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Position Paper on the proposed EU Directive for Environmental Liability

The Council of European Municipalities and Regions (CEMR) has issued the following statement, with regard to the European Commission's proposed Directive on environmental liability:

General

In principle the CEMR supports the Commission's intention to set up a scheme regulating environmental liability and therefore welcomes the adoption of a proposed directive on this issue. Through the creation of a detailed environmental liability regime, the distortion of competition stemming from different environment standards will be counteracted and the problems with regard to cross-border damage lessened. Effective liability for environmental damage can but enhance damage prevention and contribute to a better environmental situation throughout the EU.

Liability should, according to the Commission's proposal on environmental liability, be linked to activities covered by existing Community law (Annex I). Such liability is, with regard to domestic law, not easy to implement, as the laws on liability require the use of extensive references to EU legislation or of detailed enumeration appendices. It would be inappropriate for any consequent listing lacking in clarity to be subject to liability laws. A further problem is that a whole series of environment-unfriendly activities may be excluded from such environmental legislation.

Furthermore, the proposal does not cover:

- Damage to biodiversity in almost 90 % of the EU's territory,
- Any kind of pollution not foreseen in risk assessments according to the "state of the art" if the polluter was granted a permit.

Environmental disasters such as the Erika oil spill, if they happened in the future, would escape the scope of the directive. Industries' compliance with permits and licenses would be considered as legal defence in case of environmental damage. Thus environmental pollution caused by an emission or event allowed under applicable laws and regulations or in permits or authorisations delivered to the operator by the competent authority could be exempt from the scope of the directive.

An alternative - one already put into practice in Germany - involves linking environmental liability to any industrial operator of specific environment-endangering installations. Such an approach would make more sense, as it covers operators of any kind of installation that generates a certain degree of environmental danger.

CEMR does not share the Commission's belief that liability should be waived when the installations have been legally approved or when investment has been made in the latest technology. The burden for dealing with the risk lies in the first hand with the industrial operator.

The CEMR considers that, in principle, initial responsibility for restoring environmental damage lies with the operator. The State should be able to oblige the originator to eliminate the damage.

Legislation obliging private industry to rectify damage created by that same industry has already paid off in Germany. In addition, such a regulation would also strengthen the Commission's 'polluter pays' principle. Originally, the Directive should have put this principle into practice but in the proposal, the public sector, i.e. the 'competent authorities' have to face front-row responsibility. This could lead to a number of problems, in particular in relation to the provisions under article 3 and Annex I where the public sector is included as an actor. Furthermore, competent authorities are required to act in first place without possibility of exemption and with the additional pressure by the widespread possibility for organisations such as NGO's to request action. (Art. 14)

Detailed remarks

1. The CEMR welcomes the fact that the provisions foreseen in the Directive shall generate no retroactive measures. This will be a problem especially in the case of long-term effects and causes with many underlying reasons. With regard to an efficient and standard implementation of the Directive it will be suggested that a definition be offered as to what constitutes past damage in contrast to 'non-retroactivity'.
2. The 'bio-diversity' subject of protection has, up until now, been defined neither by the proposed Directive nor by the associated damage. As bio-diversity is subject to constant change, the term would seem, in the sense of legal liability, not specific enough. The Directive should, in this case, provide a definition.

Additionally, consideration should have been given to extending environmental damage liability beyond Natura 2000 areas. Limiting liability to the NATURA 2000 areas would result in a territorial division which is alien to the conventional liability system and which only covers a small part of the area. It is consequently being suggested that all prime ecological areas be included in the Directive.

3. Liability should be linked to activities covered by existing Community law. Such liability is, in domestic law, difficult to implement, as, in any law covering liability, either comprehensive reference to EU law or detailed enumeration appendices will be necessary. It would be inappropriate for any consequent listing lacking in clarity to be subject to liability laws. A further problem is that any number of environment-unfriendly activities would be excluded from such environmental legislation. It would, therefore, seem fairer if cover could be extended to all operators of installations who demonstrate a certain degree of hostility to the environment.
4. The proposal to distribute the burden of proof is also welcome. This should however be rendered more concrete in order to become practicable.

However, the burden of proof as regards causality between action and damage lies with the competent authority which could be problematic in the very short period of cost recovery (article 7; 12) in consideration of the exemptions and defences.

The CEMR does not approve the regulations in Art. 9 par 1 c -1 d which would mean dispensation of environmental liability on the basis that the emission or event should be

considered allowed in applicable laws and regulations or in the permit or authorisation delivered to the operator (1c) or on the basis that the emissions or activities were not considered harmful according to the state of scientific and technical knowledge at the time the emission was released or the activity took place. The CEMR does not either approve of the provisions in Art 9 par 2. These provisions would mean abandoning the polluter pays principle and the principle of strict environmental liability and are therefore not acceptable.

Any request for exemption from liability should the installation be approved or the latest technology have been installed should be turned down. Furthermore, the risk is one that falls within the domain of the installation operators.

In addition, for the Directive to be applied effectively throughout Europe, similar measures must be used in the evaluation of damage. This applies not only to the damage itself, but also to the measures required to remediate the damage and to compensation payments. In cases of compensation, different standards threaten to impair the uniform application of the Directive in the same way as they do the competitive capacities of individual locations.

Any regulation instituted by a court or other body (to be determined) deeming that, whenever an operator stays within the limits of the discharge permitted by his authorisation, part of the damage shall be borne by the authorising body rather than the originator, cannot be accepted. On the one hand this will, in the future, prevent the authorities from granting official approval to such installations and make the approval procedure more difficult because an authority which issues such permits would not want to risk being held liable.

But the authorities are, however, on the grounds of freedom of trade, bound to approve firms. On the other hand the authorities - in these cases, strictly liable for the approval which they were legally bound to grant - shall be partially liable. In addition, such liability infringes the required principle that the polluter should pay.

Furthermore, whereas environmental permits are generally issued by local authorities, the same bodies are deemed to take action against an operator who might have caused severe environmental pollution. This would put local authorities in the untenable position of being both the plaintiff and defendant in case of court action. They could decide to act or not or choose to restore the damage using tax payers' money for restoration rather than the operator's.

5. Under existing legislation, if those who cause or knowingly permit contamination cannot be found, liability rests with the current owner or occupier (which means that in theory there are very few "orphan" sites which result in liability falling to the local authority). Changing the definition to that of "operator" (as is proposed) may well result in more sites where there is no clear person responsible for the contamination. Where this is the case, the competent or regulatory authority - which in certain instances would be the local authority - would be required to take all necessary steps to ensure that the necessary preventative or restorative measures were undertaken.

6. The proposed starting point of operator liability is welcome. This is the equivalent of the German Environment Liability Law, which imposes liability on the owner of the installation.

7. The CEMR welcomes, in principle, liability as regards bio-diversity damage being limited to '-considerable damage'. Nonetheless, the term '-considerable damage' as applied in law, will result in considerable problems for the responsible environment authorities to put into practice. To avoid any eventual court proceedings and to guarantee a standard Europe-wide legal use, a suggestion has been made to define the term '-considerable damage' as used in the Directive.

This should also apply to terms like 'environmental damage", 'operator", 'imminent threat",

'natural services" and the 'damage" - concept which are insufficiently defined in the Directive. Furthermore, the scope of the directive should be described more accurately.

8. CEMR considers that in principle initial liability for rectifying damage caused to the environment lies with the operator. State responsibility should remain limited to monitoring and advising. Damages caused by private industry should - as has hitherto been common in German law - also in the future be rectified by the private industry originator. This system has not only, for example, proved its worth in German legislation, but it would also strengthen the Commission's required 'Polluter Pays" principle.

A guarantee must also be forthcoming that the victim shall be fully compensated. This shall not be guaranteed for as long as the amounts due by the private owner in compensation for damage have to be spent on other projects. It is, incidentally, not clear as to how the competences of the States and the environment associations are dissociated from the competences of the victim.

In addition article 6 para 1 lit. b, c facilitates the possibility for an operator to withdraw from the obligations to take necessary measures, e.g. through the claim of 'insufficient financial means".

9. The CEMR welcomes, in principle, any additional collective association law in the area of damage removal.

The proposed and enforceable (via injunctions) right of the associations to complain about the reimbursement of costs and the avoidance or cessation of dangers to the environment shall nonetheless be rejected. Fears may be raised that the series of complaints and claims from the association as regards temporary legal protection will affect the construction, conversion or operating of installations.

10. It has been suggested that some thought be given to waiving the obligatory principle of provident funds. Such principle would highlight environmental precautions, and thus act as an effective incentive for converting to environment-friendly installations. Incidentally, it would seem inappropriate to impose the risk of liability upon companies and municipalities, as property owners and installation operators against whom no precautions can be taken.

Furthermore, such a provision of cover would also ensure that the necessary damage restoration measures could actually be adopted by the state. In the absence of such provision, what will happen first is that the districts and municipalities - as local supplier of waste management measures - will face considerable financial risk. Moreover, other examples of environment damage would not be restorable due to an inability to cover costs. In addition, it is being suggested that, to cover the damage regulations, subrogation be imposed on insolvent companies - as is the case under German law (cf. § 4 par. 3 BbodSchG).

11. A further problem is the risk of non - insurability.

representatives of insurance companies have underlined that they would not be able to offer insurance coverage for operators given the following features:

- non - capped liability
- strict liability with regard to activities mentioned in Annex I of the Directive
- coverage of 'biodiversity damages"

12. The Commission seems to stress the 'principle of subsidiarity" with regard to 'hot issues", e.g. multiple party causation (article 11) and obligations for operators to effect an insurance (article 18).

In question is the future of already developed national concepts or such focusing on the owner but not the operator.

13. With regard to transboundary damages it must be pointed out that the conception for 'competence", 'obligations" and 'co - operation framework" is not explained. (article 18)

14. The Annex I should be clarified in that the local authorities could not bear the res-toration responsibility due to their official duty as supervisors.