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ANY OTHER BUSINESS

EUROPEAN COMMISSION'S WHITE PAPER ON ENVIRONMENTAL LIABILITY

Note by the Director

Summary:	The Commission of the European Communities has published a White Paper on environmental liability.
Action to be taken:	Consider whether to instruct the Director to submit observations on the White Paper to the Commission.

- 1 The Commission of the European Communities has published a White Paper on Environmental Liability (document COM(2000)66).
- 2 The White Paper deals with the general question of environmental liability. It also refers specifically to bases of liability, subjects liable, types of damage covered, the burden of proof, environmental restoration and financial security for potential liabilities.
- 3 The Executive Summary of the White Paper is reproduced in the Annex. Copies of the Paper are available to delegations on request.
- 4 The Commission of the European Communities invites comments on the Paper by 1 July 2000.
- 5 The White Paper refers to the relationship between the proposed Community legislation and international conventions relating to marine oil pollution and damage caused by maritime transport of hazardous and noxious substances. Section 4.8 of the White Paper reads as follows:

There are a growing number of international conventions and protocols dealing with (environmental) liability in several fields. There is, for instance, a long standing body of conventions and protocols concerning damage caused by

nuclear activities, as well as in the field of oil pollution at sea. A more recent convention deals with damage caused by maritime transport of hazardous and noxious substances; Member States are currently considering its possible ratification. All these conventions are based on a strict but limited liability, and the concept of a second tier of compensation. In the case of oil pollution, the second tier is a fund, fed jointly by the contributing oil companies in the importing states, which compensates - also up to a certain limit - liabilities exceeding the ship owners liability. In light of recent marine pollution accidents, it should be examined if the international regime should be complemented by EC measures. The Commission will prepare a Communication on oil tanker safety (June 2000) examining, inter alia, the need for a complementary EC regime on liability for oil spills. Different options in this regard will be examined, taking into account the specific character of the sector. More in general, a future EC regime on environmental liability would have to clarify to which extent there is room for application in those areas that are already covered by international law.

- 6 The Assembly may wish to consider whether the 1992 Fund should make observations on the White Paper, drawing the Commission's attention to the benefits of the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention and emphasising the importance that any action by the Commission of the European Communities should not prejudice or undermine the operation of this regime.

7 **Action to be taken by the Assembly**

The Assembly is invited:

- (a) to take note of the information contained in this document; and
- (b) to consider whether to instruct the Director to submit observations on the White Paper to the Commission of the European Communities on behalf of the 1992 Fund.

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EXECUTIVE SUMMARY

This White Paper explores various ways to shape an EC-wide environmental liability regime, in order to improve application of the environmental principles in the EC Treaty and implementation of EC environmental law, and to ensure adequate restoration of the environment. The background includes a Commission Green Paper in 1993, a Joint Hearing with the European Parliament that year, a Parliament Resolution asking for an EC directive and an Opinion of the Economic and Social Committee in 1994, and a Commission decision in January 1997 to produce a White Paper. Several Member States have expressed support for Community action in this field, including some recent comments on the need to address liability relating to genetically modified organisms (GMOs). Interested parties have been consulted throughout the White Paper's preparation.

Environmental liability makes the causer of environmental damage (the polluter) pay for remedying the damage that he has caused. Liability is only effective where polluters can be identified, damage is quantifiable and a causal connection can be shown. It is therefore not suitable for diffuse pollution from numerous sources. Reasons for introducing an EC liability regime include improved implementation of key environmental principles (polluter pays, prevention and precaution) and of existing EC environmental laws, the need to ensure decontamination and restoration of the environment, better integration of environment into other policy areas and improved functioning of the internal market. Liability should enhance incentives for more responsible behaviour by firms and thus exert a preventive effect, although much will depend on the context and details of the regime.

Possible main features of a Community regime are outlined, including: no retroactivity (application to future damage only); coverage of both environmental damage (site contamination and damage to biodiversity) and traditional damage (harm to health and property); a closed scope of application linked with EC environmental legislation: contaminated sites and traditional damage to be covered only if caused by an EC regulated hazardous or potentially hazardous activity; damage to biodiversity only if protected under the Natura 2000 network; strict liability for damage caused by inherently dangerous activities, fault-based liability for damage to biodiversity caused by a non-dangerous activity; commonly accepted defences, some alleviation of the plaintiffs' burden of proof and some equitable relief for defendants; liability focused on the operator in control of the activity which caused the damage; criteria for assessing and dealing with the different types of damage; an obligation to spend compensation paid by the polluter on environmental restoration; an approach to enhanced access to justice in environmental damage cases; co-ordination with international conventions; financial security for potential liabilities, working with the markets.

Different options for Community action are presented and assessed: Community accession to the Council of Europe's Lugano Convention; a regime covering only transboundary damage; a Community recommendation to guide Member State action; a Community directive; and a sectoral regime focusing on biotechnology. Arguments for and against each option are given, with a Community directive seen as the most coherent. A Community initiative in this field is justified in terms of subsidiarity and proportionality, on grounds including the insufficiency of separate Member State regimes to address all aspects of environmental damage, the integrating effect of common enforcement through EC law and the flexibility of an EC framework regime which fixes objectives and results, while leaving to Member States the ways and instruments to achieve these. The impact of an EC liability regime on the EU industry's external competitiveness is likely to be limited. Evidence on existing liability regimes was reviewed and does suggest that their impact on national industry's competitiveness has not been disproportionate. The effects on SMEs and financial services and the important question of insurability of core elements of the regime are dealt with. Effectiveness of any legal liability regime requires a workable financial security system based on transparency and legal certainty with respect to liability. The regime should be shaped in such a way as to minimise transaction costs.

The White Paper concludes that the most appropriate option would be a framework directive providing for strict liability for damage caused by EC regulated dangerous activities, with defences, covering both traditional and environmental damage, and fault-based liability for damage to biodiversity caused by non-dangerous activities. The details of such a directive should be further elaborated in the light of consultations. The EU institutions and interested parties are invited to discuss the White Paper and to submit comments by 1 July 2000.