ANNEX III

INFORMATION AND DATA REFERRED TO IN ARTICLE 20(1)

The national reports referred to Article 20(1) shall include a list of instances of environmental damage and instances of liability under this Directive with the following information and data for each instance:

(1) Date of occurrence of environmental damage and date on which proceedings were initiated under this Directive.

(2) Industry classification code of the liable legal person(s).

(3) Type of environmental damage.

(4) Costs incurred with restoration and prevention measures, as defined in this directive:

- paid for directly by liable parties;
- recovered *ex post facto* from liable parties;
- unrecovered from liable parties. (Reasons for non-recovery shall be specified.)

(5) Amount of additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce this Directive.

(6) Whether there has been resort to judicial review proceedings either by liable parties or qualified entities. (The identity of the claimants and the outcome of proceedings shall be specified).

(7) Outcome of the restoration process.

(8) Date of closure of proceedings.

Member States may include in their reports any other information and data they deem useful on issues such as the desirability for introducing limited liability in certain cases, so as to allow a proper assessment of the functioning of this Directive. An evaluation of the possibility of introducing a cap should be undertaken within three years after the entry into force of this Directive.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

TITLE OF PROPOSAL

Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and restoration of environmental damage.

DOCUMENT REFERENCE NUMBER

COM(2002) 17 final

THE PROPOSAL

Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

Community action is needed to address effectively and efficiently site contamination and the loss of biodiversity in the Community.

Site contamination is a problem since it may pose a threat to human health and the environment as a result of releases of contaminants to ground or surface waters, uptake by plants, direct contact by people and fire or explosion of landfill gases. Some 300,000 sites in the Community have already been identified as definitely or potentially contaminated[1]. It has not been possible to quantify the risks posed by this contamination but the costs associated with its clean-up give a sense of the significance of the problem. Estimates published by the European Environment Agency put partial clean-up costs (just for some Member States or regions and some sites) at between EUR 55 and 106 billion[2] - between 0.6% and 1.25% of the EU GDP. This is a big figure, but one that represents a cumulative effect over many years rather than yearly impacts[3].

There is thus quite a significant environmental problem which in great part arose because in most Member States liability for environmental damage has only recently been enacted – thus most of the clean-up expenditures associated with the sites contaminated in the past is likely to end up being paid with public money since the original polluters cannot easily be held

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1 *Management of contaminated sites in Western Europe*, EEA, June 2000.

2 Austria, EUR 1.5 billion, 300 priority sites; Flandres, EUR 6.9 billion, total clean-up costs; Denmark, EUR 1.1 billion, total clean-up costs; Finland,EUR 0.9 billion, total clean-up costs; Ger./Bav, EUR 2.5 billion, total clean-up costs; Ger/SaA EUR 1.6-2.6 billion, large scale clean-ups; Ger/SchH EUR 0.1 billion, 26 priority sites; Ger/Thür EUR 0.2 billion, 3 large scale projects; Italy, EUR 0.5 billion, 1250 priority sites; Spain, EUR 0.8 billion, partial clean-up; Sweden, EUR 3.5 billion, total clean-up costs; UK, EUR 13-39 billion, 10000 ha contaminated land (from *Management of contaminated sites in Western Europe*, EEA, June 2000).

3 It is to be noted that the proposed regime being prospective only, cost associated with the clean-up of these sites will not fall under this proposal since these sites have been contaminated before the adoption of this proposal.

liable. Liability should in the future ensure that those who contaminate clean-up the pollution or pay for the clean-up and, by doing so, encourage (more) socially-efficient prevention by potentially liable parties.

Liability rules are thus necessary to prevent further contamination and to ensure that the polluter pays principle is applied when contamination arises in spite of the preventive measures adopted.

However, the key issue in the present context is not whether liability rules are desirable - after all many Member States have already enacted them, albeit with different approaches - but whether it is desirable to enact rules at Community level rather than leaving the issue entirely to the national level. Action at Community level is necessary because:

- Not all Member States have adopted legislation to address the problem[4]. Thus without Community action there is little guarantee that the polluter pays principle will be effectively applied across all the Community. Failure to apply it may perpetuate the inneficient patterns of behavior that resulted in the present stock of historic pollution.

- Most Member States' dedicated legislation does not mandate national authorities to ensure that orphan sites[5] contaminated after the entry in force of the legislation are actually cleaned up[6]. Thus national legislation does not ensure that the environmental objective – clean-up – is attained.

- Without a harmonised framework at Community level, economic actors could exploit differences in Member States' approaches to engage in artificial legal constructions (e.g. spin-off risky operations to legally distinct and undercapitalised companies, move 'front offices' within the Community to exploit liability loopholes without changing much in terms of preventive behaviour) in the hope of avoiding liability – such behaviour would defeat the ultimate purpose of Member States' liability rules and lead to wasteful allocation of resources[7].

In the specific case of biodiversity, robust indicators of the extent and significance of damage to biodiversity and the rate of biodiversity loss which we have been experiencing in the last years are still being developed. However, the European Commission's proposal for a European Union Sustainable Development Strategy, adopted on 15 May 2001, recognised that the loss of biodiversity in the Community has accelerated dramatically in recent decades making it one of the severe or irreversible threats to the future well-being of European society that warrants priority action.

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4 Portugal and Greece are amongst the countries without specific legislation on contaminated sites.

5 Sites where the responsible parties cannot be found or are insolvent

6 Were national competent authorities required to clean-up orphan sites, they would be encouraged to ensure that workable financial assurance mechanisms be put in place. Thus the mandate not only ensures clean-up but it also encourages the setting up of funding mechanisms consistent with the polluter pays principle.

7 The absence of signs of such behaviour in the US (see the study on the Preventive Effect of Environmental Liability done in the context of the economic assessment of the draft proposal) can conceivably be explained by the existence in the U.S. of a harmonising federal law which, while allowing the states ample freedom to tackle local problems, also ensures the different States' approaches do not undermine or weaken each other.

The two main Community legal instruments dedicated to the protection of biodiversity are the Habitats and the Wild Birds Directives[8]. These directives lack liability provisions applying the polluter pays principle and thus encouraging efficient preventive behaviour by private (and public) parties. Currently few, if any, Member States fill this void by imposing liability for biodiversity damage on private parties. Thus, Community action to protect and restore biodiversity is warranted on two main grounds: ensuring socially-efficient means are used to finance the remedying of damage to biodiversity in the Community and, by doing so, encourage efficient prevention.

THE IMPACT ON BUSINESS

Who will be affected by the proposal?

Which sectors of business

Businesses carrying out any one of the following activities would be covered:

– The operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

– The operation of installations subject to authorization in pursuance of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants in relation to the release into air of any of the polluting substances covered by the aforementioned Directive.

– The operation of installations subject to permit in pursuance of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

– The operation of installations subject to permit for discharging any of the dangerous substances in pursuance of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

– The operation of installations subject to permit in pursuance of 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 in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

Note: Directives 76/464/EEC and 80/68/EEC shall be repealed on 22 December 2013 in pursuance of Article 22 of Directive 2000/60/EC; as of 23 December 2013, the relevant provisions of Directive 2000/60/EC shall be entirely applicable.

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[8] Council Directive Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7) and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979, p. 1).

Consequently, Directive 2000/60/EC shall only be taken into account for the purpose of this Directive as of that date.

– Water abstraction and impoundment of water subject to prior authorisation in pursuance of Directive 2000/60/EC of the European Parliament and of the Council.

– Waste management operations, including the collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after-care of disposal sites, subject to permit or registration in pursuance of Council Directive 75/442/EEC of 15 July 1975 on waste and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste.

  Those operations include, *inter alia*, the operation of landfill sites under Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste and the operation of incineration plants under Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste.

– Manufacture, use, storage, transport or release into the environment, of dangerous substances within the scope of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances.

– Manufacture, use, storage, transport or release into the environment, of dangerous preparations within the scope of Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations.

– Manufacture, use, storage, transport or release into the environment, of plant protection products within the scope of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market.

– Manufacture, use, storage, transport or release into the environment, of biocidal products within the scope of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market.

– Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods as defined either in Annex A to Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road or in the Annex to Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail or as defined in Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods.

– Any contained use of genetically modified micro-organisms within the scope of Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms.

– Any deliberate release into the environment of genetically modified organisms within the scope of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.

– Transport of genetically modified organisms within the scope of Directive 2001/18/EC of the European Parliament and of the Council.

In addition to the above-mentioned businesses, all other occupational activities which would cause damage to biodiversity (as defined in the proposed regime) would also be covered.

Which sizes of business (what is the concentration of small and medium-sized firms)?

All sizes of business may be affected though individual businesses would only be affected to the extent they are potentially responsible for environmental damage. The concentration of small and medium-sized firms is not know precisely but it is likely that it will not be significantly different from the concentration of SMEs in industry in general.

Are there particular geographical areas of the Community where these businesses are found?

Even though it might well be that a greater concentration of businesses covered by the proposed regime might be present in areas of old industrialisation of the Community, businesses to fall under the scope of the proposed regime are present throughout the Community. It is to be noted that businesses located outside areas of old industrialisation but in areas which are marked by a rich biodiversity will also be covered.

What will business have to do to comply with the proposal?

Businesses covered by the proposed regime will have to bear directly (by taking the necessary measures itself and pay for their implementation) or indirectly (by reimbursing the competent authority which has taken the measures) the cost of remedying and, in certain cases, preventing environmental damage.

What economic effects is the proposal likely to have?

– *On employment*

The direct impact of the proposal on overall levels of employment is likely to be neutral, as is the case with environmental regulation in general. As far as the sectoral distribution of employment is concerned, it is likely that the proposal will lead overtime to a shift of employment from relatively polluting sectors and less environmentally responsible firms to cleaner sectors and more environmentally responsible companies, which is a socially desirable trend.

– *On investment and the creation of new businesses*

Overall, the direct effect is likely to be similar to the effect on employment as described above. However, the proposal is also likely to foster investments in preventive technologies and practices capable of leading overtime to more efficient levels of prevention. This would allow our societies to achieve high standards of environmental protection with fewer resources thus freeing up resources and facilitating higher growth.

– *On the competitiveness of businesses*

The direct impact on the external competitiveness of EU industry is not likely to be significant. This conclusion rests on two major arguments. First, the proposal is unlikely to affect all firms in any given industry in the same way. Firms that adopt cost-efficient preventive practices are unlikely to be saddled with significant liability-related costs and therefore their international competitiveness will be unscathed. Secondly, even the significantly larger direct cost impact of the U.S. Superfund, also a liability-based clean-up and restoration programme, has not affected significantly the international competitiveness of the U.S. industry.

Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

No. Such specific measures have not been deemed appropriate since, firstly, environmental damage might be caused irrespective of the size of the business that has caused it and since, secondly, most of the Directives, by reference to which the list of activities which will have to bear the cost of remedying environmental damage on a strict liability basis has been drawn up, do not make such a distinction.

CONSULTATION

List the organisations which have been consulted about the proposal and outline their main views.

The European Commission adopted a White Paper on Environmental Liability on 9 February 2000[9]. The objective of the White Paper was to explore how the polluter pays principle, one of the key environmental principles in the EC Treaty, can best be applied to serve the aims of Community environmental policy. The White Paper explores how a Community regime on environmental liability can best be shaped. Having explored different options for Community action, the Commission concludes that the most appropriate option is a Community framework directive on environmental liability.

The background to the White Paper includes a Commission Green Paper in 1993 (COM(93) 47 final), a Joint Hearing with the European Parliament that year, a Parliament Resolution asking for a Community Directive and an Opinion of the Economic and Social Committee in 1994.

The White Paper has elicited numerous comments from Member States and a wide range of interested parties alike[10]. The White Paper was also the subject of Opinions from the Economic and Social Committee[11] and the Committee of the Regions[12]. The European

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9 COM(2000) 66 final.

10 Summaries of those comments can be found at the following site: http://europa.eu.int/comm/environment/wel/main/index.cfm.

11 Opinion of 12 July 2000 (OJ C 268, 19.9.2000, p. 19).

12 Opinion of 14 June 2000 (OJ C 317, 6.11.2000, p. 28).

Parliament has not adopted an official position on the White Paper[13]. The Environment Council has also debated the issue of environmental liability in April and December 2000[14].

On 25 July 2001, the Environment Directorate-General released a working paper which set out the principles on which the future regime could be based. The working paper was sent to:

- the Member States;
- the EEA States;
- the accession countries;
- certain international organisations (EFTA and UNEP);
- European associations of local and regional authorities (CEMR – Council of European Municipalities and Regions and ARE – Assembly of the European Regions);
- European environmental NGOs (EEB – European Environmental Bureau, WWF – World Wildlife Fund, Greenpeace, BirdLife, Friends of the Earth and International Friends of Nature) and consumers association (BEUC);
- European industrial and professional federations and associations: Union of Industrial and Employer's Confederations of Europe (UNICE), European Chemical Industry Council (CEFIC), Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME), European Round Table of Industrialists (ERT), Centre européen des Entreprises à Participation Publique et des Entreprises d'Intérêt Economique Général (CEEP), Network for Industrially Contaminated Land in Europe (NICOLE), European Association of BioIndustries (EuropaBio), Fédération Européenne des Activités du Déchet et de l'Environnement (FEAD), Liaison Group of the European Mechanical, Electrical, Electronic and Metalworking Industries (ORGALIME), EU Committee of the American Chamber of Commerce in Belgium, Comité des Organisations Professionnelles Agricoles de l'UE & Comité de la Coopération Agricole de l'UE (COPA / COGECA), Contaminated Land Rehabilitation Network for Environmental Technologies (CLARINET), Comité Européen des Assurances (CEA), Fédération Bancaire de l'UE, International Association of Oil and Gas Producers (OGP), European Petroleum Industry Association (EUROPIA), Union Pétrolière Européenne Indépendante (UPEI), International Tankers Owners Pollution Federation (ITOPF), European Environmental Law Association (EELA), European Property Federation (EPF), European Atomic Forum (FORATOM).

Meetings (5) were organised with Member States, accession countries, environmental NGOs, the industry and local and regional authorities.

Comments were also invited through publication of the working document on DG Environment website.

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[13] The Committee on the Environment, Public Health and Consumer Policy has adopted on 12 September 2000 an Opinion for the Committee on Legal Affairs and the Internal Market on the White Paper on Environmental Liability (doc. PE 290.139).

[14] See Council Press Release No 486 of 18.12.2000 (Document No.: 14668/00).

Belgium, Denmark, France and the Netherlands have sent written comments. Poland has also submitted written comments. Four environmental NGOs (BirdLife International, WWF EPO – World Wildlife Fund European Policy Office, EEB – European Environmentral Bureau and Friends of the Earth Europe) have sent common comments. ECSA – European Community Shipowners' Association, ICS – International Chamber of Shipping and INTERTANKO – International Association of Independent Tanker Owners have also submitted common comments. In addition, the following interested parties have sent comments: AFEP-AGREF – Association française des entreprises privées; AVENTIS; BDI – Bundesverband der Deutschen Industrie; BERGKAMP Lucas (Prof. & Partner, HUNTON & WILLIAMS); BIPAR – European Federation of Insurance Intermediaries ; BNFL – British Nuclear Fuels Plc; CBI – Confederation of British Industry; CEA – Comité européen des assurances; CEEP – European Centre of Enterprises with public participation and of enterprises of general economic interest; CEFIC – European Chemical Industry Council; CEMBUREAU – The European Cement Association; CEMR – Council of European Municipalities and Regions; CLECAT – European Organisation for Forwarding and Logistics; CODACONS – Coordinamento di Associazioni per la Tutela dell'Ambiente e dei Diritti di Utenti e Consumatori; ECGA – European Carbon and Graphite Association; EELA – European Environmental Law Association; EFCA – European Federation of Engineering Consultancy Associations; ELO – European Landowners Organisation; EPF – European Property Federation; ERT Environmental Group – European Round Table of Industrialists; ESA – Environmental Services Association; EURELECTRIC – Union of the Electricity Industry; EuroGeoSurveys – Association of Geological Surveys of the European Union; EUROMINES – European Association of Mining Industries; EUROPIA - European Petroleum Industry Association ; FBE – European Banking Federation; FEAD – European Federation of Waste Management and Environmental Services; FIEC – European Construction Industry Federation; FLA – Finance and Leasing Association; FORATOM – European Atomic Forum; Freshfields Bruckhaus Deringer; IBEC – Irish Business & Employers Confederation; IFAW – International Fund for Animal Welfare; IoD – Institute of Directors; ITOPF – International Tanker Owners Pollution Federation; IV – Industriellenvereinigung; Leaseurope; MEDEF – Mouvement des entreprises de France; Leaseurope ; NFU – National Farmers' Union; NICOLE – Network for Industrially Contaminated Land in Europe; NIREX Ltd; Nordic Family Forestry; OGP – International Association of Oil and Gas Producers; RUIZ Marta (lawyer); SMMT – The Society of Motor Manufacturers and Traders; Suez; Syngenta International; Thames Water ;TVO – Teollisuuden Voima; UEAPME – Union européenne de l'artisanat et des petites et moyennes entreprises; UEPC – Union européenne des promoteurs-constructeurs; UIC – Union des industries chimiques; UKELA - UK Environmental Law Association (with separate submissions from the Scottish Law Working Party of UKELA); UNICE – Union of Industrial and Employers' Confederation of Europe; VCI – Verband der Chemischen Industrie; VDEW – Verband der Elektrizitätswirtschaft; VDMA – Verband Deutscher Maschinen- und Anlagenbau; WKÖ – Wirtschaftskammer Österreich; ZVEI – Zentralverband Elektrotechnik- und Elektronikindustrie.

Outline of the main views of the interested parties

The main views of the interested parties can be summarised as follows[15]:

Member States

[15] The integral text of the submissions received (in principle in their original language), for which no request for confidentiality has been made, can be found at the following site: http://europa.eu.int/comm/environment/liability/followup.htm.

- On the whole, the reliance on public law mechanisms has been welcomed, although some regrets have been expressed that civil liability and traditional damage are not covered any longer.

- The need for as a precise legal regime, including definitions, as possible has been underlined.

- The need to ensure the full implementation of the "polluter-pays" principle and the importance of carefully considering the new role to be played by public authorities in relation to "orphan damages" (i.e. when the polluter cannot pay for making good the damage) have been stressed, notably in relation with the potential financial consequences for public authorities.

- Attention has been drawn to the particular situation of the owner or occupier of the land affected by environmental damage caused by a third party.

- Concerns have been expressed about proposals departing from the environmental area, which touch upon issues more relating to company law or civil procedure.

- Reference was made to the need to clarify the relation with international conventions; in addition, mention was made of different initiatives at international level in the field of civil liability in the light of which the need for the Commission to pursue its reflections on the subject was underlined.

- Doubts have been expressed with respect to the inclusion of interim losses.

- The future Community regime should not prevent Member States to adopt more stringent provisions.

Accession countries

- On the whole, the proposals set out in the working document have not raised objections; some comments made even suggest that proposals should be more comprehensive.

- Some concerns have been expressed with respect to the potential financial consequences for public authorities.

Industry and professional associations

If industry welcomes the fact that traditional damage (personal injury and damage to property) is left out and the fact that no direct action should be given to NGOs against operators, the same concerns as were already expressed in the past, have been repeated. The main points being that industry:

- insists on the need to have clear and precise provisions in general and definitions in particular;

- is generally opposed to any alleviation/reversal of the burden of proof,

- is generally opposed to joint and several liability,

- wishes to see strict liability restricted to a limited number of activities (some industry representatives consider that there is no reason to depart from fault-based liability),

- insists that complying with a permit/state-of-the-art/development risk should be retained as defences,

- is generally opposed to granting any kind of privileged status to NGOs as far as access to justice is concerned,

- is concerned about the difficulties relating to the evaluation of environmental damage,

- is worried about the difficulty operators could encounter in finding appropriate insurance coverage, though it welcomes that financial security is not made compulsory,

- invites the Commission to take account of the existing international conventions in the relevant fields (e.g. oil pollution, nuclear damage), and

- is worried about the use of economic valuation techniques.

- Industry is also concerned by the new proposals in the working document on "piercing the corporate veil".

Environmental non-governmental organisations

- The Commission's intention to present a legislative proposal soon is welcomed but there is a fear that the level of ambition is not high enough. More particularly, comments from environmental NGOs point in the following directions:

- In general, they suggest a wide-ranging review of the minimalist approach set out in the Working Paper to consider new developments in the field of genetically modified organisms (GMOs), integrated products policy (IPP), the review of the Community's policy in the field of dangerous chemicals and the need to follow up the *Erika* tanker oil spill.

- They consider that the scope of strict liability is too limited (all potentially dangerous activities should be covered or, at the very least, those activities they have listed in their comments).

- They insist that biodiversity damage outside protected areas and damage to protected areas under international conventions to which the Community and Member States are contracting parties should be covered. Liability should also apply to species protected by national legislation and all types of areas protected at national and sub-national levels. Liability should apply to all bird species protected under the Wild Birds Directive.

- They consider that, if the distinction between strict and fault-based liability is to remain, it is imperative that the fault based liability regime is also extended to pollution of water resulting from activities which may be classified as non-dangerous. (in the case, e.g., of water pollution by sewage sludge or waste water).

- They insist that soil contamination harmful for the environment and potentially harmful to human health should be covered.

- They consider that traditional damage should be covered.

- They request that the significance thresholds be substantially lowered so that the future regime be applicable to cases which fall in between the trivial and sensational.

- They ask that the Commission look for solutions to historical damage, especially in the case of contaminated soils.

- They recommend that 'compliance with a public order' does not allow licensed or authorised activities to be exempt from liability including commercially grown genetically modified crops.

- They welcome joint and several liability in cases where apportionment is not feasible.

- They welcome liability of controlling legal persons and persons providing financial security.

- They consider that citizens and affected groups should have legal standing and that they should be able to bring direct actions against operators at least in certain cases; there should be appropriate financial relief for citizens (i.e. alleviation of court costs and damages claims) who bring cases against polluters, especially where imminent damage could occur.

- They recommend that financial security should be made obligatory at Community level.

- They welcome in general restoration conditions for damage.

- They consider that the burden of proof should be alleviated.

- One NGO also recommends that monetary valuation techniques used where comparable restoration is not possible should include stated preference techniques; it supports also a retroactive regime.

<u>Local and regional authorities</u>

- Concerns have been expressed about the fact that the planned regime would lay down demanding obligations on public authorities in the implementation of the regime, especially when no polluter may be held liable.

- Concerns have also been expressed about the fact that the action of public authorities could be challenged by qualified entities.