



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

ASSEMBLY
6th extraordinary session
Agenda item 7

92FUND/A/ES.6/6
15 March 2002
Original: ENGLISH

EUROPEAN COMMISSION PROPOSAL FOR A DIRECTIVE ON ENVIRONMENTAL LIABILITY

Note by the Director

Summary:	The European Commission has adopted a proposal for a Directive on environmental liability with regard to the prevention and restoration of environmental damage.
Action to be taken:	Information to be noted.

1 Introduction

- 1.1 At its 4th extraordinary session, held in April 2000, the Assembly took note of the information contained in a document prepared by the Director relating to a White Paper on Environmental Liability prepared by the Commission of the European Communities (document 92FUND/A/ES.4/4).
- 1.2 The Director was instructed to present comments on behalf of the 1992 Fund drawing the Commission's attention to the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention. It was stated that in his comments the Director should remain neutral on political issues and emphasise the positive aspects of the global regime (document 92FUND/A.ES.4/7, paragraph 5.1.2).
- 1.3 At its 5th session, held in October 2000, the Assembly took note of the comments presented by the Director on behalf of the 1992 Fund, as instructed by the Assembly, to the European Commission on the Commission's White Paper on environmental liability, drawing the Commission's attention to the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention, as set out in the Annex to document 92FUND/A.5/5. The Assembly noted in particular the observation made by the Director in his comments that the Commission should take fully into consideration the existing global regime based on the 1992 Conventions and that any action by the Commission should not hamper the functioning of that regime.

2 Proposed Directive

- 2.1 On 23 January 2002 the Commission adopted a proposal for a Directive on environmental liability with regard to the prevention and restoration of environmental damage (document COM(2002) 17 final).
- 2.2 The proposed Directive is accompanied by an Explanatory Memorandum. Sections 1 (Introduction) and 2 (Overview of the proposal) of this Memorandum are reproduced in the Annex to this document.
- 2.3 The proposed Directive has a narrower scope than that envisaged in the White Paper. In the White Paper, it was proposed to include 'traditional damage' (damage to persons and property as well as all other types of economic loss) but these heads of damage are excluded from the scope of the proposed Directive, which focuses on compensation for environmental damage, including preventive measures. In the proposed Directive, environmental damage includes damage to biodiversity protected at European Union and national levels, damage to waters as regulated by the Water Framework Directive (2000/60/EC), as well as land contamination which poses a threat to human health.
- 2.4 Under the proposed Directive, where environmental damage has occurred the competent public authority shall either require the operator whose activity has caused the damage to take necessary restorative measures or the authority shall itself take such measures. If the operator fails to comply with such a request the competent authorities shall take the necessary restorative measures. Restoration is defined as follows (Article 1.16):
- “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.
- 2.5 Under Article 5 of the proposed Directive the necessary restoration measures shall be defined in accordance with Annex II to the Directive.
- 2.6 Annex II states that the objective of restoration is to return damaged habitats, species and associated natural resources, services and waters to baseline conditions. Interim losses from the date of the damage until the baseline condition is achieved should be compensated. Restoration is carried out through rehabilitating, replacing or acquiring the equivalent of damaged natural resources and/or services at the site originally damaged or at a different location.
- 2.7 In identifying reasonable restorative options, the competent authority should under Annex II consider a natural recovery option as well as options comprising actions that directly restore or accelerate restoration of the natural resources and services towards baseline conditions. For each option, the competent authority shall consider compensatory restorative actions to compensate for the interim loss of natural resources and services pending recovery. Such compensatory restoration should take into account the time dimension by discounting the value attributable to natural resources and/or services. To the extent practicable the competent authority shall first consider compensatory actions that provide natural resources and/or services of the same type and

quality, and of comparable value as those damaged. If such an approach is not possible, monetary valuation of the lost resources and/or services of the damaged site may be used for the purpose of choosing compensatory restoration actions.

- 2.8 Under Article 7 of the proposed Directive 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 as well as the costs of assessing an imminent threat of such damage.
- 2.9 The proposed Directive deals with the relationship between the proposed Directive and international conventions dealing with the issue of civil liability in special fields such as for oil pollution. In this regard the Explanatory Memorandum states:

“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 improve maritime safety and the functioning of the International Oil Pollution Compensation Fund as far as liability issues are concerned. When the review of the operation of the IOPC Fund undertaken under the auspices of the International Maritime Organization 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.”

- 2.10 This relationship is dealt with in Article 3.3 of the proposed Directive which reads:

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

- (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.”

2.11 The proposal will be considered by the European Parliament and the Council. The final adoption of the Directive requires agreement by both these European Union institutions.

3 Action to be taken by the Assembly

The Assembly is invited to consider the information contained in this document.

* * *

ANNEX



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.1.2002
COM(2002) 17 final

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 Romania¹, a long list could, be drawn up of instances where the environment has been heavily polluted or has otherwise significantly suffered². 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 policy³; 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 Programme⁵.

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 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

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 led 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.

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.