



## **Draft Directive on Environmental Liability - Response to Common Position Joint proposals from CEFIC, EUROPIA, OGP and UNICE**

CEFIC, EUROPIA, OGP, and UNICE represent a major part of the industry concerned by this Directive, comprising industry at large and in particular chemical as well as oil companies. Our proposals follow on from the joint paper we prepared for the 1<sup>st</sup> Reading.

Acknowledging 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 Council Common Position makes a major contribution in this regard.

We are of the view, however, that, in order to create legal certainty, ensure a level-playing field and encourage the development of appropriate financial security, some principle provisions need to be amended and EU harmonisation increased.

Furthermore, we regret that a number of amendments adopted by the European Parliament in the 1<sup>st</sup> Reading and significantly contributing to the achievement of the mentioned objectives have not been taken over by the Council in its Common Position.

### **We draw your attention to two principal provisions in the Common Position and to the amendments proposed in the annex:**

#### **1. Clear defences based on permit compliance and state-of-the-art knowledge**

Permit compliance and state-of-the-art knowledge should be sufficiently recognised to prevent the current permit system and the development of appropriate financial security being undermined (Art. 8).

#### **2. Clear operator responsibility**

It should be clear that the operator should act first, with the competent authority only intervening if the operator does not act or does not act satisfactorily (Art. 5 + 6).

### **In addition, we encourage the European Parliament to insist in the 2<sup>nd</sup> Reading on the following amendments adopted in the 1<sup>st</sup> Reading:**

- An obligation for Member States to monitor baseline conditions - **Amt 27**
- An obligation for Member States to ensure that operators do not have to pay twice in respect of the same damage because of an overlap with civil liability - **Amt 53**
- Deletion of the notion of "interim losses" and monetary valuation - **Amts on Article 2**
- Designation of Annex II (Remediation) as guidelines - **Amt 63**
- The requirement of a clear causal link between act/failure to act and damage/imminent threat occurring - **Amt 35**

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## AMENDMENT PROPOSALS

### Article 8

#### Prevention and remediation costs

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| <p>3. An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage:</p> <ul style="list-style-type: none"><li>(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or</li><li>(b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.</li></ul> <p>In such cases Member States shall take the appropriate measures to enable the operator to recover the costs incurred.</p> <p>4. The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:</p> <ul style="list-style-type: none"><li>(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event;</li><li>(b) an emission or activity or any manner of</li></ul> | <p>3. An operator shall not be required to <b>take, or</b> bear the cost of, preventive or remedial actions pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage:</p> <ul style="list-style-type: none"><li>(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or</li><li>(b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities;</li><li><b>(c) was caused by an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event;</b></li><li><b>(d) was caused by an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.</b></li></ul> <p><b>Paragraph 3 (c) and (d) shall not apply if the operator has been at fault or negligent.</b></p> <p><b>4. Deleted.</b></p> |
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| <p>using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.</p> |  |
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Justification

It seems inappropriate to oblige operators that are not liable to take preventive or remedial action and to bear the costs thereof, and to seek reimbursement afterwards. Operators that are not liable should neither be obliged to take preventive or remedial action nor to advance its financing. Defences based on permit compliance and state-of-the-art knowledge should have the same standing as those based on third-party causation and compliance with a compulsory public order or instruction. The wording of the CP risks undermining the current permit system and the development of appropriate financial security. Moreover, for the transposition of the Directive into national law, the wording "may allow" in Article 8.4 of the CP could lead to very different interpretations of this provision reaching from outright exemptions to complete disregard of permits and state-of-the-art knowledge. There should be harmonisation in this essential matter.

**Article 5**

**Preventive action**

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| <p>3. The competent authority may, at any time:</p> <ul style="list-style-type: none"><li>(a) require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat;</li><li>(b) require the operator to take the necessary preventive measures;</li><li>(c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or</li><li>(d) itself take the necessary preventive measures.</li></ul> <p>4. The competent authority shall require that the preventive measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 3(b) or (c), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself.</p> | <p>3. The competent authority may, at any time:</p> <ul style="list-style-type: none"><li>(a) require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat;</li><li>(b) require the operator to take the necessary preventive measures;</li><li>(c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or</li><li>(d) itself take the necessary preventive measures <b>if the operator fails to comply with the obligation laid down in paragraph 1 or 3 (b) or (c), cannot be identified or is not required to bear the costs under this Directive.</b></li></ul> <p><b>4. Deleted.</b></p> |
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Justification

It should be clear that the operator should act first and the competent authority only intervenes if the operator does not act or does not act satisfactorily. The current wording is confusing and partially contradictory. The first sentence of para 4 is redundant, as the obligation for the operator to act is already laid down in para 1. It is also in contradiction with para 3 (b). For clarity, the first sentence of para 4 is deleted and the second sentence of para 4 is merged with para 3 (d).

**Article 6**

**Remedial action**

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| <p>2. The competent authority may, at any time:</p> <ul style="list-style-type: none"><li>(a) require the operator to provide supplementary information on any damage that has occurred;</li><li>(b) take, require the operator to take or given instructions to the operator concerning, all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminant and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effect on human health, or further impairment of services;</li><li>(c) require the operator to take the necessary remedial measures;</li><li>(d) give instructions to the operator to be followed on the necessary remedial measures to be taken; or</li><li>(e) itself take the necessary remedial measures.</li></ul> <p>3. The competent authority shall require that the remedial measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 2(b), (c) or (d), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measure itself.</p> | <p>2. The competent authority may, at any time:</p> <ul style="list-style-type: none"><li>(a) require the operator to provide supplementary information on any damage that has occurred;</li><li>(b) take, require the operator to take or given instructions to the operator concerning, all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminant and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effect on human health, or further impairment of services;</li><li>(c) require the operator to take the necessary remedial measures;</li><li>(d) give instructions to the operator to be followed on the necessary remedial measures to be taken; or</li><li>(e) itself take the necessary remedial measures <b>if the operator fails to comply with the obligations laid down in paragraph 1 or 2(b), (c), or (d), cannot be identified or is not required to bear the costs under this Directive.</b></li></ul> <p><b>3. Deleted.</b></p> |
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Justification

It should be clear that the operator should act first and the competent authority only intervenes if the operator does not act or does not act satisfactorily. The current wording is confusing and partially contradictory. The first sentence of para 3 is redundant, as the obligation for the operator to act is already laid down in para 1. It is also in contradiction with para 2 (c). For clarity, the first sentence of para 3 is deleted and the second sentence of para 3 is merged with para 2 (e).