

II

(Preparatory Acts)

COMMISSION

Amended proposal for a Council Directive on civil liability for damage caused by waste ⁽¹⁾

(91/C 192/04)

COM(91) 219 final — SYN 217

(Submitted by the Commission pursuant to Article 149 (3) of the EEC Treaty on 28 June 1991)

⁽¹⁾ OJ No C 251, 4. 10. 1989, p. 3.

ORIGINAL PROPOSAL

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas Article 11 (3) of Directive 84/631/EEC ⁽¹⁾, as last amended by Directive 86/279/EEC ⁽²⁾, provides, on the basis of Article 100 of the Treaty, for action by the Community to determine the conditions for implementing the civil liability of the producer in the case of damage caused by waste, or that of any other person who may be accountable for the said damage, and to determine a system of insurance;

AMENDED PROPOSAL

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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Having regard to the proposal from the Commission,

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Whereas Article 11 (3) of Directive 84/631/EEC ⁽¹⁾, as last amended by Directive 86/279/EEC ⁽²⁾, provides, on the basis of Article 100 of the Treaty, for action by the Community to determine the conditions for implementing the civil liability of the producer in the case of damage caused by waste, or that of any other person who may be accountable for the said damage, and to determine a system of insurance;

⁽¹⁾ OJ No L 326, 13. 12. 1984, p. 31.⁽²⁾ OJ No L 181, 4. 7. 1986, p. 13.

⁽¹⁾ OJ No L 326, 13. 12. 1984, p. 31.⁽²⁾ OJ No L 181, 4. 7. 1986, p. 13.

ORIGINAL PROPOSAL

Whereas the Fourth Environment Action Programme of the European Communities of 1987 ⁽¹⁾ provides in point 5.3.6 that work on the question of civil liability and insurance in relation to the transfrontier movement of waste will be completed and proposals will be made; whereas it also provides in point 2.5.5 that the Commission will 'consider the scope for the better definition of responsibility in the environmental field';

Whereas disparities among laws of the Member States concerning the liability for damage and injury to the environment caused by waste could lead to artificial patterns of investment and waste; whereas such a situation would distort competition, affect the free movement of goods within the internal market and entail differences in the level of protection of health, property and the environment; whereas an approximation of the laws of the Member States on this subject is therefore needed;

Whereas, since the entry into force of the Single European Act, Article 100a has replaced Article 100 as the appropriate basis in the Treaty for approximating national provisions that affect the internal market;

Whereas such approximation must be based on a high level of protection both with regard to the damage and injury to the environment which may be repaired, and the conditions that must be fulfilled in order to initiate proceedings;

Whereas Article 11 (1) of Directive 84/631/EEC requires the producer of waste to take all necessary steps to dispose of the waste, or arrange for its disposal, so as to protect the quality of the environment;

Whereas Community action in the field of waste management seeks to minimize the production and monitor the effects of waste, throughout the whole cycle from production to disposal; whereas it concerns all types of waste;

Whereas therefore the Community system of civil liability in this field should not be limited to damage and injury to the environment that occurs during trans-frontier movements of hazardous waste;

AMENDED PROPOSAL

Whereas the Fourth Environment Action Programme of the European Communities of 1987 ⁽¹⁾ provides in point 5.3.6 that work on the question of civil liability and insurance in relation to the transfrontier movement of waste will be completed and proposals will be made; whereas it also provides in point 2.5.5 that the Commission will 'consider the scope for the better definition of responsibility in the environmental field';

Whereas disparities among laws of the Member States concerning the liability for damage and impairment of the environment caused by waste could lead to artificial patterns of investment and waste; whereas such a situation would distort competition, affect the free movement of goods within the internal market and entail differences in the level of protection of health, property and the environment; whereas an approximation of the laws of the Member States on this subject is therefore needed;

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Whereas such approximation must be based on a high level of protection both with regard to the damage and impairment of the environment which may be repaired, and the conditions that must be fulfilled in order to initiate proceedings;

Whereas Article 11 (1) of Directive 84/631/EEC requires the producer of waste to take all necessary steps to dispose of the waste, or arrange for its disposal, so as to protect the quality of the environment;

Whereas Community action in the field of waste management seeks to minimize the production and monitor the effects of waste, throughout the whole cycle from production to disposal; whereas it concerns all types of waste;

Whereas therefore the Community system of civil liability in this field should not be limited to damage and impairment of the environment that occurs during trans-frontier movements of hazardous waste;

⁽¹⁾ OJ No C 328, 7. 12. 1987, p. 6.

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ORIGINAL PROPOSAL

Whereas this system presupposes the notion of professional risk;

Whereas the principles established in Article 130r (2) of the Treaty that the polluter should pay and that preventive action should be taken cannot be effectively implemented in the waste management sector unless the cost of the damage or injury to the environment caused by the waste is reflected in the cost of the goods or services that give rise to the waste; whereas, in view of the risk inherent in the very existence of waste, the strict liability of the producer constitutes the best solution to the problem;

Whereas, however, if the waste has been lawfully transferred to an authorized disposal installation, establishment or undertaking pursuant to Article 9 of Council Directive 78/319/EEC ⁽¹⁾, liability must be transferred to the latter;

Whereas, in order to safeguard the injured party's rights, the holder of waste must be able to identify the producer, on pain of himself being considered the producer;

Whereas effective protection of the injured party requires that he should be able to claim full redress from each of the parties responsible for the damage or injury to the environment, irrespective of the establishment of the relative liability of the parties;

AMENDED PROPOSAL

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Whereas, however, if the waste has been lawfully transferred to an authorized disposal installation, establishment or undertaking pursuant to Article 9 of Council Directive 78/319/EEC ⁽¹⁾, liability must be transferred to the latter;

Whereas, in order to safeguard the injured party's rights, the holder of waste must be able to identify the producer, on pain of himself being considered the producer; whereas the Directive must also cover the liability of the eliminator of waste;

Whereas in cases where the Convention on civil liability for damage caused during the carriage of dangerous goods applies, the carrier should be liable within the limits laid down in the abovementioned Convention;

Whereas in the interest of a high level of protection for the interests of the injured parties and of the environment, the Member States must offer the persons who may bring a legal action the possibility of requesting measures to prevent, suspend and/or compensate for the act or omission which caused or may cause damage to or impairment of the environment;

Whereas effective protection of the injured party requires that he should be able to claim full redress from each of the parties responsible for the damage or impairment of the environment, irrespective of the establishment of the relative liability of the parties;

⁽¹⁾ OJ No L 84, 31. 3. 1978, p. 43.

⁽¹⁾ OJ No L 84, 31. 3. 1978, p. 43.

ORIGINAL PROPOSAL

Whereas the protection of persons and the environment requires that the producer's liability should not be reduced by the involvement of other persons having contributed to causing the damage or injury to the environment; whereas, however, the contributory negligence of the injured party may be taken into account to assign, reduce or disallow such liability;

Whereas the protection of persons and the environment requires compensation for death and personal injury; whereas such compensation should be extended to damage to property and injury to the environment; whereas this Directive does not prejudice compensation for pain and suffering and other non-material damage payable, where appropriate, under the law applicable to the case;

Whereas a uniform period of limitation for instituting compensation proceedings is in the interests both of the injured party and of the producer;

Whereas, to ensure the effective protection of persons and the environment, no contractual derogation should be permitted as regards the liability of the producer in relation to the injured party;

Whereas market conditions at present are such that it is not opportune to establish a mandatory system of insurance;

Whereas rules must be laid down at Community level for compensation for damage and injury to the environment caused by waste in the event that payment of full compensation is not possible,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall concern civil liability for damage and injury to the environment caused by waste generated in the course of an occupational activity, from the moment it arises.

AMENDED PROPOSAL

Whereas the protection of persons and the environment requires that a person's liability should not be reduced by the involvement of other persons having recklessly or negligently contributed to causing the damage or impairment of the environment; whereas, however, the intent of the injured party to cause such damage or impairment or contributory negligence on his part may be taken into account to assign, reduce or disallow such liability;

Whereas the protection of persons and the environment requires compensation for death and personal injury; whereas such compensation should be extended to damage to property and impairment of the environment; whereas this Directive does not prejudice compensation for pain and suffering and other non-material damage payable, where appropriate, under the law applicable to the case;

Whereas a uniform period of limitation for instituting compensation proceedings is in the interests both of the injured party and of the producer;

Whereas, to ensure the effective protection of persons and the environment, no contractual derogation should be permitted as regards the liability of any person under this Directive in relation to the damage or the impairment of the environment;

Whereas the liability of the producer and eliminator of waste must be covered by insurance or other financial security;

Whereas rules must be laid down at Community level for compensation for damage and impairment of the environment caused by waste in the event that payment of full compensation is not possible,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall concern civil liability for damage and impairment of the environment caused by waste generated in the course of an occupational activity, from the moment it arises.

ORIGINAL PROPOSAL

2. This Directive shall not apply

- to nuclear waste covered by national law based on the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) and the Convention supplementary to the aforementioned Convention (Brussels, 31 January 1963), as well as the Protocols attached to these Conventions;
- to waste and pollution covered by national law based on the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) and the International Convention on the Establishment of an International Fund for Compensation for Oil Damage (Brussels, 18 December 1971).

Article 2

1. For the purposes of this Directive:

- (a) '*producer*' means any natural or legal person whose occupational activities produce waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste, until the moment when the damage or injury to the environment is caused;
- (b) '*waste*' means any substance or object defined as waste in Article 1 of Council Directive 75/442/EEC ⁽¹⁾;
- (c) '*damage*' means:
 - (i) damage resulting from death or physical injury;
 - (ii) damage to property;

AMENDED PROPOSAL

2. This Directive shall not apply

- to nuclear waste covered by national law based on the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) and the Convention supplementary to the aforementioned Convention (Brussels, 31 January 1963), as well as the Protocols attached to these Conventions;
- to damage and impairment of the environment caused by oil from ships at sea insofar as the question of liability is regulated by the International Convention on civil liability for oil pollution damage of 29 November 1969 as amended by the Protocols of 19 November 1976 and 25 May 1984 and by the International Convention on the establishment of an international fund for compensation for oil pollution damage of 18 December 1971 as amended by the Protocols of 19 November 1976 and 25 May 1984.

3. This Directive shall apply not only to the territories of the Member States but also to the exclusive economic zone over which the Member States enjoy rights and obligations under public international law.

Article 2

1. For the purposes of this Directive:

- (a) '*producer*' means any person who, in the course of a commercial or industrial activity, produces waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste;
- (b) '*waste*' means any substance or object defined as waste in Council Directive 75/442/EEC ⁽¹⁾;
- (c) '*damage*' means:
 - (i) damage resulting from death or physical injury;
 - (ii) damage to property;

⁽¹⁾ OJ No L 194, 25. 7. 1975, p. 39.

⁽¹⁾ OJ No L 194, 25. 7. 1975, p. 39.

ORIGINAL PROPOSAL

- (d) '*injury to the environment*' means a significant and persistent interference in the environment caused by a modification of the physical, chemical or biological conditions of water, soil and/or air in so far as these are not considered to be damage within the meaning of subparagraph (c) (ii).

2. The following shall be deemed to be the producer of the waste in place of the person defined in paragraph 1 (a):

- (a) the person who imports the waste into the Community, except where the waste was previously exported from the Community and its nature or composition was not substantially changed prior to its re-importation;
- (b) the person who had actual control of the waste when the incident giving rise to the damage or injury to the environment occurred:
- (i) if he is not able within a reasonable period to identify the producer as defined in paragraph 1;
 - (ii) if the waste is in transit in the Community without having undergone there a substantial change in nature or composition before the occurrence of the incident giving rise to the damage or injury to the environment;
- (c) the person responsible for the installation, establishment or undertaking where the waste was lawfully transferred to such installation, establishment or undertaking licensed pursuant to Article 8 of Directive 75/442/EEC, Article 6 of Council Directive 75/439/EEC ⁽¹⁾ or Article 9 of Directive 78/319/EEC, or approved pursuant to Article 6 of Council Directive 76/403/EEC ⁽²⁾.

⁽¹⁾ OJ No L 194, 25. 7. 1975, p. 23.

⁽²⁾ OJ No L 108, 26. 4. 1976, p. 41.

AMENDED PROPOSAL

- (d) '*impairment of the environment*' means any significant physical, chemical or biological deterioration of the environment insofar as this is not considered to be damage within the meaning of sub-paragraph (c) (ii);

- (e) '*person*' means any natural or legal person as defined by public or private law:

- (f) '*eliminator*' means a person who carries out any of the operations listed in Annex II A or Annex II B to Council Directive 75/442/EEC.

2. The following shall be deemed to be the producer of the waste in place of the person defined in paragraph 1 (a):

- (a) the person who imports the waste into the Community, except where the waste was previously exported from the Community and its nature or composition was not substantially changed prior to its re-importation;
- (b) the person who had actual control of the waste when the incident giving rise to the damage to or impairment of the environment occurred, if he is not able within a reasonable period to identify the producer as defined in paragraph 1(a);
- (c) the person responsible for the installation, establishment or undertaking where the waste was lawfully transferred to such installation, establishment or undertaking licensed pursuant to Article 8 of Directive 75/442/EEC, Article 6 of Directive 75/439/EEC ⁽¹⁾ or Article 9 of Directive 78/319/EEC, or approved pursuant to Article 6 of Directive 76/403/EEC ⁽²⁾.

⁽¹⁾ OJ No L 194, 25. 7. 1975, p. 23.

⁽²⁾ OJ No L 108, 26. 4. 1976, p. 41.

ORIGINAL PROPOSAL

Article 3

The producer of waste shall be liable under civil law for the damage and injury to the environment caused by the waste, irrespective of fault on his part.

Article 4

1. The plaintiff may take legal action to obtain:
 - (a) the prohibition or cessation of the act causing the damage or injury to the environment;
 - (b) the reimbursement of expenditure arising from measures to prevent the damage or injury to the environment;
 - (c) the reimbursement of expenditure arising from measures to compensate for damage within the meaning of subparagraph (c) (ii) of Article 2 (1);

AMENDED PROPOSAL

Article 3

1. The producer of waste shall be liable under civil law for the damage and impairment of the environment caused by the waste, irrespective of fault on his part. In cases covered by the Convention on civil liability for damage caused during the carriage of dangerous goods by road, rail and inland waterway vessels of 10 October 1989, the carrier shall also be liable within the limits laid down in the abovementioned Convention.

2. The producer shall include in his annual report the name of his insurers for civil liability purposes.

Article 4

1. The national laws of the Member States shall determine:
 - (a) the person who may bring a legal action in the event of damage to or impairment of the environment caused or about to be caused by waste;
 - (b) the remedies available to such persons which shall include:
 - (i) an injunction prohibiting the act or correcting the omission that has caused or may cause the damage and/or compensation for the damage suffered;
 - (ii) an injunction prohibiting the act or correcting the omission that has caused or may cause impairment of the environment;
 - (iii) an injunction ordering the reinstatement of the environment and/or ordering the execution of preventive measures and the reimbursement of costs lawfully incurred in reinstating the environment and in taking preventive measures (including costs of damage caused by preventive measures);
 - (c) the burden of proof on the plaintiff, when affirming the causal link between the waste on the one hand and the damage or impairment of the environment suffered or likely to be suffered on the other hand; the burden of proof shall be no higher than the standard burden of proof in civil law;

ORIGINAL PROPOSAL

(d) the restoration of the environment to its state immediately prior to the occurrence of injury to the environment or the reimbursement of expenditure incurred in connection with measures taken to this end;

(e) indemnification for the damage.

2. With regard to the restoration of the environment provided for in paragraph 1 (d), the plaintiff, in the case of injury to the environment, may seek such restoration or the reimbursement of expenditure incurred to this end except when:

- the costs substantially exceed the benefit arising for the environment from such restoration, and
- other alternative measures to the restoration of the environment may be undertaken at a substantially lower cost.

In this latter case, the plaintiff may seek the implementation of these other measures or the reimbursement of the expenditure incurred to this end.

3. As regards injury to the environment, the public authorities may take the legal action provided for in paragraph 1 (a), (b) and (d).

4. Where the law in Member States gives common-interest groups the right to bring an action as plaintiff, they may seek only the prohibition or cessation of the act giving rise to the injury to the environment. If, however, they have taken the measures provided for in paragraph 1 (b) and (d), they may seek reimbursement of the expenditure resulting from such measures.

5. This Directive shall be without prejudice to national provisions relating to non-material damage.

6. The plaintiff shall be required to prove the damage or injury to the environment, and show the overwhelming probability of the causal relationship between the producer's waste and the damage or, as the case may be, the injury to the environment suffered.

AMENDED PROPOSAL

(d) whether and to what extent damages for loss of profit or economic loss may be recoverable.

2. With regard to reinstatement of the environment, as provided for in paragraph 1 (b) (iii), the plaintiff may seek such reinstatement or the reimbursement of expenditure incurred to this end except when:

- the costs substantially exceed the benefit arising for the environment from such reinstatement, and
- other alternative measures to the reinstatement of the environment may be undertaken at a substantially lower cost.

In this latter case, the plaintiff may seek the implementation of these other measures or the reimbursement of the expenditure incurred to this end.

3. Common interest groups or associations, which have as their object the protection of nature and the environment, shall have the right either to seek any remedy under paragraph 1 (b) or to join in legal proceedings that have already been brought. The conditions under which the interest groups or associations defined in the previous sentence may bring an action before the competent authorities shall be laid down by national legislation.

4. This Directive shall be without prejudice to national provisions relating to non-material damage.

ORIGINAL PROPOSAL

Article 5

Where, under this Directive, two or more producers are liable for the same damage or the same injury to the environment, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the right of redress.

Article 6

1. The producer shall not be liable under this Directive if he shows that the damage or injury to the environment results from *force majeure* as defined in Community law.

2. The producer shall not be relieved of liability by the sole fact that he holds a permit issued by the public authorities.

Article 7

1. Without prejudice to the provisions of national law concerning the right of recourse, the liability of the producer shall not be reduced when the damage or injury to the environment is caused both by the waste and by an act or omission of a third party.

2. The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by the waste and the fault of the injured party or of any person for whom the injured party is responsible.

Article 8

The liability of the producer arising from this Directive may not be limited or excluded in relation to the injured person by any contractual provision limiting his liability or exempting him from liability.

AMENDED PROPOSAL

Article 5

1. Where, under this Directive, two or more persons are liable for the same damage or the same impairment of the environment, they shall be liable jointly and severally.

2. This Directive shall apply without prejudice to the provisions of the national laws of the Member States concerning the right of redress.

Article 6

1. No liability shall attach to any person if he proves that, in the absence of fault on his part:

- (a) the damage or impairment of the environment was caused by an act or omission of a third party with the intent to cause such damage or impairment; or
- (b) the damage to or impairment of the environment resulted from *force majeure* as defined in Community law.

2. The producer shall not be relieved of liability by the sole fact that he holds a permit issued by the public authorities.

Article 7

1. No liability for damage or impairment of the environment caused by waste shall attach to the eliminator if he can prove that, in the absence of fault on his part, the producer of the waste deceived him as to the true character of the consignment of waste which caused such damage or impairment; in such an eventuality, liability shall rest with the producer.

2. The liability of any person may be wholly or partially waived if he can prove that the damage or impairment of the environment has been caused in whole or in part by the injured party or by any employee or agent of the said party.

Article 8

The liability of any person arising from this Directive may not be limited or excluded by any contractual provision limiting his liability or exempting him from liability.

ORIGINAL PROPOSAL

Article 9

1. Member States shall provide in their legislation that taking of legal proceedings under this Directive shall be barred upon expiry of a period of three years from the date on which the party taking legal action under Article 4 (1) (a) became aware or should have become aware of the damage or injury to the environment and of the identity of the producer.

2. This Directive shall not affect Member States' provisions on the suspension or interruption of the limitation period.

Article 10

The right to take legal action under this Directive shall be extinguished upon the expiry of a period of 30 years from the date on which the incident giving rise to the damage or injury to the environment occurred, unless in the meantime proceedings against the party liable for the damage or injury to the environment have been instituted.

Article 11

The Council acting on a proposal from the Commission, shall determine by 31 December 1992 at the latest the conditions to be applied and the means to be used in order to provide compensation for the damage and injury to the environment covered by this Directive in the event that:

- the person liable under this Directive cannot be identified,
- the person liable is incapable of providing full compensation for the damage and/or injury caused.

AMENDED PROPOSAL

Article 9

1. Member States shall provide in their legislation that any legal proceedings under this Directive shall be barred upon expiry of a period of three years from the date on which the person taking legal action under Article 4 (1) became aware or should have become aware of the damage or impairment of the environment.

2. This Directive shall not affect Member States' provisions on the suspension or interruption of the limitation period.

Article 10

The right to take legal action under this Directive shall be extinguished upon the expiry of a period of 30 years from the date on which the incident giving rise to the damage to or impairment of the environment occurred, unless in the meantime proceedings against the party liable for the damage or impairment of the environment have been instituted.

Article 11

1. The liability under this Directive of the producer, who in the course of a commercial or industrial activity produces waste, and of the eliminator shall be covered by insurance or any other financial security.

2. The Council, acting on a proposal from the Commission shall determine by 31 December 1992 common rules governing the situation arising:

- (i) where the person liable is incapable of providing full compensation for the damage and/or impairment of the environment caused; or
- (ii) the person liable under this Directive cannot be identified.

In this regard the Commission shall study the feasibility of the establishment of a European fund for compensation for damage and impairment of the environment caused by waste.

ORIGINAL PROPOSAL

Article 12

This Directive shall not affect:

- (a) any rights which may be relied upon by the plaintiff under this Directive or under international conventions on civil liability for the carriage of dangerous goods in force at the relevant time;
- (b) any rights established by the international Convention on Limitation of Liability for Maritime Claims (London, 19 November 1976).

Article 13

This Directive shall not apply to damage or injury to the environment arising from an incident which occurred before the date on which its provisions are implemented.

Article 14

1. Member States shall bring into force, not later than 1 January 1991, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

2. The provisions adopted pursuant to paragraph 1 shall make express reference to this Directive.

3. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

Article 15

This Directive is addressed to the Member States.

AMENDED PROPOSAL

Article 12

This Directive shall not affect any rights established by the International Convention on limitation of liability for maritime claims (London, 19 November 1976).

Article 13

This Directive shall not apply to damage or impairment of the environment arising from an incident which occurred before the date on which its provisions are implemented.

Article 14

1. Member States shall bring into force, not later than 1 January 1991, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

2. The provisions adopted pursuant to paragraph 1 shall make express reference to this Directive.

3. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

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This Directive is addressed to the Member States.
