UNICE
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ENVIRONMENT DIRECTORATE GENERAL WORKING PAPER
ON
PREVENTION AND RESTORATION OF
SIGNIFICANT ENVIRONMENTAL DAMAGE

UNICE COMMENTS

Executive Summary

UNICE is concerned that the proposals on environmental liability will create major legal and economic uncertainty for European companies. While UNICE believes that it should be left to the Member States to decide how exactly they comply with their obligations under Community law and how the costs of such compliance action should be recovered, UNICE favours an approach which focuses on public rather than civil law. It welcomes the fact that it is no longer proposed to give interest groups a right to bring direct claims against companies, but is greatly concerned about the proposals on defences, multiple party liability and biodiversity damage.

1. Scope of the regime:

Significant Environmental Damage (SED):

The Commission should:

- Define more clearly what constitutes significant environmental damage;
- Define more clearly what are appropriate restorative measures;
- Provide concrete 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 and other European legislation.

Activities and persons to be covered:

The Commission should

- Narrow down the scope of the regime to those activities that are infringing the applicable European environmental legislation that regulates them;
- Not change national rules on liability of natural persons.

2. Access to justice:

The Commission should:

- Include clear and binding criteria for establishing whether a public interest group has a legitimate interest in the environment and whether it is sufficiently representative and accountable.

3. Type of liability; defences and multiple party liability:

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 change national rules on liability of multiple parties.

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1. INTRODUCTION

With great interest, UNICE has noted the Commission's Environment Directorate General's working document on prevention and restoration of significant environmental damage. As stated in its letter of 11 September 2001, UNICE welcomes the Commission's initiative to consult widely on the issue and these comments are intended to complement our first summary reaction, which was set out in the above-mentioned letter. UNICE hopes that these comments will be taken into account by the Commission and its services whilst it is preparing and approving a proposal for a Directive on the subject.

Basically, the proposals in the working document seek to oblige the Member States to require the natural or legal persons who controlled an activity which caused significant environmental damage to protected habitats and species (or which polluted water or contaminated land to the extent that serious harm to human health is created) to take restorative measures. If these natural or legal persons were to fail to respond to this request, the Member States would be obliged to take the appropriate action themselves and recover the costs. The proposals do not require the Member States to use civil liability law to implement this obligation; administrative decisions ordering restorative action or recovery of costs would suffice to make a Member State comply with its obligation.

UNICE has always argued that civil liability is an unsuitable instrument for environmental policy and that encouraging litigation would only result in capital transaction costs rather than substantive environmental protection. UNICE favours thus an approach which focuses on public rather than civil law. Moreover, as stated in our first reaction, the working document contains a number of other positive elements, which represent progress in the discussion on environmental liability in Europe, namely the focus on *significant* environmental damage, the fact that some activities will be subject to fault liability, no retroactivity, and no direct actions against companies by public interest groups.

Having said this, UNICE is still greatly concerned about the proposals on environmental liability. Some of these proposals are new or have been revived after having been omitted from the Commission's White Paper, such as those related to 'director's liability', 'joint and several liability' and 'piercing of the corporate veil'. Others are largely unchanged, such as those related to defences and biodiversity damage.

Some major European business concerns about the proposals in the working document are set out below.

2. SCOPE OF THE REGIME

Significant Environmental Damage (SED)

Following the proposals for the working document, the Member States will be obliged to require the natural of legal persons who controlled an activity which caused 'Significant Environmental Damage' (SED) to take restorative measures. Where the SED has not yet occurred but there is an imminent threat, Member States would have to request action or take appropriate action themselves.

It is explained that SED means damage that adversely affects the favourable conservation status of the protected habitats and species, damage that causes water quality to deteriorate from one quality status to a worse one, and damage that contaminates land to the extent that serious harm to human health is created. Damage authorised under Article 6 (3) and (4) of the Habitats Directive is excluded.

As a preliminary remark, UNICE notes that existing European legislation already obliges the Member States to maintain a favourable conservation status for protected sites and species and that the Member States are also obliged by the Water Framework Directive to uphold the quality status of water covered by this Directive. Likewise, Member States are already compelled to act when there is a serious danger to human health, either under European or national legislation. Considering that these obligations are thus already in place, UNICE wonders why the Commission should now regulate in great detail how the Member States should take the action they are already compelled to take and how the costs of those measures should be recovered. In UNICE's view, it should be left to the Member States to decide how exactly they comply with their obligations under Community law and manage serious danger to human health, especially since this does not significantly distort competition to the extent that Community action would be justified.

In addition, as regards inclusion of land (soil and subsoil) contamination, UNICE would also like to repeat that most Member States have special laws or programmes to deal with clean-up of contaminated sites. UNICE therefore considers it unnecessary to regulate clean-up at Union level. Such rules might easily interfere with existing policies which adequately deal with human health risks and satisfactorily reflect varying local circumstances, such as those related to geology, climate and envisaged use.

As regards biodiversity damage, UNICE would like to repeat what it said in its comments on the White Paper namely that, given the lack of clarity on the issue of biodiversity damage, it finds it surprising that the Commission is still proposing liability for biodiversity damage, knowing that it would be impossible to assess the impact of such a proposal. Uncertainty is highlighted by the fact that the Natura 2000 network has still not been established. Member States are still in the process of proposing lists of candidate sites and it is often unclear whether or not 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.

Lastly, although UNICE is pleased that the Commission does not circumvent current rules by introducing liability for activities that are carried out in conformity with Article 6 (3) and (4) of the Habitats Directive and Article 4 (7) of the Water Framework Directive, the Commission should also exclude damage authorised under Article 16 (1) of the Habitats Directive (protection of species) and other environmental legislation. The Commission should not alter the balance between social and economic public interest reasons and nature conservation objectives, which is reflected in this legislation (see also below).

Activities and persons to be covered

It is suggested in the working document that a Community framework be established in respect of professional/commercial activities causing SED, addressing both its prevention and restoration. Liable party would be the natural or legal person who controls the damaging activity ('operator'). Strict liability would apply for SED caused by a series of activities defined in an Annex and fault - based liability for biodiversity damage for other activities.

Firstly, UNICE wonders why the Community framework does not include activities undertaken by public authorities that are not of a professional or commercial nature, and, secondly, what the situation is of non-profit making activities by non-commercial organisations and commercial activities by the State. UNICE is also worried about liability of natural persons and the indistinct nature of the concept of 'controlling a damaging activity'. The Commission should not upset national rules which strike a careful balance between holding natural persons responsible for acts committed whilst exercising a function assigned to them and the protection of these very individuals. The concept of 'controlling a damaging activity' should also be clarified.

Lastly, UNICE notes that, due to the wide scope of the European environmental legislation listed in the annex which defines the activities subject to strict liability, the scope of the proposed Community framework will be very wide. The operation of installations subject to the rules of the Directive concerning integrated pollution prevention and control is included, emissions into air and water are covered, as are all waste management operations. Activities (*e.g.* certain agricultural activities) causing diffuse biodiversity damage are not excluded from the scope of the regime either, although subject to fault-based liability, whatever this might mean in a public law context where it may be significantly easier to demonstrate 'fault' than in traditional civil law suits.

As a consequence, the proposed regime would cover a wide variety of legal and natural persons whose (authorised) activities could trigger claims involving costs that are difficult to predict and against which they may find it very difficult to defend themselves. The fact that those activities are carried out in conformity with the applicable European legislation that regulates them does not shield these persons from liability, since it is still proposed to exclude this defence (see below). In order to avoid such anomalies and to create a reasonable and manageable framework, UNICE would like to repeat its suggestion that the Commission narrows the scope of the proposed regime to those activities that infringe the applicable European legislation that regulates them.

No retroactivity

For reasons of legal certainty and legitimate expectations, UNICE agrees that the Community framework should work prospectively. Damage that becomes known after entry into force of the Community framework should be covered, unless the act or omission that resulted in the damage took place before entry into force. UNICE notes, however, that it is not explained how "new pollution" should effectively be distinguished from "old pollution". UNICE disagrees that, in case of doubt, the operator would have to establish that the cause of the damage occurred before the entry into force of the regime. A reversal of the burden of proof on this matter would give rise to significant legal uncertainty. In combination with a strict liability regime, causation is essential for responsible companies to defend themselves against claims. Following general public law principles, a Member State ordering restorative measures or recovery of costs should always reason its decisions and thus demonstrate that the addressee of its decision did indeed cause the damage, on penalty of having its decision declared null and void. In UNICE's view, a solution in case of doubt would be to establish a legal presumption that pollution is caused before entry into force of the Community framework and that the Member State can rebut that presumption if it establishes beyond reasonable doubt that the pollution was caused after that date.

As regards the proposal to have a thirty-year limitation period on liability, UNICE notes that such a long limitation period for the discovery of the pollution is unacceptable and would give rise to serious uncertainty. A thirty-year period goes far beyond average limitation periods under national law in the Member States and should be reduced substantially.

3. THE TYPE OF LIABILITY: DEFENCES AND MULTIPLE PARTY LIABILITY

The proposals of the working document seek to oblige the Member States, where SED has occurred, to require the operator to take restorative measures regardless of fault in the case of strict liability activities, and if he is at fault in the case of fault-based liability activities. If the operator were to fail to respond to this request, the Member States would be obliged to take the appropriate action themselves and recover the costs. Where the SED has not yet occurred but there is an imminent threat, Member States would have the choice either to request action by the operator, or to take the appropriate action themselves, and recover the costs of so doing.

UNICE would welcome a clear reference to the concept of proportionality in this context. It should be avoided that disproportionate measures are ordered or that companies would have to pay for such measures when less costly options are available. This would also be in line with the thinking of the services of the Commission as set out in para 21. Likewise, it should be ensured that, when an imminent threat is being assessed, there is a sufficient likelihood that SED might occur. Such analysis should be based on a scientific evaluation which is as complete as possible.

In addition, UNICE opposes the idea of giving the Member States, where there is an imminent threat, the choice either to request action by the operator or take the appropriate action themselves and recover the costs of so doing. In UNICE's view, the Member States should always first give the operator the opportunity to take action himself.

Defences

It is proposed in the working document only to allow defences where the SED is wholly the result of armed conflict; acts of God; intentional acts by third parties to cause damage which succeeded in spite of appropriate safety measures; and in the case of compliance with a compulsory order from a public authority.

Firstly, UNICE finds it strange that defences would only apply where the SED is *wholly* the result of the events described. In the case where the SED is *partly* the result of the described events, it would be unreasonable to deny the operator all defences and hold him liable for the entire damage. Also, defences related to acts of third parties should not be limited to *intentional* acts.

Then, UNICE is very disappointed that it is still proposed to exclude defences in relation to damage caused by releases authorised through European legislation and compliance with a permit. Especially under a public law regime, it would be unreasonable and inconsistent not to allow a defence against public authorities that applicable legislation and permits have been complied with. 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 are simply applying the applicable European and national legislation. The Commission should not alter the balance between social and economic public interest reasons and nature conservation objectives which is reflected in this legislation by introducing liability for authorised activities.

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

Multiple parties

It is proposed in the working document to hold operators whose activities caused SED but who cannot demonstrate the extent to which the damage results from their activities, jointly and

severally liable. It is similarly proposed to hold natural persons who control a liable legal person jointly and severally liable if they are at fault. Likewise, it is proposed to hold legal persons controlling other legal persons jointly and severally liable if they have had knowledge or ought to have had knowledge of the damaging factor, and liability is also proposed for persons providing financial security to a liable person when they control the liable party at the relevant time.

As a preliminary remark, UNICE would like to note that these proposals are confusing and difficult to assess in the context of the other proposals of the working document. As is the case with the proposals on strict and fault-based liability, they re-interpret traditional company and civil law concepts and introduce these in a public law context where they are ill-placed and where it is unclear what they mean. Moreover, it is unclear what 'control' means in this context and how the costs for restoration are to be divided amongst the different liable parties. It is also unclear how a Member State should implement these obligations.

Having said this, UNICE would like to observe, as it has done in the past when these proposals were still circulating (and before they were rightly abandoned by the full Commission in the White Paper), that issues such as 'joint and several liability', 'director's responsibility' and 'piercing of the corporate veil' are not issues for crude piecemeal regulation in an environmental liability directive, since this would substantially alter the rationale of these concepts, which have evolved gradually in the different Member States' legal systems and which perform their function within the context of these systems. It is also unnecessary since the issue of abuse of corporate constructions is addressed in national law through sophisticated legal techniques that avoid so-called "deep pocket" tactics.

4. ACCESS TO JUSTICE

It is proposed to entitle any body or organisation which has an interest in ensuring that SED is restored (either according to national criteria or because its articles of incorporation show that its purpose is to protect the environment), to bring legal proceedings to review an authority's response to submitted observations on incidents of SED and requests for action.

As a first remark, UNICE is pleased that it is no longer proposed to give interest groups a right to bring direct claims against companies. This would have substantially increased the risk of companies being exposed to harassment through abuse of proceedings, especially since actions could not be countered by demonstrating that the challenged activity is performed entirely within permit limits. Having said this, UNICE still regrets the absence of more clear criteria for establishing who would qualify as a 'qualified entity in the field of environmental protection'. Leaving the relevant criteria to the Member States would hamper the creation of a level playing-field in this context, and applying the broad standard of assessing articles of incorporation could expose public authorities to frivolous claims by unaccountable and unrepresentative pressure groups, which might significantly hinder legitimate business plans. In UNICE's view a Community framework on environmental liability should therefore include clear and binding criteria for establishing whether a public interest group has a legitimate interest in the environment and whether it is sufficiently representative and accountable.

5. RESTORATION

As stated above, in essence, the proposals of the working document seek to oblige the Member States to order so-called restorative measures (or the recovery of their costs) from the operators who caused SED. The working document explains in broad terms the objectives of restoration, how to identify restorative options, and how the final restorative option would be selected.

Although UNICE is pleased that it is clearly stated that, where several options are likely to deliver the same value, the least costly would be preferred, it is still very worried about the financial consequences of the proposed approach and disproportionate claims. In UNICE's view, the concept of 'restoration' is still very vague, as is the correlated concept of 'baseline condition'. It is unclear what is meant by compensation for "interim losses" and linked to a "time dimension" and calculation

by means of “monetary valuation techniques” based on “observed behaviour”, this could easily lead to a disproportionate and unacceptably high financial exposure for undertakings. Whilst referring to what was already said above on biodiversity damage, UNICE finds it surprising that the Commission persists in proposing this kind of liability considering that it is still impossible to assess the impact of such proposals. The studies undertaken by the Commission also fail sufficiently to clarify the issue. UNICE finds this uncertainty very worrying and therefore urgently calls on the Commission to define much more clearly what exactly constitutes SED and what appropriate restorative measures are. In addition, the Commission should provide concrete measures aimed at avoiding disproportionate and ruinous claims.

6. INSURABILITY

As stated previously, in UNICE’s view, insurability is an absolute pre-requisite for any form of liability, whether under public or private law. UNICE was therefore reassured that in the White Paper the Commission clearly stated that it considers that a Community framework on environmental liability should be insurable. UNICE welcomes the proposal not to require compulsory insurance but notes that 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 which is capable of providing adequate cover at a reasonable price. UNICE regrets to comment, as it has demonstrated above, that on several important points, the proposals in the working document are unfortunately not sufficiently clear to allow for a proper analysis.

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