Commission Proposal for a Directive on Environmental Liability
Common proposals from CEFIC, EUROPIA, OGP and UNICE

CEFIC, EUROPIA, OGP, and UNICE represent a major part of the industry falling under this Directive, comprising the industry at large and in particular chemical as well as oil companies.

Recognising the difficulties of dealing with damage to the environment in all Member States, and bearing in mind the studies and consideration in general by academics, NGOs and European and national authorities to progress this matter, we recognise that the Commission proposal of 23 January 2002 makes a significant contribution in this regard; however this Commission proposal and a significant number of amendments tabled in the European Parliament also raise serious concerns. The following suggestions are intended to make the liability regime **fair, manageable and insurable** for environmentally-responsible operators:

- **Permit and state-of-the-art defence:** These defences are fundamental for a regime that is both credible and workable in practice. **They must be retained.** Permits are not a 'licence to pollute' – they set out strict guidelines, drawn up by the authorities, taking into account specific health, safety and environmental concerns. **Permits do not cover accidents**. Environmentally responsible operators complying with their permits must be able to rely on the permit defence or the current permit system risks being undermined. The permit defence is also crucial to ensure that liability under the regime can be insured.

- **Liability must be proportional and proven:** The US Superfund scheme has shown joint-and-several liability to be inefficient, diverting vast resources away from cleanup into the courts. Liability should be strictly proportionate to any damage caused by the operator. Otherwise partially-liable, solvent operators would foot the whole bill. A reversal of the burden of proof means that a party could only exonerate itself by finding the actual polluter, which would effectively place it in the role of an investigator. Traditionally, this rests with State authorities, and it would be inappropriate to impose it on operators.

- **Appropriate access to justice:** Any possibility of the public taking direct action against operators bears a high risk of undermining the response of the competent authorities. Environmentally-responsible operators may also become the subject of legal interventions which aim to interrupt lawful activities. Any preventive or remedial action must be agreed with, and costs recovered through, the competent authorities in accordance with national law.

- **Insurance and financial guarantees:** The question of financial securities is complex and the choice and method of implementation should be left to the Member States. Any system of financial guarantees should include self-insurance and other appropriate financial tools. Unlimited liability would make any regime uninsurable.

- **Biodiversity to be defined clearly and according to EU wide principles:** The geographical scope of the new regime must be limited to areas covered by the EU Wild Birds and Habitat Directives; otherwise the target of harmonisation and equal investment conditions would be undermined. For effective restoration, precise definitions and a clear scope are required in order to quantify the damage and avoid any punitive effects.

- **No liability for third parties:** The Directive must exclude liability for acts committed by third parties, not only for wilful acts (i.e. terrorism) but also in case of accidents.

- **Limitation period:** Any limitation period should be determined by the date on which the damage occurred (or could reasonably have been discovered) rather than the date of cleanup and should not exceed 5 years.