

ELO RESPONSE TO THE COMMISSION'S PROPOSALS ON ENVIRONMENTAL LIABILITY

INTRODUCTION

1. The European Landowners Organisation (ELO) represents the interests of 30 million rural landowners in 14 EU member states. Many of our members own and manage small to medium sized businesses. This means that they are directly concerned by the Commission's proposals on environmental liability, and we greatly welcome the opportunity of commenting on them.
2. Whilst we recognise that there have been some improvements to the earlier draft proposals in terms of clarification it remains our view that the *commission have failed to explain why member state legislation is insufficient to deal with environmental liability and thus has yet to prove why the proposed regime is necessary. In addition* the proposals fail to meet the tests of subsidiarity and proportionality.
3. The Commission's own independent evidence failed to justify a civil liability regime and the paper itself fails to set out or make out a case for it. If it is imposed it will superimpose a muddled system and interfere with the effective working of the longstanding regulatory and civil liability regimes which most member states have. These effects will be detrimental to the environment.
4. Further the regime will have a substantial and potentially detrimental impact on the existing system of regulation and enforcement of environmental protection, throughout the EU. The paper fails to understand or distinguish properly between public and private law aspects of environmental protection. It fails to acknowledge or even accommodate the system of environmental protection that is currently provided through regulatory controls via the public law system. It also fails to recognise the fact that obedience to regulatory and liability sanctions as currently provided has had a preventative function and can be used to remediate damage, a recent example of this is the contaminated land regime in the UK.
5. The fact that the regime proposed fails to take any of these points into account and lacks any real clarity or certainty will mean that there will be a potential and significant economic impact on SMEs arising from the uncertainties of the EU regime.
6. The system of environmental liability set up by the Commission necessitates the need to obtain insurance. At present it would appear unrealistic for the commission to expect the insurance industry to cover the uncertainties that accompany this regime arising as they do from risks which cannot be fully assessed when the policy is taken out (e.g. biotechnology).

SPECIFIC COMMENTS

Environmental liability

7. The polluter pays principle is already applied in most Member States. The polluter is already liable for the damage he has caused by the regulatory and tort regime which currently exists. These regimes have a preventative effect in terms of deterring environmental damage. There is

no reason why increased environmental protection cannot be provided by individual Member States providing for it under their regulatory regimes.

8. Any system of liability whether regulatory or based on civil liability has to be based on clear and certain principles in order to aid compliance and secure protection. Environmental risk and damage has to be costed and assessed. The paper fails to deal with such assessment and also fails to deal with environmental liability in the context of other EU aims such as sustainable development.

A level playing field

9. The paper itself acknowledges (under paragraph 3.5 pg. 13) that “the existence of any problem of competition in the internal market caused by difference in Member States environmental liability approaches is still unclear...”. There is merit therefore in further postponing these proposals until they can be justified and the position more accurately assessed.
10. The paper fails to acknowledge that some systems established in some Member States do cover damage to biodiversity and have resulted in an improvement in protection of the environment by the prevention of environmental damage. It is not clear why it is stated under the proposals to say that EU action can only be effective unless it is backed up by a civil liability regime. This is simply not the case in the ELO’s view.

No retroactivity

11. The ELO would agree with the Commission that any liability regime should not have retrospective effect. However the paper remains unclear as to how historic and future pollution can effectively be separated. What about gradual pollution for example?
12. It is also not clear why historic pollution is left (quite rightly in the ELO’s view) to Member States to deal with and yet it is a fundamental assumption of these proposals that Member States can not deal with future pollution problems. Moreover, the Commission itself recognises that certain Member States have not yet adopted rules in this field. How, then, will previous pollution be dealt with? What criteria will be used to distinguish between «old» and «new» pollution? Will diverging national approaches not give rise to distortion?

Environmental Damage

13. The ELO’s view is that environmental damage should be defined in accordance with significant damage or a significant risk of damage rather than any environmental damage of whatever degree. There should be a far clearer definition of what constitutes significant damage.
14. There is a danger that two separate levels of damage will be introduced implying that damage to property is somehow less serious than damage to biodiversity. The paper fails to acknowledge that property does form part of the environment
15. There is a real danger of double jeopardy under the regime. A person can be liable under these proposals under the national regulatory regime and a separate community regime. It is not clear how making individuals face unlimited liability will benefit the environment. The idea that this parallel system will promote optimum legal certainty (as stated under paragraph 4.2.2 pg. 15) is naïve.

Type of liability and defences

16. It is essential that the non-polluting owner of land should be exempted from liability where the polluter cannot be found
17. In view of the general uncertainty of the proposed regime there should be a “state of the art” defence and a test of foreseeability. This would at least mean that the civil liability regime would bear some resemblance to the civil liability regimes that currently exist and are effective in member states. Recognised defences in some member states based upon the best available techniques not entailing excessive costs and the best practicable environmental option should also be maintained.

18. There should be a defence based upon compliance with a permit or licence in respect to hazardous activities. That in itself would provide some incentive to comply with such a licence's terms and conditions.
19. It should be clearly stated that agriculture comes within the definition of non-hazardous activities. There is a significant risk that those engaged in agriculture will restrict their productive role and leave their land as nature reserves. The ELO would submit that under the proposals almost any enterprise is potentially hazardous and bring with it almost unlimited liability. A whole range of activities and industry might well be jeopardised by it.
20. Reference is made in the paper to liability for the deliberate release of GMOs. It should be the firms producing the GMOs rather than users such as farmers who should bear the liability caused by these products. Liability should certainly not rest with the farmer whose release of GMOs was entirely accidental and without his consent for example in the case of the UK where farmers were given genetically modified oil rape seed without their knowledge or consent by the bio tech firm.
21. There is also a need to ensure the coherence of EU legislation. Questions arise with regard to activities authorised under one EU regulation e.g. the spreading of sewage sludge, if this conflicts with the environmental liability regulation.

Burden of Proof

22. Given that there is strict liability, the plaintiff merely has to prove causation (i.e. that the defendant caused the damage). If the burden of proof is reversed, the plaintiff wouldn't have to prove even this – the defendant would have to prove his innocence – proving a negative is nearly impossible, and such a step would invite speculative litigation with all the inherent costs (a particular problem for SMEs). It is only equitable that the claimant must prove his case at least on balance of probabilities.

Clean-up standards and objectives

23. The suggested standard of clean-up which includes plausible future use in addition to the actual use of the land is far too onerous and uncertain. **A suitable for use approach should be adopted based on current use.** There should be a cost analysis and in certain instances, where for example hardship might be caused, the clean-up cost should be linked to the actual value of the land. The possibility of full or partial containment where there are economic and technical reasons for so doing, as suggested under this heading, is a step in the right direction.
24. Where legal action is contemplated **there should be the means and potential for voluntary clean-up rather than the sole and immediate option of legal proceedings.**

Access to justice

25. There are major problems that will arise if Non Governmental Organisations acting in the public interest (NGOs) are allowed to act as public authorities. Firstly there is an issue as to whether NGOs should be able to proceed without cross undertakings as to damages. Secondly how NGOs should be monitored and controlled as regards their using the damages and to what end and thirdly how to impose similar controls on NGOs as exist with regard to public authorities. A fourth issue also arises as to how NGOs should be dealt with as regards access to land.
26. Whilst judicial review may be slow and expensive there is a real question as to whether any other system proposed in this paper would be any better. There are real problems as to how NGOs could be controlled along the lines of government agencies.
27. In the ELO's view the current system of judicial review is satisfactory. The main point, which appears to be recognised by the paper, is that the route of those groups with an environmental interest should be based upon pursuit of the Government for failing to take action rather than direct action against individuals. To do otherwise would only lead to a proliferation of legal action which is of little gain to the environment.

28. Another key point is who are the recognised NGOs? They are very widely defined. **There must be costs provisions against vexatious claims and also in some instances security for costs where such a group has no ready means of covering the costs of a successful defence.**

Costs

29. In any action there should be the means for a successful party to recoup the costs of defending an action. Consideration should also be given to the provision of an indemnity system.

Insurance

30. The importance of insurance is recognised. However it also appears to be accepted that insurance is at present unavailable and that SMEs may well experience a substantial impact from this legislation.

31. Extending the principles used in civil liability of 'objective responsibility' or the 'presumption of responsibility' creates an insurance based society which would be very costly to rural business, especially in view of the fact that there is currently only very limited insurance available.

CONCLUSION

32. The paper fails to make out a convincing case for the imposition of this regime which is likely to have a detrimental effect on the existing regime and reduce the level of environmental protection which already exists in the European member States.

33. It is not clear why EU intervention is necessary when the polluter pays principle is already adhered to and implemented in many of the member states. It is also not clear why it is stated that EU intervention is not effective without a civil liability regime to back it up. It is submitted that intervention by the EU could be justified only where the member states had failed to introduce such internal regimes for environmental protection by a certain date or in circumstances where there are transboundary issues of pollution arising between member states.

34. The introduction of this regime will have serious implications for SMEs. It will undermine the protection already afforded to the environment by the current regime which exists at present. The fact that there is so little encouragement of voluntary clean up will mean the lawyers rather than the environment will gain from these proposals.

35. It is further suggested that money from national or EC support mechanisms could be made available for SMEs for adoption of cleaner processes. Given those points it would surely be advisable for such monies to be made available prior to the imposition of the regime or many SMEs will undoubtedly suffer greatly given that they cannot even insure against the risk.

**Any comments or queries on this submission should be addressed to the
Secretary-General of the ELO at the address below**