3.4. Regarding content, the EESC formulated a number of proposals in its opinion on the specific programmes, which would enable the overall direction of research to be aligned with citizens' concerns (especially concerning waste processing). Research on nuclear safety/security was one of the priority issues discussed in the opinion.

Brussels, 18 July 2002.

The President

of the Economic and Social Committee

Göke FRERICHS

Opinion of the Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage'

(COM(2002) 17 final — 2002/0021 (COD))

(2002/C 241/31)

On 6 March 2002 the Council decided to consult the Economic and Social Committee, under Article 175 of the Treaty establishing the European Community, on the above-mentioned proposal.

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 2002. The rapporteur was Mrs Sánchez Miguel.

At its 392nd Plenary Session (meeting of 18 July 2002) the Economic and Social Committee adopted the following opinion by 63 votes, with three votes against and one abstention.

1. **Introduction**

1.1. Following a lengthy period of time between publication of the Green Paper [1] and the subsequent White Paper [2], the Commission has now published a proposal for a Directive on environmental liability, which lays down the Community legal framework for the prevention or remedying of environmental damage. The proposal is also intended to set in motion, under the Sixth Environment Action Programme [3], measures intended, inter alia, to implement the 'polluter-pays' principle.

1.2. Damage to biodiversity has accelerated over recent decades, as highlighted by the proposal for a Community strategy for sustainable development [4], which notes that the deterioration of the environment may be one of the most serious threats to nature in the future. The main nature protection legislation [5] has failed to have the desired impact, which has been compounded by the lack of provisions on liability for environmental damage. There is thus a need for Community legislation aimed at repairing and preventing environmental damage, which ensures that those responsible bear the costs of remedying the situation.

1.3. Whilst recognising this need, it should be said that drawing up the proposal has posed some difficulties, insofar as account had to be taken of the conflicting interests which the proposal is designed to regulate — on the one hand, the

(1) 1993 Commission Green Paper, (COM(93) 47 final). Opinion CES 226/94 (OJ C 133, 15.5.1994).

(2) 2000 Commission White Paper, (COM(2000) 66 final). Opinion CES 803/2000 (OJ C 268, 19.9.2000).

(3) Opinion CES 711/2001 (OJ C 221, 7.8.2001).

(4) European Commission proposal for a Community strategy for sustainable development of 15 May 2001.

(5) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992) and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979).

general interests of environmental protection, and on the other, the specific interests of economic operators and of governments. While all are recognised as legitimate, there is clearly a need to determine, once and for all, the responsibilities of each in their respective spheres of operation and competence.

1.4. National laws in this area already in force in the majority of Member States vary widely. Community-wide harmonisation is the best way to ensure that this situation does not distort the legislation in its final form, as national law does not always ensure that the affected areas are cleaned up, which is one of the most important objectives of the proposal. Other factors may also come into play, e.g. certain types of damage may affect more than one country, meaning that different systems of law apply. Finally, certain areas may not be covered by legislation.

1.5. The proposal attempts to take account of all of the conflicting interests and strike an appropriate balance between them, adhering closely to the environmental objectives set out in the Sixth Action Programme and in the other Community legislation which makes up the environmental acquis and taking account of the social and economic context in which they apply.

1.6. Before commenting on the proposal, it should be pointed out that no reference is made to traditional kinds of damage (personal injury and damage to property), since this is assumed to be covered by civil liability actions, which are widely used in the Member States.

1.7. Another omission worthy of note is GMO liability, both with regard to biodiversity in general and to consumer health. The reasons given refer to the existence of the directive on liability for defective products ([1]), but extension of this directive only covers damage to unprocessed products. For this reason, and in view of the ongoing debate and the rules on GMOs ([2]), it does not appear to be the appropriate instrument to achieve such an end.

2. **Gist of the proposal**

2.1. The legal basis for this proposal is Article 175(1) of the EC Treaty, since its objectives are environmental in nature and are concerned with preserving, protecting and improving the quality of the environment.

2.2. The proposal lays down the legal framework for the prevention or remedying of environmental damage under the following conditions:

— Environmental damage is to be defined by reference to biodiversity, waters covered by the Water Framework Directive ([3]) and land contamination. In accordance with the 'polluter pays' principle, the operator who has caused the environmental damage, or who is faced with an imminent threat of such damage occurring, must bear the costs of repairing the damage. However, Article 9 lays down a series of exceptions whereby the operator may be relieved of liability.

— These exceptions include damage caused by operators complying with the terms of permits or using state-of-the-art technology.

— Given that environmental assets (biodiversity and waters) are often not subject to proprietary rights, provisions are made to allow qualified entities, alongside those persons who have a sufficient interest, to request the competent authority to take appropriate action.

— Cross-border damage is subject to cooperation between the national authorities of the countries affected so as to ensure that the damage is corrected in cooperation with the operator liable for the damage.

— There are two ways in which the damage may be corrected: either the operator may take the necessary restoration measures, in which case they will be financed directly by the operator, or the competent authority may have the measures implemented by a third party and recover the costs from the operator(s) who have caused the damage. A combination of the two approaches is also possible in the interests of greater effectiveness.

— To ensure that operator insolvency does not prevent damage from being repaired, cost recovery may be facilitated by the establishment of a financial guarantee.

— Environmental damage caused by operators complying with the terms of permits or using state-of-the-art technology is exempted from the provisions of this directive.

— The exemptions provided for by this proposal will not apply where the operator has been negligent, although the conditions under which exemptions are applied may be altered by the rules in force under national law in the Member States.

— The proposal does not have retrospective effect. It establishes a time limit for bringing liability proceedings.

([1]) Council Directive 85/374/EEC, amended by Directive 99/34/EC (OJ L 141, 4.6.1999).

([2]) CES 358/2000 (OJ C 125, 27.5.2000) and CES 694/2002, adopted on 30.5.2002.

([3]) Directive 2000/60/EC establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000).

— The proposal includes an economic assessment focusing primarily on efficiency, costs and benefits, including the distribution of the costs by economic actors and the expected effect on competitiveness, prevention, financial assurance and the assessment of damage to natural resources.

2.3. In fact, this proposal for a directive excludes to a large extent a number of important areas involving potential harm to the environment, including nuclear damage, damage caused by hydrocarbon pollution, damage caused by the transport of toxic substances, etc. The Commission maintains that the existence of international conventions regulating civil liability in these areas, to which the majority of Member States are signatories, render their inclusion in this proposal unnecessary at this time.

2.4. The Committee wishes to point out that this proposal raises a number of difficulties connected with the legal complexity of the subject area and the exceptions to its application. The Commission must seek to ensure that it is worded in such a way as to be comprehensible to any person interested in its application.

3. **General comments**

3.1. The EESC welcomes the objective system of environmental liability proposed, which seeks to prevent damage and restore nature to its former state in accordance with the 'polluter pays' principle. However, while it acknowledges the generally positive nature of the rules proposed in view of the failure on the part of Member States to comply with many of the environmental directives, it wishes to raise certain points, in line with previous opinions, to improve the content of the proposal, particularly in connection with those aspects which are the subject of disagreement between environmental organisations and economic operators concerning the sphere of application and the liability of public and private operators.

3.2. Concerning the sphere of application, it is important to note that the rules will only apply to damage resulting from failure to comply with the environmental rules in force listed in Annex I ([1]). However, the inclusion of damage to biodiversity raises some additional problems, since it is limited to areas protected by the Natura 2000 network and the Birds and Habitats directives, which do not cover all areas of environmental importance in the Community (in fact, the area covered by the proposal amounts to less than 20 % of the territory and coastal areas of the EU). The Commission should urge all Member States to fulfil their obligations under Directive 92/43/EEC ([2]).

3.2.1. The Committee considers that rules on environmental liability based on the existence of international treaties are not applied — their ineffectiveness having been demonstrated by many serious environmental accidents in recent years in the European Union — and also that many sectoral treaties ([3]) have either not entered into force or have not been ratified by the majority of EU Member States.

3.2.2. The Commission should consider the need to supplement international laws, where they have proved inefficient in tackling environmental damage in the EU, with a Community initiative, which could be incorporated into this proposal for a directive.

3.3. The definitions set out under Article 2 are a matter of some importance. Clarifying the exact meaning in this way will help to avoid doubt by limiting the Member States' degree of discretion in implementing the directive. In this regard, it would be desirable to refine and clarify some definitions still further:

3.3.1. Biodiversity, as defined by reference to Directives 79/409/EEC and 92/43/EEC on natural habitats and birds, seems a rather limited concept. Most associations consulted proposed extending the definition to non-protected areas where there is serious damage to an area or a threat to the health of its inhabitants ([4]).

([1]) 18 directives are listed on the subject of damage to water or land, together with those concerning the contained use or the deliberate release of genetically modified organisms.

([2]) OJ L 176, 20.7.1993.

([3]) There is one sectoral instrument that has been signed but is not yet in force: the 1999 Basle Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal. There are several other ongoing or future initiatives: a potential joint liability instrument under the 1992 Helsinki Convention on the Transboundary Effects of Industrial Accidents (TEIA Convention) and the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Protection Convention) and one or more possible liability instruments (in the medium term) under the Convention on Biological Diversity and the Cartagena Protocol on Biosafety. For the sake of completeness, reference can be made to the only existing horizontal international environmental liability regime, which is the 1993 Lugano Convention on Civil Liability for Damage resulting from Activities dangerous to the Environment. This Convention is, however, not yet in force and there is no likelihood that the Community would accede to it in the near future.

([4]) The conclusions of the Environment Council of 4 March 2000 led to the strategy for sustainable development, presented to the Barcelona Summit of 15 and 16 March 2002. In the section on guidelines for the future, paragraph 38 states that progress should be made on increasing integration of protection and conservation of biodiversity in all relevant sectors and activities, as well as on full-scale implementation of the Natura 2000 network and the conservation of protected species under the habitats and birds directives in areas outside the network.

3.3.1.1. The definition of biodiversity should include the effect of GMOs, in both the short and long term.

3.3.2. Qualified entity means any person or body to be involved in implementing the rules on environmental liability by virtue of their interest in the environment. The EESC understands that the proposal limits recognition of such bodies in two ways:

— The Member States are responsible for defining the criteria for recognition in their legislation.

— Only environmental groups are to be recognised.

3.3.2.1. Not only will cultural differences penalise groups in the less environmentally advanced countries, but organisations capable of working to protect the environment will be excluded simply because that is not their main purpose. Trade unions and employers' organisations, for example, can play an important role in the prevention of environmental damage.

3.3.3. Environmental damage. The proposal lists three types of environmental damage:

— biodiversity damage;

— water damage;

— land damage.

3.3.3.1. While the definition of water damage is clearly set out in Directive 2000/60/EC, no precise definition exists of biodiversity or land damage [1]. It would thus be desirable to include a precise definition of the intended meaning.

3.4. One of the main aims of the proposal is prevention of environmental damage, in which the competent authority plays an important role. The problem, to which the EESC has drawn attention in previous opinions, is the complex administrative structure of most EU Member States, whereby responsibility for environmental matters is divided between different, frequently highly decentralised authorities, creating confusion, at the very least, when serious preventive action is needed.

3.4.1. In order to ensure that the rules on prevention have the desired impact, it would be desirable:

— firstly, to ask the Member States to clarify the responsibilities of the various authorities in a clear and precise manner to ensure that there is no overlap or duplication of their actions;

— secondly, to establish the procedure for recovery of the costs of preventive measures carried out by the competent authority as a further precondition for administrative action; if this is not the case, the burden of liability will be shifted from the polluter to the public;

— thirdly, to establish rules for recovery of the costs when the competent authority has acted, both in preventing and in remedying damage. Acknowledging the importance of Article 7, the EESC considers that more emphasis should be placed on the body responsible for ensuring compliance with this obligation (Article 13).

3.5. As far as allocation of costs is concerned, where there are multiple parties involved the proposal offers two options: joint and several liability or apportioned liability. While this dual system is intended to facilitate the directive's adaptation to the legal systems of the Member States, it should nonetheless be pointed out that determining the proportion of environmental damage is extremely difficult, which makes this system difficult to implement in practice.

3.5.1. Joint and several liability in cases where several operators have caused damage facilitates liability actions, since it is not necessary to identify each operator. Actions on a quota basis, however, must be brought against each operator on the basis of the proportion of the damage for which he is responsible. In principle, the Committee advocates application of the system of joint and several liability, because it facilitates action, but the choice should be left up to the Member States according to the circumstances of the individual case.

3.6. The definition of the competent authority is somewhat ambiguous. While it is true that states may have different competent bodies in line with their own regional organisation, the fact remains that civil liability actions are heard by courts which are not necessarily specialised in environmental issues.

3.7. The EESC recalls that in its Opinion on the White Paper it called for the creation of a financial security, with a view to making the rules more effective. However, Article 16 does not require operators carrying out activities listed in the directives set out in Annex I to take out environmental liability insurance, which could dilute the effectiveness of this proposal.

4. **Proposed amendments**

4.1. Because this directive sets out basic or minimum rules, the Commission must ensure that it is clearer and more specific than any other kind of legislative provision, since its aim is not only to ensure compliance with the environmental rules in force, set out in Annex I, but also to prevent and

[1] Communication of 16 April 2002 — COM(2002) 179 final: 'Towards a Thematic Strategy for Soil Protection'.

remedy environmental damage occurring within the European Union. So that it is applied in a uniform manner, the concepts defined in Article 2 must be revised.

4.2. One of the most important new features of this proposal for a directive is the focus on repairing environmental damage. The current rules provide only for administrative penalties, which take the form of fines. Responsibility for repairing the damage is borne by the operator who has caused it, although the competent authority may assume this task if the operator cannot be located. This causes the following problems:

4.2.1. The procedure for remedying damage set out in Annex II provides for different options, which allow the competent authority to choose the criteria on which it shall act. In the view of the EESC, the use of a single criterion should be avoided, particularly that of the lowest cost. The need to restore the affected area to its condition prior to the environmental damage must always be taken into account.

4.2.2. One of the core aims of liability actions must be recovery of the costs of repairing the damage by the competent authority. If this is not the case, the public will bear the costs involved.

4.2.2.1. However, in the case of the exemption provided for under Article 9(3)(b), the repairs may be considered to be shared between the authority and the operator, if the latter has acted in a negligent manner.

4.3. Member States are responsible for designating the competent authority. This is one area which could have a particular impact on Community harmonisation. The EESC thus considers that:

— Member States are responsible for designating the competent authority, in accordance with the provisions in force in each country;

— if various tiers of competence exist, the competence of each authority should be clear, so as to avoid overlaps in action or action by different authorities;

— civil liability actions are not heard in civil courts in all countries of the European Union; in some cases the administrative authorities intervene with contentious administrative proceedings; this tends to be a lengthy and complicated process. Since there is already experience in the EU of civil liability actions for defective products, the EESC believes that the civil courts are the most appropriate competent authority for environmental actions.

4.4. The EESC considers that if the financial security is not compulsory, repair of damage may be hindered by operator insolvency. The Commission should define more precisely the risks involved so that insurance companies can write the necessary policies. In parallel, the creation of national or regional funds financed by the financial penalties applicable for failure to comply with the directives listed in Annex I would be appropriate. In this way, the penalties would fulfil their intended aim of repairing environmental damage.

4.5. The fact that the rules are non-retroactive in nature creates the problem of repair of damage caused in the past. As Article 19(2) states, the operator who has caused damage must prove that it was caused prior to the entry into force of the directive, and is thus not covered.

4.6. Finally, it is important to stress the importance of the reports to be drawn up by the Member States in accordance with Article 20 and Annex III. A five year period should be sufficient to evaluate:

— implementation in practice;

— whether the rules should be amended in order to place time-limits on the provisions now being proposed;

— whether experience of the directive's implementation over this period indicates that Annex I should be amended.

Brussels, 18 July 2002.

The President

of the Economic and Social Committee

Göke FRERICHS

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 in the course of the section's deliberations:

Point 3.3.1

Amend as follows:

'Biodiversity, as defined by reference to Directives 79/409/EEC and 92/43/EEC on natural habitats and birds, ~~seems a rather limited~~ is a relatively new concept. ~~Most associations consulted proposed~~ Before extending the definition to non-protected areas, experience should be gained with the Commission proposal. ~~where there is serious damage to an area or a threat to the health of its inhabitants.~~'

Result of the vote

For: 19, against: 37, abstentions: 0.

The following text from the Section's opinion was rejected in favour of the amendment adopted in plenary. However, at least a quarter of the votes cast were in support of the text.

Point 4.2

Delete point.

The nuclear energy industry, unlike hydrocarbon and renewable energy sources, is excluded from the provision of the Directive and therefore given preferential treatment. Existing conventions governing the nuclear industry do not include damage to the environment and provide for exceptionally low levels of compensation in other cases, not the true cost. The Committee therefore recommends that Article 3.4, which provides for exclusion, is deleted from the directive.

Result of the vote

For: 29, against: 27, abstentions: 4.