UNICE
Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

22.3/28/1 6 July 1998

CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE

UNICE COMMENTS

1. INTRODUCTION

The issue of civil liability for environmental damage in the EU – usually referred to as "environmental liability" – has taken a turn which gives UNICE cause for grave concern. The purpose of this paper is to explain this concern in some detail.

On 17 November 1997, Environment Directorate-General, DG XI, published a working document on this topic. This paper was intended to structure a debate enabling the Commission's services to elaborate further on this rough outline and start drafting a White Paper. The working document was presented by Commission officials at hearings in December at which UNICE was invited to give its views, together with a large number of industry organisations and environmental action groups.

Both UNICE and other organisations voiced a series of fundamental questions. Commission officials indicated that these questions would be seriously considered in the process of drafting the forthcoming White Paper. At the same time, and despite the plea for on-going and in-depth consultation of industry, participants were told that there would be no further consultation until after actual adoption and publication of a White Paper. Since the hearing, there has been total silence. Commission officials could not be contacted to obtain clarification on developments in this important matter.

This is unfortunate, especially as UNICE feels it can make a positive contribution to the debate (see section 5).

UNICE has now received unofficially a copy of the draft White Paper (dated 22 April 1998). While, admittedly, this document is only a draft and was not intended for comments or discussion, it has already been discussed within industrial circles. UNICE has prepared these comments because it is alarmed at both the tone and content of the draft White Paper.

The tone of the document is one-sided. It rests on an extreme interpretation of the "polluter pays" principle. It advocates that industry should pay the cost of restoring the environment in Europe without recourse to any defences or due legal process. The only positive element is rejection of the Lugano Convention.

A typical illustration of a misleading paragraph is the example given on page 1 of a dramatised case of an "inadequate" storage facility. The authors of the draft fail to mention that this is an almost classical example where, in the circumstances of the case, an operator will be liable under existing theories of tort law in all Member States. It is very unlikely that there is any country in the EU which has no legal requirements (either in law or in general or specific permits) for storage of hazardous substances.

Industry recognises that, for such events, the polluter will normally be liable under existing law and will be held responsible for clean-up costs. It is misleading to use this case as an argument for strict environmental liability.

2. SOME GENERAL ISSUES

- ***Rationale for "environmental liability"***

  The rationale for introducing "environmental liability" as set out in paragraph III.4 of the draft White Paper is questionable: it goes without saying that non-compliance with EU or national legislation gives rise to liability in all Member States. In this sense, environmental legislation and liability laws are already entirely consistent.

  In paragraph III.5, the draft White Paper argues that introduction of a strict liability regime will serve the objective of reducing distortions of competition.

  This argument is just as incorrect as it is misleading. It is not borne out by the economic study, which states that companies do not take environmental liability into account when choosing a place of business. The authors of the study had not found that differences in the legal regimes of Member States result in such distortions.

  Furthermore, there is an important contradiction in the draft White Paper: on the one hand, its authors propose to impose environmental liability to remove distortions in the internal market; at the same time, they encourage Member States to introduce stricter rules than those set out in a future directive.

  In the discussion on environmental liability, there is this constant dilemma: regulate at EU level or leave it to Member States on the basis of the principle of ***subsidiarity***? The services of the Commission wish to have the best of both worlds: achieve harmonisation ***and*** let Member States introduce their own stricter rules.

  Thus, the authors of the draft White Paper propose to replace a perceived current distortion by a new future distortion. This is both inconsistent and unreasonable.

- ***Competitiveness of industry in Europe***

  On the key issue of European industry competitiveness, the draft White Paper seems to say: "European industry should not worry, the US and Japan will follow" (page 31).

  UNICE finds this argument naive. It is extremely unlikely that Japan would follow and the legislation implementing "Superfund" in the US is already quite controversial. The competitive position of industry in Europe will be adversely affected if Europe's main trading partners do not follow the EU model.

  International alignment is unlikely to take place because it is hard to conceive that global harmonisation could be achieved in this field where it has failed in other, far less contentious areas (such as contract law). Conversely, if harmonisation (including the White Paper's proposals on "piercing of the corporate veil") were to be achieved within a reasonable period of time, it could expose European parent companies of US companies to US-style litigation and damage awards. This would worsen the competitive position of EU industry even further. All of this should lead the EU to proceed with extreme caution.

- ***Insurability***

For industry in Europe, insurability is a pre-requisite for any form of liability. The draft White Paper fails to indicate whether or how environmental liability can be adequately insured. The new Dutch policy is not a panacea: it provides limited coverage, for smaller and medium-sized companies only. The services of the Commission, on the other hand, are optimistic that a form of liability, as proposed in the draft, can be insured. How and at what cost is not at all clear.

- ***Strict liability and prevention of damage***

  The draft White Paper (par. III-2) considers strict liability as an instrument to prevent damage to the environment. Thus, liability law is used as a tool to achieve political objectives. UNICE finds this approach incorrect as a matter of principle.

  Moreover, UNICE feels that, more than strict liability, a fault-based liability regime gives companies and individuals a much stronger incentive to avoid being held liable – simply by refraining from negligent acts. The difference between fault-based liability and strict liability is that in the latter case, a polluter is liable even if the relevant event is beyond his control. If an event is beyond someone's control, it is impossible by definition to avoid the event. Therefore, prevention can only play a role, psychologically as well as legally, where liability is fault-based.

- ***Broad Directive***

  The draft White Paper opts for a "broad Directive". This would include both damage to the ecology and "classical" liability for death and injury and damage to property. However, the paper does not clarify why it should be necessary to re-codify liability for damage to property and for death and injury to persons at European level.

  In UNICE's view, legislation in the Member States is adequate, rooted as it is in national legal traditions. It is unnecessary and undesirable to re-codify tort liability law in the EU via the back-door approach of "environmental liability".

- ***Transboundary pollution***

  The ambitions of the draft document's authors extend not only to pollution at national level, but also to transboundary pollution (draft White Paper, page 6). However, transboundary pollution cases are already adequately dealt with in law. They give rise to questions about jurisdiction of courts, recognition and enforcement of judgements, and applicable law. The former two aspects are covered by the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, as interpreted by the European Court of Justice. The third aspect is governed by the rules on conflict of laws which form part of the legal systems in all Member States (and which are codified internationally by the Hague Conference on Private International Law).

  Therefore, there is no need for legislation on transboundary pollution cases at EU level.

- ***Definition of "damage to the environment"***

  At the December 1997 hearings, UNICE queried how a court or administrative authority should define and quantify the notion of "damage to the un-owned environment". It is disappointing that the draft White Paper does not address this.

  The draft does not explain how national courts and administrative authorities should calculate "damage to the environment" in a particular case. The "reasonable" cost of restoration (p. 16) needs further definition in order to be workable. The paper mentions the "points system" used by the "Länder" in Germany. However, this is a fiscal notion used to calculate an amount of fiscal levies under Preservation of Nature Legislation. As such, it is arbitrary and very bureaucratic to

implement. It is not well suited to a private law compensation scheme. Liability law should leave courts a reasonable measure of discretion to take account of all circumstances of each particular case.

The draft White Paper does introduce a new concept, i.e. a form of "immaterial" compensation, (page 16). This concept is based on the notion that the environment has "ethical value". UNICE finds this idea extremely vague. It causes unacceptable uncertainty for industry. It is of little or no value to the cause of the environment.

- ***Environmental Interest Groups (EIGs)***

The draft White Paper offers environmental interest groups the possibility to ask for an injunction to terminate a particular activity (paragraph VII, 5). What if that activity is performed entirely within permit limits? Would this not expose companies to harassment through abuse of injunction proceedings? Who qualifies as an "environmental interest group"?

Injunctions can only effectively be applied to activities which are within the control of the defendant. Therefore, UNICE fails to understand how this could apply in any system other than a fault-based liability.

UNICE rejects the idea that EIGs should be granted the right to claim compensation for clean-up cost. That right belongs to the State as guardian of the public interest. It would give rise to a number of very difficult issues such as whether private owners of land should tolerate EIGs cleaning up their property, how to determine what are "reasonable costs", and how to ensure that funds are effectively used for relevant and reasonable clean-up activities, etc.

It would be excessive to give both the State ***and*** individual injured parties ***and*** EIGs concurrently the right to proceed against an alleged polluter. It is difficult to envisage how this would work from a procedural point of view. What if the EIG claims restoration whilst injured parties claim compensation? The services of the Commission seems to opt for giving priority to the former. The rights of individuals are thereby ignored. This conflicts with the democratic premises of the Union and with constitutional protection of individuals in Member States.

However, UNICE fully supports the proposal to give EIGs the right of relief, through injunctions or otherwise, against *the authorities* if they fall short in their environmental obligations.

- ***Retro-activity***

The draft White Paper devotes only a few lines, on page 21, to a "transitional regime". The key yardstick to determine whether environmental liability applies is whether the "damage occurs after the entry into force of the EC regime". The draft paper does not explain, however, how "new pollution" should effectively be distinguished from "old pollution".

A solution would be, in UNICE's view, to establish a legal presumption that pollution is caused before the entry into force of the regime. The plaintiff could rebut that presumption if he establishes beyond reasonable doubt that the pollution was caused after that date.

The draft White Paper, however, proposes a reversal of the burden of proof: yet another example where the draft proposals give rise to significant legal uncertainty.

3. LACK OF LEGAL PROTECTION / BURDEN OF PROOF

The draft White Paper offers no legal protection whatsoever to defendant companies. It advocates a reversal of the burden of proof, even as regards causation (p. 19).

It is a basic principle of law, enshrined at EU level in the "product liability" Directive, that the plaintiff should have the burden of proof that the defendant caused the damage. This is closely related to the principle in criminal law that a party is innocent until proven guilty. Under some legal systems, e.g. in the Netherlands, the courts have some discretion when weighing evidence in a particular case. This would achieve some alleviation of the burden of proof. However, this is not the same as a complete reversal of the burden of proof.

The authors of the draft paper use the German "Umwelthaftungsgesetz" (footnote 12) as an illustration of reversal of the burden of proof. They do not, however, quote relevant case law by the Bundesgerichtshof, which clarifies that this reversal to the disadvantage of the defendant is limited: the plaintiff has to establish first of all "on the basis of the circumstances of the case" that the particular plant operated by the defendant was capable of causing the damage. This amounts to placing the burden of proof of ***causation*** on the claimant.

Probability theories are not suitable as a basis for establishing the claimant's case *prima facie*. This holds true in particular in complex and uncertain situations. An example: particular diseases occur in an area surrounding a plant. In such cases, two causation issues have to be established: first, it has to be established whether the plant has indeed changed the quality of the environment (air, soil); next, it has to be established whether these changes have caused the particular diseases. Why should the plant operator be in the better position than the claimant to discharge the burden of proof in respect of the second causation issue?

The draft White Paper offers defendants extremely limited – if any – defences. The argument used is that "having only a few defences makes the chances for the defendants to win a legal procedure smaller" (page 34).

UNICE finds this statement totally unacceptable. It runs counter to basic principles of fair administration of justice and challenges any notion of fairness and legal protection. Any environmental liability regime is acceptable only if liability and defences are balanced. Where the State is the claimant or where solely the interest of or damage to the environment is at stake, a defendant polluter should at least be allowed the defence of "compliance with a permit". When granting a permit, the authorities weigh the interest of the environment against the economic interest of the proposed industrial activity. In doing so, they accept that some impairment of the environment is acceptable. It is unreasonable to hold the permit holder liable for such damage, as it was considered tolerable by the authorities when they granted the permit.

Another defence that should be allowed is "state of the art" and development risk. It is unreasonable for the legislator or a court to assign the risk of unknown future damage to one party. It is also undesirable for society because it will stifle industry in its innovative efforts.

Finally, defendant polluters should be allowed defences such as action by a third party, order by a public authority, compliance with technical and environmental standards, etc.

4. NEW ELEMENTS

So far, this position paper has dealt with issues which have been a recurrent feature in discussions on the topic of environmental liability. However, the draft White Paper adds a significant number of new elements, each of which is to the detriment of industry in Europe.

- ***Piercing of the "corporate veil"***

  First, piercing of the "corporate veil". This is not an issue for piecemeal regulation in an "Environmental Liability" Directive. The proposals made in the draft White Paper would put an end to the rationale of company law. It superimposes strict liability of parent companies for environmental liability on top of that of subsidiaries.

The issue of abuse of corporate constructions is addressed in national law through sophisticated legal techniques which avoid "deep pocket" tactics. Contrary to what is claimed on page 33, the proposals for "piercing the corporate veil" in the draft White Paper would establish a "deep pocket" approach as a matter of principle. This, again, is inconsistent and harmful for industry. It would discourage incorporation or establishment of companies in the EU.

- ***The "1% rule"***

  Another new element is the "1% rule" (page 19). The proposal introduces joint and several liability for polluters contributing more than … *1%* of the alleged damage.

  Joint and several liability can only apply in cases where more than one party who could have caused the entire damage can be identified but where the plaintiff cannot establish which party actually caused the damage. The traditional example is where two hunters fire a bullet each and a by-stander is hit by one bullet. The victim cannot prove which of the two hunters hit him or her. It is clear that either of the defendants may have caused the entire damage.

  Where it can be established that a polluter has caused only part of a pollution, liability should be limited to that part. The only exception is the case of the hunter where it cannot be established who caused the damage, although it is certain that one of the parties did. It is equally unreasonable to reverse the burden of proof in these cases: for a particular co-defendant, it is as difficult as it may be for the plaintiff to establish who else has caused the pollution and to what extent.

  The 1% rule would undoubtedly give rise to "deep pocket" tactics.

  In summary, the 1% rule could in fact mean that a company making only a minor contribution to a particular case of pollution would have to pay the whole bill until and unless the defendant could indentify who are the remaining polluters, and in what ratios. This is as impracticable (also from an insurance point of view) as it is fundamentally unfair.

- ***Soil contamination***

  On page 16, under b, of the draft White Paper it is proposed to establish at EU level standards and objectives for clean-up of contaminated sites. This extremely ambitious proposal ignores the fact that local circumstances vary substantially throughout the EU.

  This is an evolving area where standards and objectives are being developed in a careful manner in the Member States, taking account of constant improvement in clean-up techniques and methods for identification of hazards. The scope of the problem is in a process of crystallisation at national level. It would be premature and counter-effective for the EU to seek to harmonise here. Subsidiarity should be key.

- ***Waste***

  The draft White Paper, on pages 14-15, introduces the concept of liability for damage caused by waste of a person who has no control over the waste. That person has the burden of proving that there was no causal link whatsoever between the transaction or transfer he/she was involved in, and damage caused by the waste. Also, the paragraph in question seems to establish a "presumption of illegality" in respect of any person who is involved in waste disposal activities.

  A regime as proposed would deter anyone from wishing to be involved in any form of waste disposal. It is yet another example of the "deep pocket syndrome". Because of the deterrence and "deep pocket" effects, the consequences would be extremely adverse, not only for industry but for society as a whole and – last but not least – for the environment.

- ***Limitation***

  So far, this paper has expressed serious concerns regarding the bleak prospects for industry in Europe if the proposals set out in the draft White Paper were to be enacted.

  UNICE is, of course, aware that it is proposed that the new regime would initially be limited to areas protected by the "Habitats" Directive and the "Wild Birds" Directive. However, UNICE does not think this should lessen industry's concerns. The draft White Paper and any legislation resulting from it will set a precedent for future legislation at EU level. At national level, Member States would be encouraged to go beyond the minimum regime proposed in the White Paper. Therefore, the aforesaid limits on the coverage of the proposed regime will not reduce its negative impact on industry.

5. THE WAY FORWARD

UNICE is not against all forms of legislation in this domain. However, environmental liability is a "greenfield" matter at the level of the Union. It requires careful weighing of minimum requirements of justice, legal security and assessment of cost vs. benefit. The proposals set out in the draft White Paper do not meet these standards. They do not create a level playing-field. They will confront industry in Europe with huge cost and a major competitive disadvantage in the globalising marketplace.

The environment is a valuable public asset and authorities should have an obligation to clean up those parts of the environment that are of value to society (generally speaking, protected areas and protected species). Where these parts of the environment have been polluted by an identified polluter, authorities could be granted a right of recourse to recover reasonable clean-up cost against the polluter. That right of recourse should in UNICE's view derive from a fault-based liability system. Fault-based liability is already in place in all Member-States. "Fault" would exist where a polluter is in breach of a prohibition established by law either at EU or at national level, to pollute protected areas and species. The law would specify that the prohibition serves the public interest for which public authorities are responsible.

UNICE acknowledges that the right of recourse could, theoretically, also be based on strict liability. As set out above, any strict liability regime should be accompanied with reasonable defences (including but not limited to compliance with permit and state of the art).

A system, as described here in summary form, could include the right for environmental action groups to be granted injunctions against the government for not complying with its obligation to restore the environment.

This system has the following advantages: it is consistent with the notion that the environment is a matter of public interest; it is suitable for regulation at EU level in the form of a Directive; it does not interfere with national legal systems and their evolution; and, last but not least, it would be of great benefit for the environment.

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