Opinion of the Economic and Social Committee on the ‘White Paper on Environmental Liability’

(2000/C 268/07)

On 18 February 2000, the Commission decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the ‘White Paper on Environmental Liability’.

The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 21 June 2000. The rapporteur was Mrs Sánchez Miguel.

At its 374th plenary session (meeting of 12 July 2000), the Economic and Social Committee adopted the following opinion by 87 votes to seven, with 19 abstentions.

1. Introduction

1.1. It has taken the Commission almost seven years since the Green Paper on Remediying environmental damage(1) to publish a White Paper establishing the structure of a future Community regime for environmental liability and outlining the main factors that will determine the effectiveness and viability of this regime.

1.2. In the meantime, it has become clear that it is necessary not only to prevent environmental damage caused by human activity, but also to implement another essential principle — the ‘polluter pays’ — which is echoed throughout Community legislation and which is gradually becoming accepted to varying degrees by all the social players.

1.3. The serious incidents of recent years — Doñana, Erika, Baia Mare etc. — have demonstrated the need to transcend national legislation on environmental liability, which does not provide the instruments required to respond to those cases where damage affects more than one country. National laws on environmental liability differ greatly, and some countries still have no legislation on the subject. This makes it difficult to address environmental problems effectively.

1.4. Consideration should also be given to certain developments whose possible impact has to be predicted, such as the extensive use of GMOs, which is currently meeting stiff opposition in civil society. The precautionary principle must apply in full to GMOs. The relevant EU legislation(2) is currently being reviewed. In some Member States, some strands of opinion are calling for a moratorium on the use of GMOs until they have been scientifically proven to be harmless for human health and the environment.

2. Gist of the White Paper

2.1. The White Paper explores various ways to shape an EU-wide environmental liability regime, in order to improve application of the environmental principles set out in Article 174(2) of the EC Treaty (the ‘precautionary’, ‘preventive action’ and, in particular, ‘polluter-pays’ principles) and implementation of EU environmental law. Pursuant to these principles, the EU regime would aim to serve as an effective instrument of prevention supporting the application of other existing EU environmental legislation. However, its main purpose is to repair environmental damage in compliance with the ‘polluter-pays’ principle, so that society is not left to foot the bill directly.

2.2. The main features of a possible Community regime are outlined, including:

— no retroactivity;

— coverage of both traditional damage (harm to health and property) and environmental damage (site contamination and damage to biodiversity: the latter only if they are protected under the Natura 2000 network based on the habitats and wild birds directives. It could, therefore, cover not only damage to habitats, but to flora and fauna as well, e.g. migratory birds);

— a closed scope of application (regulated activities’) linked with EU environmental legislation: contaminated sites and traditional damage to be covered only if caused by an EU-regulated hazardous or potentially hazardous activity (these activities are established in many directives such as those setting limits on emissions of dangerous substances into the air or into the marine environment, the IPPC and Seveso II directives, legislation on waste disposal, GMOs, etc.).

(1) COM(93) 47 final of 14 May 1993.
strict liability (which means that there is no need to prove the fault of the polluter, simply a link between the facts and the damage) for damage caused by 'inherently dangerous activities', and fault-based liability for damage (to the Natura 2000 network only) caused by 'a non-dangerous activity';

codification of defences (exempting or extenuating circumstances) removing or reducing liability;

liability focused on the operator in control of the activity which caused the damage. If this is a company with a legal personality, the legal person will be liable instead of the management or other employees;

criteria for assessing different types of damage;

an obligation to spend compensation paid by the polluter on environmental restoration;

proposals for enhanced access to justice (the question of 'ius standi' for filing a liability lawsuit). The White Paper expresses a preference for the State as opposed to environmental organisations and associations, which can only take direct action in urgent cases).

2.3. Different options for Community action are presented and assessed: the White Paper concludes that the most appropriate option would be a framework directive. The details of such a directive should be fleshed out in the light of the consultations the Commission is carrying out.

3. General comments

3.1. The ESC is satisfied with this White Paper and calls on the Commission to ensure that the final result is a legislative proposal which, combined with the other available Community instruments, serves to curb the EU's environmental decline.

3.2. In line with its previous opinions (1), the ESC supports the legislative instrument proposed i.e. a framework directive, as this will allow the subsidiarity principle to be clearly applied, thus harmonising the broad lines and allowing Member States to develop the regulations which they consider most necessary.

3.2.1. The framework directive would mean merging into a single text existing pieces of legislation whose disparate nature hampers their application. It would also repeal obsolete legislation while maintaining tried and tested scientific concepts, and would, above all, make the provisions clearer and easier to apply for the parties concerned.

3.3. The ESC welcomes the non-retroactive nature of the proposed regime. It should be borne in mind that this principle will not apply when polluting activities commencing prior to the entry into force of the EU regime continue subsequently. In such cases, the polluter will be liable. Account should also be taken of compliance with environmental legislation over the period concerned.

3.4. With regard to the proposed damage to be covered, the ESC stresses the major importance of a broad liability system which covers not only traditional damage but also environmental damage. It is true that in the EU there are currently liability regimes for failure to comply with environmental legislation, incurring purely monetary penalties, and that Member States can broaden the system to impose other types of penalty. This type of penalty, however, compensates only part of the damage caused and does not serve to fully restore the damaged environment.

3.5. The benefits to be secured by enforcing environmental liability must not be undermined by the recognition of certain defences. These defences must be calibrated in line with the degree to which environmental regulations have been respected, and obeying a compulsory order from the relevant administrative authority could be considered as a cast-iron defence.

3.6. The proposed regime could have a preventive effect, as it will involve finding and increasing the resources for more rigorous environmental action. In this respect, measures are needed to help SMEs adapt their production systems to environmental needs. This means simplified procedures that take account of the number of small firms which carry out 'hazardous' activities and which would therefore be affected. Funds could also be provided to help SMEs adjust to the new requirements, especially as regards the cost of insurance.

3.7. In the interest of fairness, it is necessary to establish the criteria and method for calculating environmental damage. Regional regimes are already being applied using evaluation criteria such as the value of natural resources. The cost of repairing environmental damage could also be applied as a criterion. The use of several different criteria means that they can be adjusted according to the type of damage caused, as they take account of all the contributory factors. It is in any case necessary to continue seeking criteria which uphold the principle of equity in repairing damage.

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3.7.1. In order to develop evaluation criteria, it seems helpful to use ‘benefit-transfer’ databases similar to the Environmental Valuation Resource Inventory (EVRI) which contains relevant evaluation material.

3.7.2. The criteria for calculating the compensation to be paid by the polluter should include whether environmental regulations have been complied with, whether the activity had been licensed, whether more than one party is liable, and the defences which might reduce liability.

3.8. So as to preserve the competitiveness of the EU economy, the introduction of environmental liability should have no adverse effects. Although the Commission does not currently have any verifiable data on the effects on external competitiveness, the outlook is promising since most OECD countries have this type of legislation (1). This should minimise the impact, as liability systems and the attendant guarantees will be generalised.

3.8.1. The ESC also takes the view that under the relevant international agreements (for example, the Lugano Convention), the EU should propose that environmental liability regulations be aligned in all countries, especially within the WTO, so as to avoid distortions of competitiveness.

3.9. It is also necessary to anticipate EU enlargement, as environmental policies in the applicant countries differ from Community policies. When the acceding countries incorporate Community legislation into their own, they should also be provided with wide-ranging information, and interested parties should be consulted. They should also receive financial support (e.g. from the pre-accession funds) enabling them to comply within the requisite time-frame.

4. Specific comments

4.1. The ESC feels that some aspects of the proposed environmental liability for damage to biodiversity could be improved in a future framework directive.

4.1.1. Damage to bio-diversity will only apply within the Natura 2000 network. It is therefore vital that the Commission adopt the list of sites of Community importance as soon as possible. The Committee calls on the Member States to finally meet their obligation under Directive 92/43/EEC and submit national lists which truly meet the Directive’s requirements.

4.1.2. Establishing a threshold for triggering liability is necessary in the interests of legal certainty. However, it must be borne in mind that it is not always possible to evaluate the damage immediately. The threshold should not be based solely on economic factors; the decision as to whether damage is significant should also relate to the damage to biodiversity and the pollution of the site. The Committee thinks that any legislative instrument should clarify the terms ‘threshold’ and ‘significant damage’ in order to avoid any inconsistencies in implementation.

4.1.3. The drafting of the provisions of the framework directive that concern GMOs will be a particularly delicate matter. The legislation (90/220) concerning risk assessment and authorisations is being revised, and is currently in the conciliation procedure between the European Parliament and the Council. One point of dispute has been the question of liability, and the Commission has promised, in a statement from Commissioner Wallström, to regulate the matter horizontally in the framework directive by the end of 2001. It should also be remembered that products containing GMOs are already covered by the Directive on liability for defective products (2) (damage to persons and goods) which was recently extended to include non-processed agricultural products. Point 4.5.4 of the White Paper rightly mentions this link, stating that the Product Liability Directive prevails as the legislation applicable when compensation is sought for traditional damage. The liability regime for damage to the environment and to biodiversity urgently needs to be clarified, as is clear from the recent cases of farmers who found themselves unwittingly using genetically modified seed.

4.2. The fact that there are two different types of liability also affects the burden of proof. In the case of strict liability (for damage caused by activities considered dangerous under Community legislation (3)), the plaintiff must only prove the causal link between the damage and the polluter. In the case of fault-based liability (where the defendant has acted wrongfully), the plaintiff must also prove that there was deliberate intent. The Committee takes the view that the Commission proposal is in this instance justified, and supports it.

4.3. The ESC also takes the view that under the relevant international agreements (for example, the Lugano Convention), the EU should propose that environmental liability regulations be aligned in all countries, especially within the WTO, so as to avoid distortions of competitiveness.

4.5.4. The White Paper states that it is important for the EU liability regime for the protection of biodiversity also to cover non-dangerous activities, since the Wild Birds and Habitats Directives contain a set of requirements for restoration of significant damage regardless of the nature of activity responsible. The Commission, however, believes that in these cases the liability should differ from that established for damage caused by dangerous activities.

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(1) The United States, where environmental liability has been in application for 20 years, has calculated that the Superfund regime amounts to less than 5% of the total spent each year at national level to ensure compliance with federal environmental legislation.


(3) The White Paper states that it is important for the EU liability regime for the protection of biodiversity also to cover non-dangerous activities, since the Wild Birds and Habitats Directives contain a set of requirements for restoration of significant damage regardless of the nature of activity responsible. The Commission, however, believes that in these cases the liability should differ from that established for damage caused by dangerous activities.
4.3. A liability action may also be affected by the type of defence, as noted in 3.5 above. The Committee considers that the only firm defences should be an Act of God or a compulsory order by a public authority. Other defences may be considered only as extenuating circumstances. In many cases, the combined action of a producer and a public authority would make them jointly liable for environmental damage.

4.4. A matter of great importance which is not addressed in the White Paper is information. For the proposed system to be effective, it requires the involvement of socio-economic organisations, NGOs and other associations concerned with environmental protection. It therefore needs an information network channelling information from the public authorities to the public and vice versa on achievable measures to avoid environmental damage.

4.4.1. There could be a thematic network such as the one for Community action in the field of accidental marine pollution.

4.4.2. The United Nations Århus Convention could be implemented (1).

4.4.3. The IMPEL network could be used.

4.5. The White Paper states that the active legal capacity to bring an action belongs in the first instance to the State, i.e. the relevant administrative authority and, in the second instance, to environmental organisations and interested parties. The Committee considers this to be a necessary system in order to be able to challenge possible procrastination or negligence on the part of the authorities.

4.5.1. The Committee welcomes the provision allowing urgent injunction measures to freeze the activities of the polluter in order to prevent greater damage.

4.6. A matter of vital importance to the effectiveness of the proposal is the compulsory insurance for all dangerous activities affecting the environment. The implementation of Directive 85/374/EEC has proven not to have had a significant impact on the financial costs to businesses. It has even been extended to the service sectors (particularly the medical profession), owing to the peace of mind it affords parties subject to this type of liability. The Committee considers that the requirement for compulsory insurance puts this type of liability on the same footing as other forms of compulsory insurance already regulated in the EU, such as motor-vehicle insurance or civil liability insurance for defective products. The Committee also thinks it makes sense for companies to take other measures which they can choose voluntarily (e.g. reserves, letters of intent, further insurance).

5. Conclusions

5.1. The Committee recognises the importance of civil liability actions for the environment. A number of elements must be clearly defined in order to ensure that the instrument is easy to apply for all Member States. The Committee therefore recommends that:

5.1.1. A list should be drawn up of all Community legal texts governing liability.

5.1.2. The following concepts should be defined: dangerous activity; damage to biodiversity; identification of protected areas; damage evaluation criteria; and all other terms influencing implementation.

5.1.3. The two proposed liability regimes (strict liability for dangerous activities and fault-based liability for non-dangerous activities) should be clearly distinguished so that there are no grounds for confusion when implementing the system. An Appendix should specify the Community provisions which determine dangerous activities and those which determine the liability system for non-dangerous activities.

5.2. The Committee feels that a framework directive provides the best instrument for dealing with environmental liability, as it can best accommodate the different situations within the EU. However, the terms of harmonisation must not skew competition. This risk must be borne in mind with a view to establishing a minimum statutory core.


The President
of the Economic and Social Committee
Beatrice RANGONI MACHIAVELLI

(1) UN/ECE Convention on Access to information, public participation in decision-making and access to justice in environmental matters. The Convention was adopted at the Ministerial Conference in Århus (Denmark) on 23-25 June 1998.
APPENDIX

to the Opinion of the Economic and Social Committee

The following amendment, which received at least one quarter of the votes cast, was defeated during the discussion.

**Point 4.3**

Amend the second and third sentences as follows:

‘The Committee considers that an Act of God or a compulsory order by a public authority should always be accepted as exempting circumstances. Other reasons may also be considered as exempting or extenuating circumstances.’

**Reason**

To ensure a reasonable degree of legal certainty, in particular taking into account that the proposed liability regime will cover the new area of environmental damage alongside traditional damage.

**Result of the vote**

For: 35, against: 58, abstentions: 1.