

COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 15 September 1989

Proposal for a
COUNCIL DIRECTIVE

ON CIVIL LIABILITY FOR DAMAGE CAUSED
BY WASTE

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Introduction

Article 11(3) of Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the Community of the transfrontier shipment of hazardous waste¹ stipulates the following:

"The Council shall, acting in accordance with the procedure referred to in Article 100 of the Treaty, determine not later than 30 September 1988 the conditions for implementing the civil liability of the producer in the case of damage or that of any other person who may be accountable for the same damage and shall also determine a system of insurance."

As a reaction to the pollution caused by the accident at the Sandoz plant, the Council asked the Commission in its resolution of 24 November 1986 to examine the problems posed by damage to the environment and to review existing Community preventive and remedial measures.

Consequently, the Commission is currently preparing a communication to the Council and Parliament which examines the problems related to the introduction of a system of civil liability for damage to the environment.

2. Objectives of the Directive

A prime objective of the Directive is to apply the "polluter pays" principle on terms conducive to the goal of completing the internal market.

The aim of establishing a uniform system of liability within the Community is to ensure, firstly, that victims of damage caused by waste receive fair compensation and, secondly, that industry's waste-related costs resulting from environmental damage are reflected in the price of the product or service giving rise to the waste.

The occurrence of differences among national laws regarding the designation of the person liable (producer, holder) and the absence of a concerted development of notions like the damage and injury to the environment covered by liability, the causal relationship, the limitations of liability, etc, would lead to unequal conditions for competition among Member States and thus to artificial currents of investments and of wastes to those countries where conditions are least stringent for the economic operators and most disadvantageous to the victim. This is contrary to the philosophy of the Single European Act, that foresees a high level of protection. The Directive also has a preventive intention. The reasoning is that, if the polluter knew with certainty that he would have to pay the cost, he would be encouraged to take action to minimize risks as soon as possible.

¹ OJ No L 326, 13.12.1984, p. 31.

3. Scope

The Directive covers all types of waste generated by an economic activity, with the exception of nuclear waste or waste and pollution caused by oil, where these are covered by the Brussels Conventions in force within Member States.

Nuclear waste is excluded from the field of application of the directive, being covered by international conventions and notably the Convention on civil liability in the field of nuclear energy (Paris, 29 July 1960) and the complementary convention to the latter (Brussels, 31 January 1963) together with the protocols relating to these Conventions.

The current status of the application of these conventions corresponds to the objectives sought for other wastes by the present directive.

Community waste management policy is designed to minimize waste arisings and to monitor the effects of waste throughout the whole cycle from production to disposal. This item has high priority in the Community's environment policy, to the extent that it will make it possible to determine the civil liability applicable during the cycle of production, lifetime and disposal of waste.

4. No-fault or strict liability

As this principle implies automatic liability, it will ensure that victims receive compensation, the environment will recover and economic agents are held liable in keeping with the objectives of the Directive.

The concept of no-fault or strict liability for environmental risks is everywhere gaining ground. In the related (and comparable) field of defective products, Council Directive 85/374/EEC of 25 July 1985² adopts this principle, and it can also be found in a growing number of international conventions, e.g. on nuclear energy and oil pollution of the seas. The draft convention prepared by Unidroit on compensation for damage caused by the carriage of dangerous goods by rail, road or inland waterway, currently being negotiated within the United Nations Economic Commission for Europe, is also based on the same principle.

In the same spirit, the final communiqué of the 8th Conference of Ministers on the Protection of the Rhine against Pollution in Strasbourg on 1 October 1987, which was also attended by the Commission, calls for harmonization of legislation on civil liability for damage caused by dangerous substances on the basis of the principle of strict liability.

The same trend is becoming increasingly established in national legislation. Germany and Belgium have already introduced the principle of no-fault liability. In France, it is well established by case law. Case law in the Netherlands is moving in the same direction, and a law is being drafted to introduce the principle in the new Civil Code. In Spain, strict liability has been introduced in the waste management sector.

² OJ No L 210, 7.8.1985, p. 29.

5. The principle of liability

The Directive attributes liability to the producer of the waste that causes damage or injury to the environment.

The polluter-pays implies that the costs of waste, regarded as a social problem, should be reflected in the price of the products or service considered to have given rise to the waste.

This represents a departure from the principle which enjoys some support to the effect that liability for damage lies with the carrier. While this standpoint has its merits in the field of carriage of dangerous goods, it is unsuitable for application to waste, which is of a different character.

Because of the generally doubtful value of waste, its producers are keen to get rid of it. There is a temptation throughout the whole chain of economic operators involved in a commercial operation relating to waste, to deal with the waste illegally rather than hand it over to an authorized disposal undertaking.

Besides, the waste producer possesses the main key for taking the measures needed to avoid risks to man and the environment: above all others, he knows about the nature, the composition and the characteristics of the waste.

For this reason a producer of waste must retain liability until disposal is ensured under the prescribed conditions.

There is, of course, nothing to stop the producer making a contract with the carrier or any other operator to the effect that they have liability towards him if they are at fault in causing the damage or injury to the environment for which compensation is due.

However, the holder will always have to be considered liable if he is unable to name the producer.

6. Damage and other injuries covered by the Directive

The liability system introduced covers :

- damage to individuals (physical injury, death);
- damage to property (deterioration, destruction);
- injury to the environment. This must be put in a new category separate from the preceding categories.

Environmental injury concerns society rather than an individual; it is sometimes difficult to quantify, and it cannot be excluded that restoring the environment to its state prior to the damage may involve costs out of all proportion to the desired result. It is for this reason that Article 4 of the proposed Directive limits the principle of liability.

In the first place, only important and persistent interferences are aimed at. These clarifications will make it possible for the national judges to leave aside negligible and temporary interferences.

In the second place, the interferences will have to be caused by a modification of the conditions of water, soil or air. As a matter of fact, this includes interferences in flora and fauna if caused by a modification of such conditions. Finally, the payment of "punitive damages" is not foreseen, but merely restorative measures or reimbursement of measures reasonably taken.

7. Parties entitled to institute proceedings

In the first instance, the right to institute liability proceedings against the person causing the damage lies with the victim or his heirs.

Concerning injuries to the environment, given the fact that these concern society, this right is given to the public authorities. This right may also be granted to special-interest groups or established, recognized associations whose corporate goal is to protect the environment or public health. For such groups, the Directive introduces a system that takes account of the law applicable in the Member States, some of which grant a direct right to proceed to such associations (Netherlands, Luxembourg) or, as in the case of France and Italy, permit them under certain conditions to institute civil proceedings joined to a criminal action or, finally, who remain virtually closed to such initiatives.

The Directive is not designed to harmonize practices in this field. The Community has chosen an intermediate solution which consists in neither opposing current developments, nor precipitating potential developments. The same reasoning has been applied to the question of public bodies' right to sue.

8. Limitation of liability

a. Time limits

The proposal provides for a time limit of three years beginning with the day on which the plaintiff became aware, or should have become aware, of the damage or injury to the environment and the identity of the producer, following the pattern set in Directive 85/374/EEC. Thus a degree of vigilance is required of the plaintiff.

In addition, the right to compensation expires 30 years after the event which caused the damage or injury to the environment. It appears justified to place a time limit on the possibility of initiating a liability action. The 30-year limit seems to be a good compromise in view of the very slow build-up, for example, of contamination in soils.

b. Financial limits

From the point of view of the victims or the environment affected, financial ceilings on civil liability are not justified, except in the circumstances specified in Article 4; furthermore, such ceilings would be contrary to the principles laid down in Article 130r(2) of the Treaty that the polluter should pay and that preventive action should be taken. Consequently, the Commission is making no proposals in this respect.

c) Limits to liability

(1) Force majeure: This may exonerate the producer, provided he can prove it.

(2) Contributory negligence:

If the damage was caused partly by the waste and partly by a fault on the part of the victim, the circumstances of the case in point should decide whether the waste producer's liability should be reduced - and, if so, by how much - or entirely excluded. This fits in with the solution adopted in Article 8(2) of Directive 85/374/EEC.

(3) Some or all of the damage or injury to the environment was caused by a third party

Article 8(1) of Directive 85/374/EEC states that the liability of the producer shall not be reduced when the damage or injury to the environment is caused both by a defect in the product and by the act or omission of a third party.

The reason for this approach is that the producer can always take action against third parties. A similar rationale should apply to liability for damage and injury to the environment caused by wastes. The proposal is, therefore, to follow the philosophy behind Article 8 of Directive 85/374/EEC.

9. Insurance

Although Directive 86/631/EEC provides for the setting up of a system of insurance to cover damage caused by waste, the Commission believes it would be wise to proceed cautiously on this subject.

For one thing, the insurance companies are currently against even limited mandatory insurance cover, as the market for environmental insurance is currently expanding rapidly. A minimum ceiling (which, politically, could not be less than the ECU 70 million specified by Directive 85/374/EEC) might distort the market. Secondly, the parties liable may prefer other means of equal effectiveness, e.g. deposit, bill of exchange, etc., as accepted by United States legislation in this field.

In these circumstances, it appears preferable not to legislate on this aspect for the time being.

10. Non-recoverable damage and injury to the environment

There is a need for a Community policy to deal with cases where the party responsible cannot be identified or proves incapable of compensating the victim or repairing the injury to the environment.

If Member States make different choices regarding apportionment of costs (to waste producers? to the victim? to society?), payment rules and management of funds, there is a risk of unwarranted distortions. From the point of view of environmental policy, these choices must be firmly based on the principles laid down in Article 130r of the Treaty. From the victim's point of view, it would be unfair if similar cases (or even the same case) where a pollution incident affects several Member States) were dealt with differently.

Although some Member States are already addressing themselves to the question of non-recoverable damage and injury to the environment, the Commission will need more time to prepare proposals, not only because of the extreme complexity of the subject but also because it would be illogical to limit the scope of a Community instrument to damage and injury to the environment caused by waste.

For these reasons, it is proposed that the examination of the issue should be continued, and the Commission be instructed to draft rules.

11. Legal basis

Article 11(3) of Directive 84/631/EEC specifies the use of Article 100 as a legal basis for the Directive on civil liability for waste.

The current differences in national provisions on the civil liability of the producer for damage and injury to the environment caused by waste are liable to distort competition, affect the free movement of goods in the internal market and give rise to differences in the level of protection of health, property and the environment. These differences therefore have a direct effect on the establishment or functioning of the internal market.

Article 11(3) of Directive 84/631/EEC specifies Article 100 as a legal basis for approximating provisions on civil liability for damage caused by waste.

Since the entry into force of the Single Act, Article 100a has replaced Article 100 as the appropriate basis for harmonizing national provisions that have an effect on the internal market. It is therefore proposed that Article 100a be taken as the legal basis.

12. The Articles

Article 1

This Article determines the scope of the Directive (see also point 3).

It is proposed to exclude from the scope of the Directive civil liability regulated by existing international conventions - to the extent that they are applied by the Member States - and civil liability for nuclear waste other than that covered by Community legislation on waste.

Article 2

The definition of "producer" is that used in Directive 84/631/EEC; the definition of "waste" refers to Directive 75/442/EEC. It should be noted that the Commission has prepared and sent to the Council an amendment to these Directives, providing among other things for a new definition of the concept of "waste".

The following are also considered to be producers of waste;

- the importer into the Community of waste from non-Community countries;
- the holder of waste, where the waste is in transit within Community territory, or the identity of the actual producer is unknown;
- the disposal agent, if the waste has been lawfully entrusted to his care.

The definitions of "damage" and "injury to the environment" are dealt with in point 6.

Article 3

This Article defines the principles of strict liability and its assignment to the producer (see also points 4 and 5).

Article 4

This Article specifies what actions are admissible and requires proof of a causal link. While the Commission has chosen not to shift the burden of proof entirely, it has improved the position of the victim, who frequently does not have the means of knowing what certain "professional" activities entail.

Article 5

This Article, like Article 5 of Directive 85/374/EEC, establishes joint and several liability in the event that several producers are implicated.

Article 6(1)

This specifies that the producer is not liable when the damage or injury to the environment is due to force majeure.

Article 6(2)

Some Member States consider that the holding of an official authorization cannot be relied on to limit or exclude civil liability for damage and injury to the environment. This is the case for France and the Netherlands. The Federal Republic of Germany has for some time now refrained from granting authorizations which limit the claims of third parties. In view of the continuing divergence of opinion, the Commission has preferred to regulate this issue explicitly.

Article 7

See point 8(c)(2) and (3) of the explanatory memorandum.

Article 8

Civil liability cannot be considered optional or negotiable. Contractual arrangements derogating from the provisions of this Directive will therefore not be permitted. See also Article 12 of Directive 85/374/EEC.

Article 9 and 10

See above, point 8(a).

Article 11

See above, point 10.

Article 12

For the purpose of establishing a system of no-fault liability, account must be taken of various agreements in force or in the course of negotiation in the transport sector.

As already indicated in point 4 above, liability in respect of the carriage of dangerous goods is to lie with the carrier.

Since the overriding aim is to protect the injured party, the proposed Directive must avoid restricting his or her possible recourse under other instruments.

Some international agreements provide for limitation of liability. This right must be respected by the Directive.

Article 13

This Article bars retroactive application of the Directive.

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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⁽¹⁾,

In cooperation with the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾

Whereas Article 11(3) of Directive 84/631/EEC⁽⁴⁾, as last amended by Directive 86/279/EEC⁽⁵⁾, 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;

Whereas the Fourth Environment Action Programme of the European Communities of 1987⁽⁶⁾ 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;

(1)

(2)

(3)

(4) OJ No L 326, 13.12.1984, p.31.

(5) OJ No L 181, 4.7.1986, p.13.

(6) OJ No C 328, 7.12.1987, p.6.

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 transfrontier movements of hazardous waste;

Whereas this system presupposes the notion of professional risk;

Whereas the principles established in 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⁽⁷⁾, 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;

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;

(7) OJ No L 84, 31.3.1978, p.43.

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.
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 July 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 ⁽⁸⁾;
 - c) "damage" means:
 - i) damage resulting from death or physical injury;
 - ii) damage to property;
 - 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 insofar as these are not considered to be damage within the meaning of sub-paragraph c), ii).

⁽⁸⁾ OJ No L 194, 25.7.1975, p.47.

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 reimportation;
 - 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⁽⁹⁾ or Article 9 of Directive 78/319/EEC, or approved pursuant to Article 6 of Council Directive 76/403/EEC⁽¹⁰⁾.

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 sub-paragraph c) ii) of Article 2(1);

(9) OJ No L 194, 25.7.1975, p. 31.

(10) OJ No L 108, 26.4.1976, p.41.

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.

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.

Article 9

1. Member States shall provide in their legislation that 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) 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 thirty 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.

Article 12

This Directive shall not affect:

- a) any rights which may be relied upon by the plaintiff under this Directive 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.

Done at Brussels,

For the Council