

EU

Liability for Environmental Damage: New Proposal

On 23 January 2002, the European Commission tabled its long-awaited proposal for a Directive to set up an EU system of liability for environmental damage. The proposal establishes a framework to ensure that such damage in the future is prevented or restorative measures are undertaken. It has no retrospective effect.

Under the proposal, environmental damage includes damage to wildlife and natural biodiversity protected at EU (through Habitat and Wild Birds Directives) and national levels, damage to the water courses regulated by the Water Framework Directive, as well as land contamination which causes serious harm to human health.

Public authorities will play an important role in the proposed liability scheme. It will be their role to ensure that responsible operators undertake themselves or finance the necessary restorative measures in cases of environmental damage.

Qualified entities, such as public interest groups, including non-governmental organisations (NGOs), as well as persons who have a sufficient interest (i.e. those who have suffered damage) can request the competent authority to take appropriate action. They can also challenge the competent authority's action or inaction. This will permit the public to oversee and influence the role played by competent authorities as trustees of environmental assets, while not being directly involved.

It was expected that the draft Directive, which has taken over ten years to realise and has been the subject of ongoing heated debate, would cause an uproar not only among industrial and environmental lobby groups, but also between Ministers and Members of the European Parliament. With an estimated 300,000 sites in the EU identified as definitely or potentially contaminated, the economic costs will be enormous for even a partial clean-up.

The environmental lobby claims that the proposal is completely geared towards the interests of industry, while the UNICE (the Union of Industrial and Employers Confederations of Europe), which represents 16 million European companies, said it was deeply concerned by the proposal. Its fear was that companies would be exposed to unlimited liability claims for damage to biodiversity, 'which is difficult to define and which is not quantifiable'. UNICE is calling on Member States and the European Parliament to reject the proposal.

EU Environment Commissioner Margot Wallström called the draft legislation a 'compromise proposal that is

nevertheless fairly balanced', although she admitted having made many concessions, to avoid 'the risk of the Directive never coming into being'.

The centrepiece of the debate surrounding the proposal is the question of the scope of the Directive. That is, what environmental damage and which occupational activities should be covered? And what are the defence opportunities potentially available to alleged polluters?

The operators potentially liable under the Directive for the costs of prevention or restoration of environmental damage, are the operators of practices or activities listed in Annex I considered as posing a potential or actual risk to mankind and the environment. These activities include releasing heavy metals into water or the air; installations producing dangerous chemicals; and landfill sites and incineration plants. However, Annex I excludes oil transport and drilling operations from its scope. Operators of activities outside Annex I may also be liable for the costs of preventing or restoring biodiversity damage. However, an operator 'should only be liable if he is at fault or has been negligent'.

The proposal also includes provisions concerning cross-border damage, financial security (although insurance schemes are encouraged, they are not mandatory), its relationship with national laws, and a provision for reviewing the regime five years after it comes into force.

The draft specifies some exemptions and defences, which are justified by the need to ensure legal certainty and preserve incentives for innovation. For example, activities and emissions which are believed to be safe for the environment according to 'the state of scientific and technical knowledge' when they occur are not covered by the proposal. In certain cases, however, negligent operators will not be able to rely on the exemptions.

One of the major stumbling blocks up to the last minute was the definition decided on for biodiversity, which covers only protected areas and species under the Habitats and Wild Birds Directives. NGOs also claim that the provisions on access to the courts are inadequate and that, in their present state, they totally disregard the Aarhus Convention (on Access to Information and Public Participation in Environmental Decision-making) and contradict the Commission's aims in the case of improved governance.

It will be interesting to see the reaction of the next Environment Council to the proposal. (MJ)

