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

22.3/28/1 **10 April 2000**

ENVIRONMENTAL LIABILITY
Commission White Paper

UNICE COMMENTS

Executive Summary

UNICE is concerned that the Commission's proposals on environmental liability will create major legal and economic uncertainty for European companies. UNICE is of the view that the Commission's proposals on the scope of the regime, access to justice and type of liability should be reconsidered and further clarified.

1. Scope of the regime:

Damage to biodiversity:

The Commission should:

- define what constitutes significant biodiversity damage,
- provide measures aimed at avoiding disproportionate and ruinous claims,
- provide transparency as regards criteria for designating protected areas,
- provide transparency as regards criteria for quantifying damage,
- not introduce liability for activities carried out in conformity with the Habitats Directive.

Contaminated sites:

The Commission should:

- propose a more flexible, site-by-site, approach that takes into account local circumstances

Traditional damage:

The Commission should:

- not include traditional damage

Activities to be covered:

The Commission should

- narrow down the scope of the regime to those activities that are infringing the applicable EC environmental legislation that regulates them;
- define more clearly what constitutes a hazardous, a potentially hazardous and a non-hazardous activity.

1. Access to justice:

The Commission should:

- refrain from giving interest groups the right to bring direct claims against companies.

1. Type of liability, defences and burden of proof:

The Commission should:

- allow the defence in relation to compliance with applicable legislation and permits,
- allow the defence in relation to "state of the art" and development risk,
- not reverse the burden of proof in relation to causation.

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1. INTRODUCTION

UNICE has noted the Commission White Paper on Environmental Liability and welcomes the opportunity to give an initial reaction in this important debate.

The 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.

As a preliminary remark, UNICE regards civil liability an unsuitable instrument for environmental policy. Encouraging litigation by facilitating considerably the plaintiff's task and denying business appropriate legal defences can only result in capital transaction costs and huge legal and economic uncertainty for businesses, whether large or small, rather than desirable substantive environmental protection.

Having said this, UNICE is encouraged to see that the Commission considers that, for reasons of legal certainty and legitimate expectations, an EC environmental liability scheme should only work prospectively; that disproportionate costs of restoration should be avoided; and that the scheme should be insurable, and thus quantifiable.

However, UNICE is worried that it may be difficult to attain these objectives, given the fact that many of the wide-ranging proposals and definitions of the White Paper are still unclear. UNICE therefore wonders whether the Commission's optimistic appraisal about the likely impact of an EC liability regime on European companies' competitiveness might be too categorical or at least premature. UNICE feels that the real significance of the White Paper proposals is underplayed when, for instance, reference is made to the closed scope of the scheme, which in fact seems to be very wide, encompassing almost any (authorised) activity involving almost any substance that is likely to adversely affect the environment. Equally, when it is said that biodiversity damage in the sense of the White Paper may only occur in protected areas which are expected to cover up to around 10% of EC territory, it is in fact still very unclear to what extent exactly business activity in

a particular region or Member State is affected, and what kind of disturbance of a large variety of protected animal and plant species may suffice to trigger liability.

UNICE would therefore welcome more explanation and clarity on several very important issues touched on in the White Paper which are still not sufficiently clear. This would enable companies to assess more accurately the effects of proposals on their daily operations and enable the Commission to address effectively some major business concerns. UNICE would welcome the opportunity to contribute constructively to this.

Some major European business concerns about the White Paper proposals are set out below. UNICE may issue additional comments to elaborate further on these and other issues in the near future.

2. SCOPE OF THE REGIME

Damage to biodiversity

The Commission states in the White Paper that significant damage to biodiversity should be covered by an EC liability regime. According to the Commission such damage could take the form of damage to the large variety of habitats, wildlife or species of plants as defined in the annexes to the Habitats and the Wild Bird Directives. As regards the valuation of biodiversity damage the White Paper acknowledges that there are no widely accepted measurement techniques to quantify environmental damage and establish the amount of liability.

Given the lack of clarity on the issue of biodiversity damage, UNICE finds it surprising that the Commission nevertheless proposes liability for biodiversity damage, knowing that it would be impossible to assess the impact of such a proposal and not providing any safeguards to avoid disproportionate and ruinous claims. Uncertainty is highlighted by the fact that, to date, the Natura 2000 network has not yet been established. In spite of Commission pressure, Member States are still in the process of proposing lists of candidate sites and it is often unclear whether, in the view of the Commission, an area requires protection. In the absence of any clarity as regards the location of protected areas and criteria for quantifying damage, business is unable to consider the extent to which the Commission's proposals on biodiversity damage may affect their activities.

UNICE finds this uncertainty extremely worrying and therefore urgently calls on the Commission to define more clearly what exactly constitutes significant biodiversity damage and to provide concrete measures aimed at avoiding disproportionate and ruinous claims. In addition, the Commission should provide more transparency as regards both the criteria that it considers should be applied for designating protected areas and the criteria that could be applied for quantifying biodiversity damage.

In addition, UNICE wonders how the Commission's proposal to impose liability for biodiversity damage relates to provisions of the Habitats Directive which allow the carrying-out of plans or projects that adversely affect the integrity of the protected site, for imperative reasons of overriding public interest, including those of a social or economic nature, on condition that the Member State concerned takes all compensatory measures necessary to ensure protection of the overall coherence of Natura 2000. As regards protection of species, derogation for social and economic public interest reasons is provided in Article 16 of the Habitats Directive.

UNICE calls on the Commission not to circumvent current rules by introducing liability for activities that are carried out in conformity with the Habitats Directive. UNICE considers that the

Commission should not alter the balance between social and economic public interest reasons and nature conservation objectives, which is reflected in the Habitats Directive.

Contaminated sites

Although the Commission acknowledges that most Member States have special laws or programmes to deal with clean up of contaminated sites, it nevertheless considers that clean-up standards and objectives should be established at Union level.

UNICE would agree that the main objective for contaminated sites should be removal of any serious threat to man and environment but believes that the Commission's proposals should reflect more prominently the fact that local circumstances (such as those related to geology, climate and envisaged use) vary considerably throughout the Union. UNICE would therefore prefer a more flexible, site-by-site, consideration that takes into account local circumstances.

Traditional damage

According to the Commission an EC environmental liability regime should, for reasons of equity, also cover traditional damage, such as damage to health or property, which is already covered satisfactory by national liability rules without significantly distorting competition.

UNICE wonders therefore whether the Commission should include traditional damage in the framework of an EC regime on environmental liability and thereby harmonise several important substantive requirements of Member States' national law of tort. National rules related to fact-finding, unlawfulness, burden of proof, causation and defences have evolved gradually in the different Member States' legal systems and perform their function within the context of these systems. Harmonisation of such traditional tort concepts should not be undertaken lightly, and UNICE wonders therefore whether the Commission's legislative competence in the field of the environment would allow for such wide-ranging harmonisation measures. UNICE suggests that the Commission excludes traditional damage from the scope of the EC regime.

Activities to be covered

The Commission states in the White Paper that the liability regime should have a closed scope of application linked with EC environmental legislation. Contaminated sites and traditional damage should be covered only if caused by an EC regulated hazardous or potentially hazardous activity; damage to biodiversity damage should be covered if caused by any dangerous and non-dangerous activity.

UNICE notes that, due to the wide scope of EC environmental legislation, the closed scope of the proposed EC liability regime appears to be in fact quite wide, encompassing almost any activity involving almost any substance that is likely to adversely affect the environment. As a consequence the proposed regime would cover a wide variety of legal and natural persons whose (authorised) activities could trigger liability claims involving amounts of liability that are difficult to predict and against which they may find it very difficult to defend themselves (see below).

Moreover, the fact that those activities are carried out in conformity with the applicable EC legislation that regulates them, does not shield actors from liability, since the Commission excludes this defence (see below). Considering the above, UNICE has some difficulty understanding the Commission's statement at para 4.2.2 that the approach of a closed scope has the advantage of ensuring optimal legal certainty.

UNICE suggests that the Commission narrows down the scope of the proposed regime to those activities that are infringing the applicable EC legislation that regulates them and defines more clearly what constitutes a hazardous activity, what a potentially hazardous activity and what a non-hazardous activity.

No retroactivity

UNICE agrees with the Commission that the EC regime, for reasons of legal certainty and legitimate expectations, should work prospectively. According to the Commission, damage that becomes known after entry into force of the EC regime should be covered, unless the act or omission that resulted in the damage took place before entry into force.

UNICE notes however that the White Paper does not explain how "new pollution" should effectively be distinguished from "old pollution"; the Commission says that a definition of "past pollution" will need to be given at a later stage. A solution would be, in UNICE's view, to establish a legal presumption that pollution is caused before entry into force of the EC regime. The plaintiff could rebut that presumption if he establishes beyond reasonable doubt that the pollution was caused after that date. UNICE would like to point out that a reversal of the burden of proof on this matter would give rise to significant legal uncertainty.

3. ACCESS TO JUSTICE

Although the Commission states that protection of the environment is a public interest and that therefore the State has the first responsibility to act if the environment is damaged, the White Paper proposes to give interest groups a right to bring direct claims against companies. According to the Commission an EC environmental liability regime could contribute to implementing the Aarhus Convention in Community law by giving public interest groups the right to bring claims against alleged polluters if the State does not act or does not act properly ("two-tier approach"). In addition, the Commission proposes to give interest groups the right to ask for an injunction directly in urgent cases and bring claims for reimbursement of reasonable costs incurred in taking urgent preventive measures.

UNICE fears that implementation of such a "two-tier approach" would give rise to a number of procedural and practical difficulties (when for instance is the State deemed not to have acted or not to have acted properly?), and, moreover, strongly opposes public interest groups bringing direct actions. In this respect, UNICE would like to point out that the Aarhus Convention does not require giving interest groups a right to bring direct actions against companies.

UNICE is worried that direct claims by public interest groups, in particular for injunctions, would expose companies to harassment through abuse of proceedings, especially since actions cannot be countered by demonstrating that the challenged activity is performed entirely within permit limits (see below). Such a situation could slow down investment in the Union considerably. Moreover, UNICE regrets the absence of clear criteria for establishing who would qualify as an environmental interest group. UNICE considers that the right to bring claims for damage to the unowned environment belongs to the State as guardian of the public interest. The Commission's proposals would give rise to a number of very difficult issues such as whether private owners of land should tolerate interest groups cleaning up their property at "reasonable cost" and how to deal with interest groups claiming restoration whilst injured property owners claim compensation.

UNICE therefore urgently calls on the Commission to refrain from giving public interest groups the right to bring direct claims against companies but, along the lines of the Aarhus Convention, reserve for public interest groups the right to challenge decisions by public authorities which contravene environmental law.

4. THE TYPE OF LIABILITY, DEFENCES AND BURDEN OF PROOF

Defences

UNICE notes that the Commission is proposing to exclude defences in relation to damage caused by releases authorised through EC regulations and compliance with a permit, because they, supposedly, are normally not allowed by existing national environmental liability regimes of EU Member States.

UNICE finds this argumentation unconvincing. Apart from the fact that the environmental liability regimes of EU Member States are far less wide-ranging than that is presently proposed in the White Paper, it is not entirely true. Compliance with a permit is a relevant defence in some Member States since it plays an important role in assessing the unlawfulness of certain activities. The same applies to defence in relation to "state of the art" and development risk, which is widely accepted across the Union, for instance in the area of product liability.

UNICE strongly believes that a defendant should be allowed a defence against public authorities in relation to compliance with applicable legislation and permits. When adopting legislation or granting a permit, the authorities weigh the interest of the environment against the economic interest of the proposed activity. In doing so, they accept that some impairment of the environment is acceptable. It is unreasonable not to take this into account when assessing liability.

However, UNICE finds it encouraging to see that the Commission considers it appropriate that in particular circumstances where the operator who caused the damage can prove that the damage was entirely and exclusively caused by emissions that were explicitly allowed by his permit, that part of the compensation should be borne by the permitting authority. However, UNICE wonders how exactly such combination of the polluter's liability and that of the permitting authority could work in practice, considering that there are legal systems where liability of public authorities is subject to different rules or even different courts. UNICE considers the Commission's statements on shared liability very vague and is concerned that it would be interpreted differently across the Union. In addition, UNICE is concerned that shared liability would have the damaging effect of public authorities trying to escape liability by imposing much stricter permit conditions.

Lastly, UNICE believes that "state of the art" and development risk is another defence that should be allowed. It is unreasonable to assign the risk of unknown future damage to one party. It is also undesirable for society because it will stifle innovation.

Burden of proof

UNICE is pleased that the Commission does not specifically propose a reversal of the burden of proof for establishing facts concerning the causal link (or absence thereof) between an activity carried out by the defendant and the damage. Instead the Commission proposes one or other form of alleviation of the traditional burden of proof. UNICE finds this very vague but would like to point out that some alleviation of the burden of proof is not the same as a complete reversal. UNICE would strongly oppose a reversal of the burden of proof. In combination with a strict liability regime, causation is essential for responsible companies to defend themselves against liability.

5. INSURABILITY

In UNICE's view, insurability is an absolute pre-requisite for any form of liability. UNICE is therefore pleased that the Commission also considers that an EC environmental liability regime should be insurable. However, in situations where the risk cannot be defined or assessed, it is highly unlikely that the insurance sector would be in a position to devise an insurance policy capable of providing adequate cover. UNICE regrets to note that, as it demonstrated above, on several important points the Commission's White Paper is unfortunately not sufficiently clear to allow for a proper analysis of the effects of the proposals that are set out therein.