

Landowners

Organisation

EUROPEAN LANDOWNERS ORGANISATION**ENVIRONMENTAL LIABILITY****INTRODUCTION**

The European Landowners Organisation (ELO) exists to contribute to the policies of the European Union in promoting a prosperous and attractive countryside, and to ensure that private landownership can continue to make a positive contribution to the economy and environmental management of rural areas. The ELO's national constituent organisations in Austria, Belgium, Denmark, England and Wales, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Scotland, Spain and Sweden represent millions of landowners throughout Europe.

We understand that the Commission is considering once again the imposition of a single framework for liability for environmental damage throughout all the Member States in the light of the publication of 2 reports: one by McKenna and Co on the legal aspects of Environmental liability systems throughout the EEC, and a report by ERM Economics on the economic aspects of introducing a liability system.

It is the view of the ELO that the findings of the reports support the view that action on a single framework by the Commission is unnecessary.

THE LEGAL REPORT

The report considered the legal liability systems of 19 different countries with regard to "remedying" environmental damage.

The report made the following general findings:-

- all countries have a form of classic civil liability where the person who causes damage should have to compensate for it;
- there are some differences between member states (MS) in their systems to deal with environmental liability. However there is no indication in the report that this causes real problems;
- the liability systems which currently exist throughout the member states have strict liability and the polluter pays principle already enshrined in national legislation;
- all the systems operate some form of administrative system for environmental protection;

- the report shows that many of the systems to be relatively new and still evolving. It is the view of the ELO that the Commission should give these systems time to see whether they are effective before imposing a burdensome and duplicitous structure was imposed on top.

It is apparent that the current regulatory systems already go a long way towards achieving Commission objectives. It needs to be recognised by the Commission that environmental damage occurs in the context of production and consumption as a result of consumer demands throughout the member states. It is not clear how environmental damage is defined; is it in the context of damage to a person's life or health or property or does it extend to wider considerations of the environment itself for its own sake. The Rio declaration on the Environment and Development acknowledges that human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. It also recognises that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations

THE ECONOMIC REPORT

The report considered the Economic implication of Environmental Liability systems. It was acknowledged that the empirical basis of consideration was poor, primarily because environmental liability systems are novel in Europe, and the target for performance was prevention **and** the avoidance of accidents which was difficult to measure. Analysis of the issues were surrounded by considerable uncertainty. The main conclusions were as follows:-

- whilst a single environmental liability system may have an advantage for dealing with accidental pollution, it is unsuitable to deal with diffuse multi party pollution where causation is hard to prove. Accidental pollution incidents are generally estimated to be approximately 15% of the total environmental damage. Pollution from diffuse sources and on going releases accounted for 85% of damage. Other directives already deal with sudden accidental damage
- the report states that a single liability framework is an unsuitable means for dealing with transboundary pollution particularly where it is airborne;
- whilst there was some difference between member states in dealing with the problem there was no evidence of distortion in competition or trade;
- Small and Medium Enterprises (SMEs) were likely to be disadvantaged because of the costs of complying with the complex regulations of an environmental liability system, for example the costs of environmental risk assessment requirement, obtaining finance and insurance if forms of financial guarantees are required

SUBSIDIARITY

In the ELO's view there is no justification for action to be taken at the level of the EU on the issue of liability and environmental damage. Such action needs to be considered in the context of subsidiarity criteria and can be justified only firstly: where it can be established that the objectives of the Community's environmental policy cannot be achieved sufficiently by the Member States: and secondly that they could be better

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achieved sufficiently by Community action or that there is a need to avoid distortion of competition in the Single Market by harmonising the laws of the Member States. In the ELO's view neither of these two reasons apply. The recent reports further indicate that those reasons are not applicable here

The ELO believes that the Reports fail to alter the ELO's current view. Indeed there is less cause for Community action now than in 1993 when the EC Green Paper on this question was published by the Commission. Together with other existing statutory,

private and common law provisions it is clearly demonstrated that action by Member States alone is capable of achieving the objectives of the Community's environment policy in this regard although it must be acknowledged that some member states need encouragement to

Introducing an EU wide liability framework might well halt the process that the reports indicate is already being achieved in Member States using their existing and established legal frameworks, that are constantly evolving.

Many of the objectives of the Commission have already been stated clearly in Article 130r that has set much of the agenda for the continuing evolution of environmental law. Apart from amounting to a breach of the principles of subsidiarity, action on lines discussed by the Commissioner would, the ELO believes, add to any confusion that already exists in this area and will increase the burdens on industry and agriculture without environmental gain.

It is not realistic to consider that all EU members can, even if it were desirable, have a single legal regime for remedying environmental damage. Each Member State has different problems of past and present pollution and air water and soil has been affected to different extents in each case. The limitations of a single system are shown in the reports to be onerous and will add little other than administrative burdens particularly in terms of dealing with diffuse transboundary and airbourne pollution. Each Member State has the sufficient amount of flexibility in its own legal system to implement environmental objectives and to ensure good environmental practice.

HARMONISATION

We see no evidence from the recent reports or otherwise that uniform legislation in this field is required for the proper working of the market, or that differing systems of civil liability lead to distortions of competition in the Single Market or even that those distortions should be eliminated.

Such distortions and variations in costs that do exist are in part the history of land use in particular Member States. Flexible practical initiatives based in part on cost benefit analysis are needed rather than a single regulatory framework that will merely stifle environmental improvement by an inflexible, regulatory regime that is essentially bureaucratic. If the Commission requires proof of this they need only look to US system of superfund and the environmental legal framework attached to that. Both the economic and legal reports support this view, particularly with regard to SMEs.

Efforts to harmonise a single legal structure would be extremely controversial and would in effect involve rewriting the law that already exists. This would involve expensive litigation to both the detriment of the environment and to industry. In practical terms it would be extremely difficult to implement evenly.

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There is no evidence that competition perceived or real effects relocation within the Community and the argument for harmonisation for its own sake continues to be insupportable in the ELO's view.

The US Superfund approach cannot be justified in the light of the progress already being made by Member States and the factual evidence that clearly demonstrates that the objectives contained under the Directive 130r are not more likely to be met.

Superfund is excessively slow and bureaucratic. On average it takes 10 years to clean up each site, of which only three years is actually spent on physical remediation measures. The real benefactors have been the lawyers and consultants. Rewriting the law will simply prompt unnecessary litigation at no gain to the environment.

The current legal framework within Member States should not be distorted.

SCOPE

The Reports also indicate the potential and scope for existing legislation to go a long way towards tackling the problems of past as well as prevention of future pollution. The reports provide evidence that a single system of environmental liability is neither the only or most effective solution to the problem of environmental damage.

In practice it is often difficult to isolate past and future damage and a suitable framework together with balanced regulatory controls provides a balanced effective and realistic means of dealing with past pollution and preventing future incidents. The Commission could assist by providing grants and funding to encourage responsible action and incentives to industry and agriculture to remediate pollution.

In many Member States, people aggrieved by loss or damage to owned property have long established rights to sue others for actions of negligence and nuisance. The problems related to the unowned environment are often dealt with by regulatory authorities themselves democratically accountable, who are given a number of extensive powers to prevent pollution, to require action to remedy existing damage and to clean up contamination resulting from past and current use. It is inconsistent to extend to NGOs claiming specific environmental objectives overlapping powers to bring parties to challenge the decisions of regulatory authorities. The polluter pays principle is firmly enshrined in the existing legal framework.

There are strong arguments which the reports would appear to support, for maintaining flexibility within the Member States legal frameworks rather than having a rigid generalist approach as formulated. Such an approach merely encourages pressure for development on green field sites from those who fear such liabilities. There are already mechanisms in force to ensure that sites are restored to their condition prior to the pollution taking place.

FUNDING AND FINANCIAL SECURITY

Uncertainty arising from the unwelcome introduction of strict liability across the board and an extension of the rights of action to Non-Government Organisations will merely raise the costs of clearing and encourage expenditure of vast sums on administration and avoidance as in the USA. If any environmental damage no matter how minor is covered

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no priority can be given to more serious sites. It is unlikely that insurance would be available.

CONCLUSIONS

Further extensions of the existing framework cannot be justified. In the ELO's view the objectives of Article 130r are already being met. The IPPC controls further strengthen the sophisticated and well-established mechanisms for controlling environmental pollution both past and future.

The implementation of the proposals for a single environmental liability system would be damaging as much as unnecessary. The inflexibility and generality of the proposals remain old fashioned and fail to take into account recent changes and the increase in awareness throughout industry and the agricultural sector of environmental considerations. The Economic report in particular is not able to indicate any cost benefit in having the single liability system proposed. A system that rewards responsibility, rather

than simply implements unlimited liability (as to a large extent happened in the United States) should be promoted.

ELO POLICY GROUP
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**Any comments or queries on this submission should be addressed
to the Chairman of the ELO Policy Group at the address below.**

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