EUROPEAN ECONOMIC AREA

STANDING COMMITTEE
OF THE EFTA STATES

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WORKING GROUP ON THE ENVIRONMENT

COMMENTS BY THE EEA EFTA STATES ON THE WHITE PAPER ON ENVIRONMENTAL LIABILITY (COM (2000) 66 final)

I. EXECUTIVE SUMMARY

The EEA EFTA States welcome the White Paper and express their support to the main structure of a future EU environmental liability regime, as it is suggested in the paper. The opinion of the EEA EFTA States is, however, that a future EU regime would be even better if strict liability was introduced for all relevant polluting activities, and not restricted to certain activities with an inherent danger. We would also encourage the Commission to reconsider the concept of "closed scope". It may be a better solution to include all environmental damage regardless of the source. This would be in line with the rules governing damages in other fields.

II. GENERAL REMARKS:

1. The EEA EFTA States welcome the White Paper and express their support to the main structure of a future EU environmental liability regime, as it is suggested in the paper. A comprehensive implementation of the Polluter Pays-principle into EC law is an important step in the right direction. It will hopefully contribute to improve compliance with other important environmental principles, such as the principle of sustainable development and the principle that precautionary and preventive action should be taken.

2. The possible main features suggested in the document are not in every respect in line with the present regulation of environmental liability in the three EEA EFTA States. This fact is in itself not a hindrance to EEA EFTA support. First, the proposed EU regime will constitute a framework with minimum requirements, which allows states to maintain or introduce stricter regulations where appropriate. Second, some shortcomings in national regulations may be explained by the difficulties relating to upholding special national requirements in an open international economy. Liability regulations on an EU level will help to ease such difficulties.

3. In our view the future EU regime would be even better if strict liability was introduced for all relevant polluting activities, and not restricted to certain activities with an inherent danger. For the victims (either human beings or the environment itself) of pollution, or other forms of environmental damages, the source of the pollution is likely to be unimportant. The focus will be on the mere fact that they are suffering a loss due to environmental damage, not whether the damage in question came from a hazardous activity, a potentially hazardous activity or from a non-dangerous activity. The EEA EFTA States would, accordingly, encourage the Commission to reconsider the concept of "closed scope". It may be a better solution to include all environmental damage regardless of the source. This would be in line with the rules governing damages in other fields.

4. However, there are reasons for different treatment of dangerous and non-dangerous activities. But instead of introducing different standards of liability, one should consider differential treatment when it comes to mandatory insurance. The White Paper does not foresee mandatory financial security requirements for any kind of activity, which we accept as reasonable at the present time, in light of the fact that such obligations do not exist in the Member States. Financial security is, nevertheless, a core issue, and we would welcome any initiative that could stimulate the further development of specific financial guarantee instruments.

5. In our view damage to the biodiversity should not be restricted to Natura 2000 areas or species covered by the Wild Birds Directive. In reality, biodiversity will be harmed also in other cases. One example could be the release of harmful GMOs, which may become harmful to existing populations and plants or animals. Under the proposed regime the person (or persons) responsible for the release would not be liable if the damage occurs outside specific areas or harms species which are not covered by the Wild Birds Directive. We would also like to draw attention to the fact that environmental damage also should include damage to cultural heritage and damage to cultural landscape.

6. The EEA EFTA States will follow closely the development of suitable valuation methods in relation to biodiversity damage. It has been a problem also in national law to assess the damage to be paid in such situations, and it is hard to accept that damages, which are evident to all, are not compensated due to insufficient valuation methods.

7. In relation to access to justice, the White Paper seems to conclude that the access of private parties should only be allowed when public authorities have not acted at all or when they have not acted properly. It seems necessary to consider this proposal very closely in the light of the "Convention on Access to Information, Public Participation in Environmental Decision-making and Access to Justice in Environmental Matters" (the Aarhus Convention). One might consider that the environment will be better protected if relevant public interest groups were given a direct access to justice, and not on a subsidiary basis. The compensation received from the liable persons would in any case be used for restoration or for alternative solutions aimed at the establishment of equivalent natural resources where restoration is deemed impossible. Access to courts on an equal footing would also underline the importance of public participation in this field.

8. A group of EFTA experts submitted comments on the Green Paper on Remedying Environmental Damage (COM (93) 47 final) in October 1993. The group recommended that the EU should consider accession to the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (the Lugano Convention). This course of action still merits consideration, in particular as that convention is open for accession by all states that are members of the Council of Europe. It should be borne in mind that the reluctance of states to ratify the Lugano Convention may in part be due to uncertainty about the EU member states' position with regard to the convention.

9. The future EU regime should not interfere unnecessarily with international conventions and protocols dealing with environmental liability which are well established and function effectively. This would *inter alia* include the «Protocol to the International Convention on Civil Liability for Oil Pollution Damage» of 27 November 1992, and the «International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea» of 3 May 1996.

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