

Environment: liability with regard to the prevention and remedying of environmental damage

2002/0021(COD) - 23/01/2002 - Legislative proposal

PURPOSE: to create a regulatory framework establishing environmental liability with regard to the prevention and remedying of environmental damage. **CONTENT:** the principle, according to which the polluter should pay, is at the root of Community environmental policy. The drafting of this Commission proposal to finally see this principle securely applied in the EU under strict legal conditions has been a long time in the making and dates back to the 1993 Green Paper on Environmental Liability, Parliamentary resolutions on this matter and the 2000 White Paper on Environmental Liability. Enhanced EU harmonisation and regulatory control in this field is justified on the grounds that: - Not all Member States have adopted legislation to address the problem. (Portugal and Greece have no specific legislation on contaminated sites). - Not all Member States' legislation adequately covers the primary objective of site clean-up. - Without a harmonised framework at Community level, economic actors could exploit differences in member states' approaches and engage in artificial legal constructions. For example, spin-off risky operation to exploit liability loop-holes. Essentially, the proposal aims to establish a framework whereby environmental damage would be prevented or remedied through forcing operators to consider the costs of cleaning up polluted sites where there is a clear case of negligence on their behalf. On the basis of the subsidiarity and proportionality principles, the Directive leaves it open to the member states to decide when measures should be taken by the relevant operator or by the competent authorities or by a third party on their behalf. The specific aim of the proposed Directive is to determine certain rules on restoring damaged sites and to identify appropriate restorative measures so that a minimum common basis is shared by all EU Member States. Whenever possible, and in accordance with the "polluter pays" principle, the operator, who has caused the damage or who is faced with an imminent threat of such damage occurring, must ultimately bear the cost associated with those measures. Had the measures been taken by the competent authorities or by a third party on their behalf, the cost of so doing must then be recovered from the operator. Significantly, the proposed Directive provides, in cases where proprietary rights can not be established, that qualified entities, or persons who have a sufficient interest (e.g. environmental NGOs), may request the competent authority to take appropriate action and possibly challenge their subsequent action or inaction. The proposed Directive hinges on two areas. Firstly, to ensure that site contamination is effectively and efficiently cleared up. Secondly, to arrest the continuing loss of biodiversity in the EU. Concerning the first area namely site contamination, the Commission estimates that some 300 000 sites in the Community have already been identified as definitely or potentially contaminated. The clean up cost alone has been estimated at between EUR 55 and 106 billion. Since many sites have been classified as "orphan sites" (i.e. where ownership is impossible to determine or else the owners are insolvent) the cost of cleaning it up will come from public finances. This proposal seeks to ensure that liability should, in the future at least, determine who is responsible for contamination. Once that has been determined they should be held liable for the clean-up costs. Concerning the loss of bio-diversity, the Commission notes that existing EU Directives (i.e. the Habitats and Wild Birds Directive) contain no liability provisions whereby the polluter pays principle applies. Currently, few, if any, of the member states fill this void by imposing liability for bio-diversity damage on private parties. Lastly, the Commission has conducted a number of studies to assess the economic impact of the proposal in terms of its benefits and costs. Based on these studies the Commission concludes that imposing liability on operators is an effective tool for the prevention of damage occurring in the first place. This, after all, is one of the main objectives of the Directive. The parties responsible for the potential damage are encouraged to invest in prevention rather than pay for the higher restoration cost. Importantly, insurance costs are not being made compulsory under the initial proposal - but are strongly encouraged. In response to criticism that it would be impossible to insure clean-up costs, the Commission refers to a number of studies, which indicate unequivocally that

insurers are both prepared, indeed already offer, insurance for this kind of legislation. Much of the studies are based on research in the United States where insurers have been offering comprehensive deals for the past twenty years.