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Mr Ludwig Krämer
Directorate-General Environment
Directorate A – ENV.A3 – Environmental Governance
European Commission
200 rue de la Loi (BU-9 2/167)

B-1049 BRUXELLES

Dear Mr Krämer,

RE: WORKING DOCUMENT ON THE PREVENTION AND RESTORATION OF SIGNIFICANT ENVIRONMENTAL DAMAGE (ENVIRONMENTAL LIABILITY)

I refer to your letters of 30 July 2001 and 3 September 2001 on the subject of environmental liability. Attached to your 30 July letter is a consultation document setting out new proposals on environmental liability in Europe. In your letter, you require comments to be sent to the Commission by 15 September 2001. As pointed out in our letter of 2 August 2001, we shall not be able to make a full analysis of your new proposals by that date. These proposals have a major impact on liability in Europe and a full assessment would involve wide consultation with our members for which there would be insufficient time were comments to be submitted by 15 September. However, we take this opportunity to give you our first summary reaction, whereupon we will react in more detail in due course.

As a general comment, we are pleased that the Commission has issued a consultation document and has not presented industry in Europe with a *fait accompli* by publishing the text of a draft Directive on this very difficult and important dossier, which is still subject to much debate.

The working document contains a number of positive elements, which would represent progress in the discussion on environmental liability in Europe: liability is restricted to "Significant Environmental Damage"; fault-based in lieu of strict liability applies in certain cases; retroactivity has been ruled out; action groups have no direct claims against operators; the prime remedy would be the "least costly" form of restoration.

Unfortunately, these positive points do not take away industry's core concerns with respect to the Commission's endeavours to introduce this new liability in Europe. The elements of *"Director liability"* and *"piercing of the corporate veil"* (para 13/14) represent a major retrograde step. They aim to re-write company law in Europe (as other elements aim to re-write civil law generally). Re-writing company law in Europe, as re-writing civil law generally, is an unsuitable instrument for environmental policy, which would go against the subsidiarity principle. In this context, civil law (including company law) should be left to the Member States.

We also note that proposals to have a mitigated regime for 'responsible operators' have not been taken on board at all. We find this disappointing because these proposals contained a number of elements, which would have made the proposed regime substantially more balanced.

In our previous comments, we have expressed as key requirements for environmental liability *inter alia* that (a) the liability should be *insurable* and that (b) *compliance with a permit* should unequivocally be accepted in the list of defences. These basic concerns are inadequately addressed in the new proposals, in spite of the fact that the Commission itself, in the 9 February

2000 White Paper, clearly indicated that an EC environmental liability regime should be insurable.

Thus, we remain very concerned that this liability will entail an uncertain and additional financial burden for companies in Europe.

Apart from these general observations, we would summarise (in "short-hand") the following points of detail:

1. The meaning of "strict" versus "fault-based" liability is unclear in European law (as opposed to national law).
2. It is unclear in which cases strict liability will apply without having the benefit of the full text of the proposed Annex. The list of Directives (para 20) seems to include virtually all activities by inclusion of the IPPC Directive.
3. Why does the liability not apply to activities undertaken by the State and other public authorities not engaged in professional/commercial activities?
4. Why a thirty-year limitation period which goes far beyond the average limitation period under national law in the Member States?
5. Why is the burden of proof that the cause of the damage occurred before the entry into force of the Directive on the operator?
6. Why does the list of defences not include 'state of the art' and 'development risk', and 'compliance with a permit'? Moreover, defences related to acts of third parties should not be limited to intentional acts.
7. "Damage that creates serious harm to human health" is a vague test, which could result in US-style litigation and damages.
8. The definition of 'Significant Environmental Damage' (SED) rightly excludes activities authorised under the Habitats Directive. However, it should also exclude activities authorised under Article 16 (1) and other Directives or national legislation; in particular authorised emissions to water and/or air should not be regarded as constituting SED.
9. It is unclear what the remedies are if an operator does not discharge his "duty to prevent an imminent threat of SED".
10. It is difficult to judge the impact of the regime unless and until the criteria for carrying out restoration have been published.
11. Reversal of the burden of proof in cases where multiple parties are liable is unacceptable.
12. The definition of "qualified entities" (EIGs) is too wide and could cover organisations that do not have a legitimate interest in the environment.
13. Court orders to secure funds for prevention/restoration (para 19), in particular in combination with the proposals related to the piercing of the corporate veil, are unacceptable and unnecessary, since Member States' national legislation already provides for sufficient safeguards, injunction proceedings, seizure and enforcement.
14. It is unclear what is meant by compensation for "interim losses". Linked to a 'time dimension' and calculation by means of 'monetary valuation techniques' based on 'observed behaviour' (see para 21.2), this could easily lead to a disproportionate and unacceptably high financial exposure for industry.
15. The definition of "restorative options" is very vague, as is the correlated concept of "baseline condition" (see para 21.1 – 21.3).

As mentioned, this is only a first summary reaction to the proposals that are set out in the working document. We intend to submit further comments later. I hope that this first summary reaction, as indeed our future comments, will contribute to discussions on this important topic.

Yours sincerely,

(original signed by)
Daniela Israelachwili
Acting Secretary General