

PROPOSAL FOR A DIRECTIVE ON ENVIRONMENTAL LIABILITY WITH REGARD TO THE PREVENTION AND RESTORATION OF 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 action should be recovered, UNICE favours an approach which focuses on public rather than civil law. The Commission's proposals are not sufficiently clear to allow business to assess the risks involved and to consider the extent to which their activities may be affected. The legislator should devise a reasonable and manageable Community framework for environmental liability, which is both quantifiable and insurable.

1. Scope of the regime:

Environmental Damage:

The legislator should:

- Define clearly what constitutes environmental damage;
- Define clearly what are appropriate restorative measures;
- Provide concrete measures aimed at avoiding disproportionate and ruinous claims;
- Provide clear criteria for quantifying damage;
- Ascertain insurability.

2. Access to justice:

The legislator should:

- Devise clear and binding criteria for establishing whether an individual or public interest group has a legitimate interest in the environment and whether they are sufficiently representative and accountable.

3. Type of liability; defences and limitation period:

The legislator 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;
- Provide for a five-year limitation period for recovery from the date on which the damage was caused.

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1. INTRODUCTION

UNICE has noted the Commission's proposal for a Directive on environmental liability with regard to the prevention and restoration of environmental damage and welcomes the opportunity to comment on the proposal. UNICE hopes that these comments will be taken into account by the Commission, the Council and the European Parliament in discussions and decisions on the proposed Directive.

The Commission's proposals seek to oblige the Member States to require the natural or legal persons who controlled an activity which caused environmental damage to take restorative measures or to take the appropriate action themselves and recover the costs.

As a preliminary remark, UNICE strongly favours an approach which focuses on public rather than civil law. The State should have prime responsibility for ordering restorative measures. Civil liability is an unsuitable instrument for environmental policy and encouraging litigation would only result in capital transaction costs rather than substantive environmental protection.

UNICE commends the Commission for not undermining existing rules and permits by proposing liability for authorised activities, and for not hindering innovation by proposing liability for activities which were not considered harmful when they took place. However, UNICE is deeply concerned about the Commission's proposal to introduce liability for biodiversity damage. In the absence of clear criteria to evaluate and quantify damage to biodiversity, and without a cap on liability, companies would be exposed to unlimited liability which could lead to disproportionate and ruinous claims against which they may be unable to insure themselves. Due to this uncertainty, business is not able to assess the risks involved and to consider the extent to which their activities may be affected. Uncertainty is highlighted by the fact that it is still unclear where protected habitats will be located.

UNICE will elaborate further on these and other issues below.

2. SCOPE OF THE REGIME

Environmental Damage

It is explained that environmental damage means biodiversity damage, water damage and land damage. As a general comment, UNICE would like to note that existing national and 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, under either European or national legislation. Considering that these obligations are already in place, UNICE wonders why there should now be detailed regulation at European level on how the Member States should take the action they are already compelled to take and on 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. Moreover, existing rules already give companies ample incentives to avoid damage and minimise risks.

In addition, as regards inclusion of land (soil and subsoil) damage, UNICE emphasises that almost all Member States have special laws or programmes to deal with clean-up of contaminated sites. UNICE is therefore against inclusion of land damage in the Directive. This 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 stress that, given the lack of clarity on the issue of biodiversity damage, it finds it surprising that the Commission is proposing liability for biodiversity damage, considering 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. 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, especially in view of the fact that the Commission does not propose effective safeguards to avoid disproportionate and ruinous claims and fails to present convincing arguments which indicate whether adequate insurance cover will be available and affordable.

In the absence of clear criteria to evaluate and quantify damage to biodiversity, and without a cap on liability, companies would be exposed to unlimited liability which could lead to disproportionate and ruinous claims against which they may be unable to insure themselves. This prospect is extremely damaging to companies, whether big or small, and might frustrate numerous legitimate business projects to the detriment of European competitiveness. UNICE fears that the Commission's proposals could lead to a disproportionate and unacceptably high financial exposure for both public authorities and undertakings, and is not convinced by the economic assessment of the proposal. The economic assessment underplays the costs by comparing liability systems that are fundamentally different, and by referring to insurance schemes which are based on those different systems and which have limitations which make them unsuitable for providing cover for the risks which would emanate from the Commission's proposal.

As the Commission rightly points out, the US system is limited and the linked insurance schemes are similarly limited. The Commission's proposal does not set limits on liability. For this reason alone it is tenuous to conclude that the Commission's proposal would be insurable because natural resource damage liability in the US is financially insurable. The same holds true for estimations of financial expenditures which are based on the US model. Without a cap on liability, or comparable safeguards to avoid disproportionate claims, financial expenditures are almost impossible to estimate given that the valuation of biodiversity damage remains unclear and that monetary valuation techniques towards the site may be used to choose compensatory restoration actions (see Annex II of the proposal). Under these circumstances it is highly unlikely that adequate insurance cover will be available at an affordable price. UNICE is disappointed that the Commission nevertheless proposes unlimited liability for biodiversity damage, knowing that it would be impossible to assess the impact of such a proposal.

Activities and persons to be covered

The Commission proposes to establish a Community framework based on environmental liability whereby environmental damage would be prevented or restored. Liable party would be the natural or legal person who operates the operation of a damaging activity ('operator'). Strict liability would

apply for environmental damage caused by a series of activities defined in Annex I and fault-based liability for biodiversity damage for other activities.

As a general comment, UNICE would like to emphasise that, for obvious reasons, companies at present are highly committed to avoiding damage and minimising risks. European and national environmental legislation also satisfactorily reflects the principles of prevention and precaution bearing in mind that in practice there is rarely a risk-free option.

Having said this, UNICE is worried about liability of natural persons and the indistinct nature of the concept of 'operating the operation of an activity covered by the Directive'. 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 'operating the operation of a damaging activity' should be clarified in the definition of 'operator'.

UNICE notes that, due to the wide scope of the European environmental legislation listed in Annex I, 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. Consequently, the regime would cover a wide variety of legal and natural persons whose 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 if the operator has been negligent.

Generally, UNICE would like to comment that the proposals on strict and fault-based liability and negligence are confusing and difficult to assess in the context of the other proposals of the proposed Directive. In order to avoid such uncertainties and to create a clear and manageable framework, UNICE suggests that the legislator narrows the scope of the proposed regime to those activities that infringe the applicable European legislation that regulates them.

Temporal Application and Limitation Period (Articles 19 and 12)

For reasons of legal certainty and legitimate expectations, UNICE agrees that the Community framework should work prospectively and that, in cases of doubt, the operator would have to establish that the cause of the damage occurred before the entry into force of the regime if the competent authority is able to establish with a sufficient degree of plausibility and probability that the damage has been caused by an activity which has taken place after the entry into force of the Directive. 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.

UNICE is very concerned about the proposal to have a five-year limitation period for recovery from the date on which the restoration measures have been carried out. UNICE notes that the Commission is in fact proposing an unlimited limitation period for taking restorative measures. This is unacceptable and would give rise to serious uncertainty. An unlimited limitation period in relation to unlimited liability is excessive and contradicts national principles concerning limitation periods. UNICE suggests to have a five-year limitation period for recovery from the date on which the damage was caused.

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

The Commission's proposals seek to oblige the Member States, where environmental damage has occurred (or where there is an imminent threat thereof), to require the operator to take restorative measures or to take the appropriate action themselves and recover the costs of so doing.

UNICE would welcome a clear legally binding 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 Commission as set out in para 3.2 of Annex II. Likewise, it should be ensured that, when an imminent threat is being assessed, there is a sufficient likelihood that environmental damage 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 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 and only take the appropriate measures themselves if the operator unjustifiably fails to take action himself.

Exemptions and Defences (Article 9)

UNICE strongly believes that existing rules and permits should not be undermined by imposing liability for authorised activities. The legislator would act in an inconsistent and unreasonable manner if it would undermine its own legislation. Similarly, it is apt not to hinder innovation by imposing liability for activities which were not considered harmful when they took place.

Having said this, UNICE finds it strange that defences related to acts of third parties are limited to *intentional* acts.

Multiple parties (Article 11)

UNICE would like to comment that the proposal to oblige the Member States to either hold some operators jointly and severally liable, or to apportion the share of the costs on a fair and reasonable basis to the operators concerned, is confusing and difficult to assess in the context of the other proposals. As is the case with the proposals on strict and fault-based liability and negligence, it re-interprets traditional civil law concepts and introduces these in a public law context where they are ill-placed and where it is unclear what they mean. It is also unclear how a Member State should implement these obligations.

UNICE observes that issues such as 'joint and several liability' are not issues for crude piecemeal regulation in an environmental liability Directive, since this could 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. Generally, UNICE considers that operators should be liable on a proportional basis when it is clearly demonstrated that their activities caused the damage.

UNICE is worried about the Member States adopting divergent provisions in this context, and generally, in relation to the Commission's proposal. Due to the unprecedented scope of the proposal, divergent rules could easily introduce distortions between Member States which do not presently exist. Although aware of Article 176 EC, UNICE suggests that the Directive should expressly discourage Member States from adopting different rules and refer to the principle of proportionality and equity which set limits on the Member States' power to adopt more stringent protective measures. UNICE points out that Article 20 of the proposal is a sufficient safeguard if there were a need for more stringent measures at EU level.

4. REQUESTS FOR ACTION AND JUDICIAL REVIEW (ARTICLES 14 AND 15)

UNICE 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 lead to differences across the EU in this context, and applying the broad standard of assessing articles of incorporation could expose public authorities and companies to frivolous claims by unaccountable and unrepresentative individuals and 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 an individual or public interest group has a legitimate interest in the environment and whether they are sufficiently representative and accountable.

5. RESTORATION (ANNEX II)

The proposed Directive 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 reassured that it is clearly stated that where several options are likely to deliver the same value, the least costly would be preferred, it is very worried about the financial consequences of the proposed approach and disproportionate claims. The concept of 'restoration' is 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 towards the damaged site", this could easily lead to a disproportionate and unacceptably high financial exposure for public authorities and undertakings. Whilst referring to what has already been said above on biodiversity damage, UNICE finds it surprising that the Commission proposes this kind of liability considering that it is 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, the Council and the European Parliament to refrain from imposing liability for biodiversity damage, or, alternatively, to devise concrete measures aimed at avoiding disproportionate and ruinous costs.

6. INSURABILITY

In UNICE's view, insurability is an absolute pre-requisite for any form of liability, whether under public or private law. UNICE is therefore surprised that the Commission is making proposals for a Community framework on environmental liability without having any substantiated arguments which indicate whether adequate insurance cover will indeed be available for the risks that emanate from these proposals. As demonstrated above, due to the differences and limitations of other existing liability schemes, it is misplaced to assume the development of insurance markets over time with little problem simply because they have done so in the US and elsewhere. As stated above, other systems are limited and the linked insurance schemes are similarly limited. It is therefore highly questionable to underpin the conclusion that the Commission's proposal would be insurable on the fact that natural resource damage liability elsewhere is insurable.

In view of the above, UNICE finds it difficult to understand that the Commission is nevertheless proposing to oblige the Member States to encourage the use by operators of any appropriate insurance or other forms of financial security and to encourage the development of appropriate insurance instruments (Article 16). 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. The proposals of the Commission are not sufficiently clear to allow for such an analysis. UNICE would be strongly against the development of funds as an alternative, since these, as has been amply demonstrated in the US, are highly inefficient and penalise responsible companies. Instead, the legislator should devise a reasonable and manageable Community framework for environmental liability, which is both quantifiable and insurable. UNICE regrets to note, as it has demonstrated above, that the Commission's proposal, on several important points, will lead to major uncertainty since it is neither quantifiable nor likely to be insurable. In the light of the above, the Commission's proposal now needs to be worked on to devise such a manageable framework.