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NOTE

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Subject : Proposal for a Directive of the European Parliament and of the Council on
environmental liability with regard to the prevention and remedying of
environmental damage

Delegations will find in the Annex to this document a revised version of the full text of this proposal to take account of the discussion in the last two Working Party meetings (of 15 and 21 January). The changes which arise from the discussion on 21 January are underlined.

At the next Working Party meeting on 31 January the Presidency intends to focus on the following:

1. "The safety net" (Articles 5 and 6, footnotes 50 and 54, and Article 7(3A))
2. Transboundary damage (footnotes 66 and 81)
3. Suggestions from the Presidency in relation to the Committee (see below).
4. Annex II
5. Other latest changes by the Presidency.

Presidency suggestion:

Delegations will note that the Presidency has introduced the idea of a Committee procedure (see Article 16A) to address the implementation of Annex II (see also Article 7(5)). The Presidency would like to enlarge upon this idea by proposing to solve some of the issues arising in Article 14 on the phased in obligatory financial security via the Committee procedure.

In particular, a redrafted Article 14 could include a number of criteria, on the basis of which the Commission, by a fixed end-date and in accordance with the committee procedure, could decide upon when the mandatory nature of the financial security provision would be applied to each of the activities listed in Annex I on a case by case basis.

In addition, the Committee could also be asked to determine specific rules as regards the "low risk activities", referred to in the second indent of Article 14(1).

The Presidency has not proposed any specific text on these suggestions at this stage. However, at the meeting on 31 January, the Presidency would like the opinion of delegations on the suggestions. In addition, delegations are encouraged to suggest criteria that they would like to see included in a redrafted Article 14.

**Proposal for a Directive of the European Parliament and of the Council on
environmental liability with regard to the prevention and remedying of
environmental damage ¹**

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

The purpose of this Directive is to establish a framework based on environmental liability for the prevention and remedying of environmental damage ².

Article 2

Definitions

1. For the purpose of this Directive the following definitions shall apply:
 - (1) "environmental damage" means:
 - (a) damage to protected species and natural habitats ³, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species;

¹ D/DK/FIN/P/S/UK: General scrutiny reservation on the text.
All delegations and Cion: scrutiny reservation on Articles 2 to 4, Articles 6 to 8 and Articles 14 and 18.

DK/F/UK: Parliamentary scrutiny reservation.

² F: suggests deletion of "based on environmental liability" and addition, "by the person causing the damage and at his expense".

³ UK suggests "(a) biodiversity damage, which is any damage to, or contamination of, habitats, or any harm to species that has or has had serious adverse effects on reaching or maintaining the favourable conservation status of biodiversity, or creates a significant risk of any such effects.".

F suggests "(a) damage to protected natural resources, being any significant adverse effects with regard to the baseline condition."

- (b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned ⁴, with the exception of adverse effects where Article 4(7) of that Directive applies ⁵;
- (c) land damage, which is any damage that creates a significant risk of human health ⁶ being adversely affected as a result of land contamination;

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- (2) "damage" means a measurable adverse change in a natural resource and/or measurable impairment of a natural resource service which may occur directly or indirectly ⁸;

⁴ UK: insert
 "(b) water damage, which is any use or contamination of water that adversely affects the ecological status, ecological potential and/or chemical status of the waters concerned to such an extent that this status will or is likely to deteriorate from one of the categories defined in Directive 2000/60/EC (with the exception of adverse effects where Article 4(7) of that Directive applies), or which causes biodiversity damage or an adverse effect on human health or a significant risk of either of these;"; NL/A do not favour this suggestion.

⁵ A suggests adding exception of Article 4(5); Cion does not consider this addition useful.
B suggests adding risk to human health.

⁶ S, supported by B/I/P, suggests addition of "or natural resources". B: prefers "and natural resources"; and UK suggests "(c) land damage, which is any land contamination which causes biodiversity damage, water damage or an adverse effect on human health, or a significant risk of any of these."

⁷ P suggests a new preamble 7A in relation to air pollution: "Environmental damage within the meaning of this Directive refers to water, soil and biodiversity damage resulting from accidental or deliberate release of substances, materials or radiation; airborne elements are also included within the meaning of this Directive as far as they cause damage to water, soil or biodiversity, or present serious potential or actual harm to human health."; Pres suggests as a compromise "(Whereas) airborne elements are also included within the meaning of this Directive as far as they cause damage to water, soil, protected species or natural habitats".

⁸ A/B/DK/EL/L: must include damage caused by GMOs; A/B/DK/E/EL/I/L/IRL/P favour producer liability, as opposed to user liability; B reminds Cion of recital 16 of Directive 2001/18 EC.

- (3) "protected species and natural habitats" means ⁹
- the species listed in Annex I or mentioned in Article 4.2 to Directive 79/409/EEC or listed in Annexes II and IV ¹⁰ to Directive 92/43/EEC;
 - the natural habitats of these species and the habitats listed in Annex I of the Directive 92/43/EEC; and
 - where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives ¹¹;

⁹ UK/F/A consider that species should be protected only within protected sites; A suggests following definition "... means natural habitats and species within sites adopted in accordance with Article 4 of Directive 79/409/EEC or Article 3 of Directive 92/43/EEC and any habitat or species, not listed in those sites that Member States choose to designate for equivalent purposes as those laid down in these two Directives";
F recalls the definition proposed in 14289/02 COR 2:
"- The species listed in Annex I or mentioned in Article 4.2 of the Directive 79/409/EEC, or listed in the Annexes II and IV of the Directive 92/43/EEC;
- The natural habitats of these species and the habitats listed in Annex I of the Directive 92/43/EEC,
As far as these are situated in a special protection area or in a special conservation area, classified and designated in accordance with Directives 79/409/EEC and 92/43/EEC, respectively."
DK/P/ES/Cion oppose this suggestion which would considerably limit the scope of the Directive;
P/B/DK consider that a wider definition is needed in Article 2(3). B suggests that this definition should cover all organisms in all habitats and ecosystems within the EU, it would then be implicit that damage caused by GMOs should cover any damage to all organisms in these habitats and ecosystems; P suggests coverage of "variability among living organisms from all sources, including diversity within species, between species and of ecosystems".

¹⁰ NL considers that due to the lack of compensation measures applicable in the case of Annex IV, it is preferable to delete this reference; Cion opposes such a deletion.

¹¹ F/UK: delete this indent; A/D/IRL/DK/I/P/FIN/NL consider this indent should be maintained; S/E: maintain this indent but delete "where a Member State so determines".

(4) "conservation status" means:

- (a) in respect of a natural habitat, the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat;

The conservation status of a natural habitat will be taken as 'favourable' when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (b) below;

- (b) in respect of a species, the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that species;

The conservation status of a species will be taken as 'favourable' when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

- (5) "land contamination" means the direct or indirect introduction, as a result of human activity, of substances, preparations, organisms or micro-organisms harmful [or potentially harmful] ¹² to human health or natural resources in, on or under land;
- (6) "waters" mean all waters covered by Directive 2000/60/EC;
- (7) "operator" means any natural or legal, private or public person who operates or controls ¹³ the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity and/or the person registering or notifying such an activity;
- (8) "occupational activity" means any activity other than those carried out by an individual for personal purposes ¹⁴;
- (9) "emission" means the release in the environment, as a result of human activities, of ¹⁵ substances, preparations, organisms or micro-organisms;
- (10) "imminent threat of damage" means a sufficient likelihood that environmental damage will occur in the near future ¹⁶;

¹² D/F/UK: delete. P/Cion: against.

¹³ A: linguistic reservation, the German version of the IPPC Directive translates "controls" with "besitzen" which is not suitable here.

¹⁴ FIN/P/UK: prefer "carried out in the course of a business or undertaking". D: prefers "means any activity carried out for economic purposes".

¹⁵ UK: suggests insertion of "non-authorised".

¹⁶ F/P would prefer the following definition "an abnormal situation which makes it foreseeable that there is a high risk of environmental damage occurring within a period of time which is long enough to allow safeguard measures to be taken", A: against this; D/UK: scrutiny reservation. Cion: opposed.

(11) "preventive measures" means any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage;

(11A) "interim losses" means losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. ¹⁷

(12) "remediation" means

(i) in the cases of damage to protected species, natural habitats and water: any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services, ¹⁸ including:

(a) primary remediation: which is any remedial action which returns the damaged natural resources and/or impaired services to, or towards, baseline condition ¹⁹;

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(b) complementary remediation: which is any remedial action taken in relation to natural resources and/or services in a different location ²¹ from that in which the relevant natural resources and/or services have been damaged;

¹⁷ A/F: reservation on concept of interim losses.

¹⁸ A: replace "including" by "Remedying of environmental damage is achieved through...".

¹⁹ I: add text on requirement to make site secure.

²⁰ I: suggests addition of new paragraph:
"Secondary remediation: which is any remedial actions taken in order to prevent further damage to the natural resources and/or impaired services in the concerned sites;"

²¹ I: add "which is geographically linked to the damage site".

- (c) compensatory remediation: which is any action taken to compensate for interim ²² losses of natural resources and/or services that occur from the date of damage occurring until the return of damaged natural resources and/or impaired services to baseline condition;
- (ii) in the case of land damage: the necessary measures to ensure that the relevant contaminants are controlled, contained, diminished or removed so that the contaminated land, taking account of its current or [...] future use ²³, no longer poses any significant risk of adversely affecting human health ²⁴;
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- (13) "natural resource" means protected species, natural habitats, water and land;
- (14) "services" (or "natural resources services") means the functions performed by a natural resource for the benefit of another natural resource and/or the public ²⁶;
- (15) "baseline condition" means the condition ²⁷ of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available ²⁸ including, *inter alia*, historical data, reference data, control data, or data on incremental changes alone or in combination, as appropriate;

²² A: delete "interim".

²³ A: replace "its current or [plausible] future use" by "the function of the specific land use area"; note in the German version this should read "des gewidmeten Zwecks des Gebietes". F: delete "[plausible] future use".

²⁴ B/EL/P/S suggest the addition of "natural resources".

²⁵ B: suggests new definition "'fault" means any breach of or lack of compliance with any environmental statutory provisions governing the activities of the type which caused the damage."

²⁶ A/D/S: this definition may not be necessary.

²⁷ F: suggests inserting "at the time of the damage".

²⁸ A/D/FIN/S: finish the paragraph here.

- (16) "recovery", including "natural recovery", means, in the case of protected species, natural habitats and water the return of damaged natural resources and/or impaired services to baseline condition and in the case of land damage, the elimination of any significant risk of adversely affecting human health ²⁹;
- (17) "costs" means costs which are justified by the need to ensure the proper and effective implementation of this Directive including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs and monitoring and supervision costs; ³⁰
- (18) "public concerned": means the public affected or likely to be affected by, or having an interest in, environmental decision making; for the purpose of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. ³¹
2. Damage to protected species and natural habitats ³² within the meaning of paragraph 1(1)(a) does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

²⁹ B/EL/P/S: scrutiny reservation, add "natural resources".

³⁰ A: scrutiny reservation, would prefer a more general definition.

³¹ Presidency compromise to take account of Aarhus Convention. D suggests "'public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups including non-governmental organisations promoting environmental protection."; Cion questions whether, further to Article 12, this definition is really necessary; P would also prefer the use of Article 12(1)(a) and (b) for this definition.

³² EL suggests "previously accepted" to replace "previously identified".

Article 3

Scope

1. This Directive shall apply to ³³:
 - (a) environmental damage caused by the operation of any of the occupational activities ³⁴ listed in Annex I, and to any imminent threat of such damage occurring by reason of any of those activities.
 - (b) damage to protected species and natural habitats ³⁵ caused by the operation of any occupational ³⁶ activities other than those listed in Annex I, and to any imminent threat of such damage occurring by reason of any of those activities.

2. This Directive shall apply without prejudice to more stringent ³⁷ provisions of Community legislation regulating the operation of any of the activities falling within the scope of this Directive and without prejudice to Community legislation containing rules on conflicts of jurisdiction.

³³ P: add "environmental damage" here and delete those words from subparagraph (a) and the words "protected species and natural habitats" from sub-paragraph (b). B, supported by S, suggests the following text for paragraph 1:
"This Directive shall apply to environmental damage caused by the operation of any [...] occupational activity [...], and to any imminent threat of such damage occurring by reason of any such activity" (ref. to Annex I activities would be made in Article 8).

A/D/F/FIN/I/UK: against.

³⁴ A/D/DK/S/UK would like to see a clearer definition of this term, particularly in relation to whether the activity must only involve the dangerous activity or whether any activity linked indirectly to the dangerous activity will also be included.

Pres asks these delegations to provide written suggestions.

³⁵ D: possibly delete this subparagraph altogether; B/P suggest that this should be the wider term "environmental damage"; A/F/I: against B/P proposal; E: concern due to difficulty of implementation.

³⁶ NL, supported by A: delete the word "occupational".

³⁷ D would replace paragraph as follows: "This Directive shall not apply as far as provisions of Community legislation contain rules on preventive actions and/or remedial actions for environmental damage as defined in Article 2(1)(1)".

3. Subject to Article 9(3), and without prejudice to relevant national law, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage³⁸.

Article 4

Exceptions

1. This Directive shall not cover environmental damage or an imminent threat of such damage caused by:
 - (a) an act of armed conflict, hostilities, civil war or insurrection [...] ³⁹;
 - (b) a natural phenomenon of exceptional, inevitable and irresistible character;

³⁸ A/B/D/DK/F/L/P/S suggest a new preamble to explain that traditional damage is not covered (text suggestions would be welcomed).

³⁹ Presidency, following the debate, considers that it is best not to mention "terrorism" in this indent given that, according to the specific case, these acts could be either interpreted as covered by the existing text of (a) or by Article 8.4.

⁴⁰ On permit defence and state-of-the-art defence - see also Presidency compromise in Articles 7-8:
S/B/NL/EL/IRL are generally in favour of Presidency suggestion;
E/I/D: open to Presidency suggestion;
DK: against any form of exemption in Article 4 and in Articles 7 and 8;
UK/F/P/A: reservation, prefer the inclusion of clear exemptions in Article 4. In particular:
P proposes reinstating this exemption by inserting the following:
"2. The operator shall not be liable under this Directive for damage which he proves was caused by:
(a) an emission or event expressly allowed in applicable laws and regulations or in the permit or authorisation issued to the operator;
(b) as (d) above
3. Paragraph 2 (a) and (b) shall only apply if the operator proves that he has not been negligent.";
F proposes:
"This Directive shall not cover environmental damage or the imminent threat of such damage where the operator proves that the damage was caused by:
(a) an emission or event expressly allowed in applicable laws and regulations or in the permit or authorisation issued to the operator;
(b) emissions or activities which were not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission or the activity occurred.
The exclusion contained in (a) and (b) above shall not apply if the operator has been negligent.";
A proposes reinstating this exemption by inserting the following:
"(c) emissions or activities allowed in a permit or authorisation issued to the operator, the purpose of which is to protect the environment;
(d) activities carried out in compliance with the usual good farming practice according to regulation (EC) No 1257/99 and the usual good agricultural practice as far as the environment is concerned" the current paragraph (d) would become paragraph (e) and a new paragraph 1A would be added as in the Presidency proposal;
UK proposes reinstating this exemption by inserting the following:
1(c) "an emission or event which the operator proves is authorised by, and fully in accordance with such conditions of, an authorisation expressly conferred by or given under applicable national laws and regulations which implement those measures adopted by the Community specified in Annex IV, as applied at the date of the emission or event". The proposed Annex IV would contain the Directives referred to at points 1, 3, 4, 5 and 7 of the current Annex I.

2. This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident ⁴¹ in respect of which liability or compensation falls within the scope of any of the International Agreements listed in Annex A to Annex I, including any future amendments of these Agreements, which is in force in the Member State concerned. ⁴²
3. This Directive shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the operation of the activities covered by the Treaty establishing the Atomic Energy European Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the International Agreements listed in Annex B to Annex I ⁴³, including any future amendments of these Agreements ⁴⁴.

⁴¹ I/UK: delete the phrase "arising from an incident"; Cion/S: scrutiny reservation; F/P: maintain it.

⁴² D: add the following text: "(...) This Directive shall not affect the right of the operator to limit his liability in accordance with the following provisions which are applicable in the Member State concerned and relate to the limitation of liability of the owner of seagoing vessels or inland navigation vessels:

1. Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, including any future amendment to the Convention;
2. Strasbourg Convention on Limitation of Liability in Inland Navigation, 1988, (CLNI) including any future amendment to the Convention;
3. Provisions of national law that regulate the limitation of liability in the same way as the conventions or amendments listed in numbers 1 and 2.

The requirements listed in number 3 above are also satisfied if the provisions provide for higher limits than those prescribed in the conventions or amendments listed in number 1 or 2 above."; Cion: against this addition; Pres asks D if a solution to this question can be found in Article 18 or perhaps in national implementing legislation.

⁴³ A/EL/IRL/L: basic reservation, as they do not believe that the nuclear industry should be put at an advantage over other industries which would be liable under this Directive (e.g. energy production from renewables) also concern as they are not parties to any of the Conventions; want the nuclear industry to be covered by the Directive and IRL suggests, as a possible solution, that the Directive would apply in cases of damage where no claim is made under the relevant convention.

NL suggests exclusion as far as covered by the International Agreements. (P: supports).

D/B/F/FIN/S/UK: against including the nuclear industry and P supports the Commission proposal, not to include the nuclear industry. E: scrutiny reservation.

⁴⁴ NL: add "which is in force in the Member State concerned". IRL: add "In cases of damage or imminent threat of damage of this type where no claim is made under one of the said International Agreements the Directive [may/should/shall] apply".

Also see review clause contained in Article 18(3).

4. This Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.⁴⁵
5. This Directive shall not apply to activities the main⁴⁶ purpose of which is to serve national defence or international security nor to activities the sole purpose of which is to protect from natural disasters.

Article 5

Preventive actions

1. Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall take the necessary preventive measures⁴⁷.
2. Member States shall provide that where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible.

⁴⁵ A prefers original Commission text.

⁴⁶ DK prefers "sole" to "main".

⁴⁷ F suggests "All operators shall, at their own costs, take the necessary measures to prevent the imminent damage as soon as the risk arises". Cion indicates that "costs" aspects are dealt with in Article 8.

3. ⁴⁸ The competent authority may, at any time:
- (a) require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat;
 - (b) require the operator to take the necessary preventive measures;
 - (c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or
 - (d) itself take the necessary preventive measures ⁴⁹.
4. If the operator fails to comply with the obligations laid down in paragraph 1 or 3(b) or (c), cannot be identified, or is not required to bear the costs under this Directive, the competent authority, without prejudice to Articles 7 and 8, shall ⁵⁰ ensure that these measures are taken.

⁴⁸ B suggests that this paragraph should be deleted and instead become a new paragraph 4bis of Article 11.

E: scrutiny reservation.

⁴⁹ A: add "if there is an imminent threat of damage" (check German translation, should be "bei Gefahr im Verzug").

⁵⁰ B/EL/L/NL/S/Cion: favour a safety net which requires the Member States to act in particular circumstances; A/E/FIN/IRL: can accept some form of mandatory system but with a sufficient degree of flexibility, some fine-tuning of text may be required. Therefore, from the Council debate, it seems clear that these two groups of Member States can accept the general approach of the Presidency compromise proposal (as contained in Articles 5(4), 6(3) and 7(3) and (3A)).

D/F/I/P/UK: support a discretionary system, F is against imposing an obligation on the competent authority to take action itself; I suggests common guidelines for when action should be taken.

Article 6
Remedial actions

1. Where environmental damage has occurred the operator⁵¹ shall, without delay, inform the competent authority of all relevant aspects of the situation and without prejudice to paragraph 3⁵² take the necessary remedial measure, in accordance with Article 7.

- 2.⁵³ The competent authority may, at any time:
 - (a) require the operator to provide supplementary information on any damage that has occurred;
 - (b) require the operator to take the necessary remedial measures;
 - (c) give instructions to the operator to be followed on the necessary remedial measures to be taken; or
 - (d) itself take the necessary remedial measures.

3. If the operator fails to comply with the obligations laid down in paragraphs 1 or 2(b) or (c), cannot be identified, or is not required to bear the costs under this Directive, the competent authority without prejudice to Articles 7 and 8 shall⁵⁴ ensure that these measures are taken.

⁵¹ F, supported by I, suggests that it should be clearly stated that the operator is liable for all damage resulting from the operation of his Annex I activity.

⁵² consequential change on insertion of Article 8(4A).

⁵³ B suggests that this paragraph should be deleted and instead become a new paragraph 4bis of Article 11.

⁵⁴ B/EL/L/NL/S/Cion favour a safety net which requires the Member States to act in particular circumstances; A/E/FIN/IRL can accept some form of mandatory system but with a sufficient degree of flexibility, some fine-tuning of text may be required. D/F/I/P/UK support a discretionary system, F is against imposing an obligation on the competent authority to take action itself; I suggests common guidelines for when action should be taken.

Article 7

Determination of preventive and remedial measures

1. Operators shall identify, in accordance with Annex II, potential remedial actions and submit them to the competent authority for its decision, unless the competent authority has taken action under Article 6(2)(d) and (3).⁵⁵
2. The competent authority shall decide which remedial measures shall be implemented in accordance with Annex II, and with the cooperation of the relevant operator, as required⁵⁶.
3. Where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary remedial measures are taken at the same time, the competent authority shall be entitled to decide which instance of environmental damage must be remedied first.
In making that decision, the competent authority shall have regard, *inter alia*, to the nature, extent and gravity of the various instances of environmental damage concerned, and to the possibility of natural recovery⁵⁷.

⁵⁵ A suggests new subparagraph: "In cases referred to in Article 3 (1)(b) the operator shall be required by the competent authority to take the necessary preventive or remedial measures".

⁵⁶ A: add " Remedying of environmental damage is alternatively achieved either through primary, complementary or compensatory remediation". F: against.

⁵⁷ NL: any risk to human health should also be taken into account.

- 3A. The competent authority is entitled not to adopt:
- preventive or remedial measures itself if the imminent threat or damage is not serious and ⁵⁸ the cost of the preventive or remedial measures that it should take would be disproportionate ⁵⁹ to the environmental benefits to be obtained ⁶⁰;
 - remedial measures itself if the damage falls within Article 8(4A), other than those for which the costs can be attributed to the operator.
4. The competent authority shall invite the persons referred to in Article 12(1) and in any case the persons on whose land remedial measures should be carried out to submit their observations and shall take them into account.
5. Detailed specific requirements as regards Annex II may be drawn up by the Commission in accordance with the procedure laid down in Article 16A(2).

Article 8

Prevention and remediation costs

1. The operator shall bear the costs for the preventive and remedial measures taken pursuant to this Directive.

In the cases referred to in Article 3(1)(b) the operator shall be required to bear the cost of the preventive or remedial measures taken pursuant to this Directive only if he was at fault or negligent ⁶¹.

2. [...]

⁵⁸ D: replace "and" by "or".

⁵⁹ DK: linguistic reservation "disproportionate" missing from Danish text.

⁶⁰ DK/F/P support this text in principle; I: some rewording may be required; B: may give too much flexibility, would like to investigate alternative formulation.

⁶¹ B would prefer a direct reference in the first sub-paragraph to Annex I activities and in the second to non-Annex I activities, rather than making the distinction in Article 3. D suggests deletion of this subparagraph. A suggests deletion of word "negligent".

3. Subject to paragraph 4, the competent authority shall recover, *inter alia*, via security over property or other appropriate guarantees from the operator, or, if appropriate, the third party⁶² who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the taking of preventive or remedial measures under this Directive.

However, the competent authority may decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified.

4. An operator shall not be required to bear the cost of preventive or remedial measures taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage occurring:
- (a) has been caused by a third party, and the damage or imminent threat in question resulted despite the fact that appropriate safety measures were in place; or
 - (b) is the result of compliance with a compulsory order or instruction emanating from a public authority⁶³.
- 4A. An operator may not be required to bear the full cost of remedial measures taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

⁶² S: reservation on inclusion of third party, B suggests reference should be to "third party operator".

⁶³ UK: add "other than an order or instruction consequent on an emission or incident caused by the operator's own activities."

E: delete paragraph 4.

- (a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation [...] conferred by or given under applicable national laws and regulations which implement those measures adopted by the Community specified in Annex I, as applied at the date of the emission or event.
- (b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

In such cases Member States shall put in place the appropriate procedures to identify to what extent costs which are to be incurred in taking any remedial measures are to be borne by the operator taking into account all mitigating circumstances. ⁶⁴

5. ⁶⁵ Member States shall ensure that in all circumstances operators bear any costs relating to any measure which they were required to take as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities, including the terms of any permit or authorisation.

Articles 5 and 6 shall not be taken into consideration for the purpose of defining the legislative, regulatory and administrative provisions referred to in this paragraph.

⁶⁴ IRL/NL: favourable to Presidency suggestion;
D/B find that more concrete guidance would be required; B suggests adding an indent on precautionary measures as a mitigating factor;
DK: against any derogations to the polluter-pays- principle;
S, supported by FIN, suggests the following new Article 8A to replace 8.4A:
"When the extent of the liability according to Article 8 is determined, account may in particular be taken of whether the operator has performed in accordance with a permit or authorisation issued to the operator, and whether the emissions or activities were not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place."

⁶⁵ A: delete this paragraph.

6. Measures taken by the competent authority in pursuance of Articles 5(4) and 6(3) shall be without prejudice to the liability of the relevant operator under this Directive and without prejudice to Articles 87 and 88 of the EC Treaty.

66

Article 9

Cost allocation in cases of multiple party causation

1. When the same instance of damage has been caused by the actions or omissions of several operators, and without prejudice to the full recovery of the costs, Member States may provide either that the relevant operators are to be held jointly and severally liable for that damage or that the competent authority is to apportion the share of the costs to be borne by each operator on a fair and reasonable basis ⁶⁷.

2. [...] ⁶⁸

⁶⁶ NL has made a proposal for an additional Article on transboundary damage here (see also footnote n° 81):

"Article 8a:

1. Where environmental damage has occurred or there is an imminent threat of such damage occurring in areas within the jurisdiction of a Member State other than the Member State where the activity takes place, the competent authority of the Member State where environmental damage has occurred or there is an imminent threat of such damage occurring may, at any time, require the competent authority of the Member State where the activity takes place to provide supplementary information on any imminent threat of environmental damage or in suspected cases of such an imminent threat, or on any damage that has occurred, and shall:
 - (a) require the competent authority of the Member State where the activity takes place to ensure that the necessary preventive or remedial action is taken; or
 - (b) itself take the necessary preventive or remedial action.
2. The competent authority of the Member State where environmental damage has occurred or there is an imminent threat of such damage occurring shall be indemnified by the competent authority of the Member State where the activity takes place for any costs it has incurred in relation to the taking of preventive or remedial action under this Directive."

⁶⁷ P/D/F/IRL: delete paragraph 1.

⁶⁸ EL/Cion: opposed to deletion.

3. This Directive is without prejudice to any provisions of national law concerning the rights of contribution ⁶⁹ or recourse.

Article 10

Limitation period for recovery of costs ⁷⁰

The competent authority shall be entitled to initiate cost recovery proceedings against the operator, or if appropriate, a third party who has caused the damage or the imminent threat of damage in relation to any measures taken in pursuance of this Directive before the expiry of a period of five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later.

Article 11

Competent authority

1. Member States shall designate a competent authority or competent authorities responsible for fulfilling the duties provided for in this Directive ⁷¹.

Where a Member State decides not to give the competent authority the power to issue binding decisions or the power to enforce any such decisions, that Member State shall ensure that a court or other independent and impartial public body is competent to issue and enforce such decisions.

⁶⁹ B: requests clarification of this term (is it equivalent to "regres")

⁷⁰ B suggests that this should be moved to Article 8.

⁷¹ A/D/F/I/IRL/S: subparagraph 1 is sufficient, the other paragraphs are not necessary;
I: the Article imposes too heavy a burden on the competent authority.

2. Regardless of whether a decision referred to in the second subparagraph of paragraph 1 is issued by the competent authority, a court or some other independent and impartial public body, the duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken in accordance with Annex II shall rest with the competent authority.
3. Member States shall ensure that the competent authority carries out appropriate investigations so as to fulfil its duties under this Directive, independently of any prior request for action lodged pursuant to Article 12.

To that effect, the competent authority shall be entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary, for the purpose of the investigation.

[...] ⁷²

4. Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or remedial measures.
5. Any decision taken pursuant to this Directive which imposes preventive or remedial measures shall state the exact grounds on which it is based. Such decision shall be notified forthwith to the operator concerned, who shall at the same time be informed of the legal remedies available to him under the laws in force in the Member State concerned and of the time-limits to which such remedies are subject.

⁷² UK suggests deletion of all of paragraph 3.

Article 12

Request for action

1. The public concerned
 - (a) having a sufficient interest, or alternatively
 - (b) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat ⁷³ thereof of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a sufficient interest and impairment shall be determined by the Member States.

To this end, the interest of any non-governmental organisation within the meaning of Article 2 (18) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article ⁷⁴.

⁷³ P/UK: scrutiny reservation on inclusion of "an imminent threat thereof".

⁷⁴ Presidency proposal, supported by EL/FIN/NL, to take account of concerns to align this with the Aarhus Convention; E: scrutiny reservation; D: alternative proposal for para 1: "The Member States shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat thereof of which they are aware and shall be entitled to request the competent authority to take action under this Directive; P: suggest that (1)(a) and (b) should be moved to Article 2(1)(18) as the definition of the public concerned and so this paragraph would begin "The public concerned shall be entitled to submit to the ...".

2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the environmental damage in question.
3. ⁷⁵ Where the request for action and the accompanying observations show in a plausible manner that an instance of environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.
4. The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the public concerned, which submitted its observations to the authority of its decision, under this Directive, to accede to or refuse the request for action and shall provide the reasons for that decision.
5. [...] ⁷⁶

⁷⁵ F/P/S: delete paragraph 3 and F: delete paragraph 4 if "imminent threat" maintained.

⁷⁶ B: scrutiny reservation on deletion, as see the former paragraph 5 as a safeguard for legal certainty and rights of defence (fair trial).

Article 13

Review procedures ⁷⁷

1. The public concerned, having a sufficient interest or alternatively alleging impairment of a right as referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.
2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

Article 14

Financial security ⁷⁸

1. Member States shall ensure that operators shall use appropriate insurance or other forms of financial security to cover their responsibilities under this Directive in relation to Annex I, part A activities within three years from the date contained in Article 19; in relation to Annex I part B activities within 6 years from the date contained in Article 19.

⁷⁷ D wants to align this to Article 9(3) of the Aarhus Convention and suggests the following text for para 1: " The Member States shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge the decisions, acts or omissions by the competent authority under this Directive.

I: reservation, would like text to be more specific; S: scrutiny reservation on scope of this Article; F: scrutiny reservation on use of "public concerned"; B: relationship with "access to justice".

⁷⁸ A/DK/D/E/EL/L/P/S support a mandatory system for financial security; A/D/DK/E/P/B can support the general direction of the Presidency proposal (A/D/S would prefer a higher degree of harmonisation); Cion/F/FIN/IRL/NL/UK support a voluntary system. UK draws attention to its analysis of costs entailed by a mandatory system provided in document 5675/03.

Member States may decide not to apply this provision to low risk activities.⁷⁹

2. The Commission will review the operation of this provision and, if appropriate, within six years from the date contained in Article 19, make proposals for thresholds to be set for the minimum financial security required according to the different activities covered by Annex I Parts A and B⁸⁰.
3. In relation to the financial security, Member States may allow it to be limited in time, after the expiry of the activity, and may establish an upper cap.
4. Member States shall also take measures to encourage the development, by the appropriate economic and financial operators, of financial security instruments and markets.

⁷⁹ B/D/P expressed concerns about the application of this provision and its consequences for the internal market.

⁸⁰ A suggests replacing paragraph 2 with "Member States shall set a minimum financial security".

Article 15

Co-operation between Member States

Where environmental damage affects or is likely to affect several Member States, those Member States shall co-operate, including through the appropriate exchange of information, with a view to ensuring that preventive action and, where necessary, remedial action is taken in respect of any such environmental damage ⁸¹.

Article 16

Relationship with national law

1. This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and restoration requirements of this Directive, the identification of additional responsible parties and allocation of financial responsibility to or among responsible parties.
2. This Directive shall not prevent Member States from adopting appropriate measures, such as the prohibition of double recovery, in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under this Directive and by a person whose property is affected by damage.

⁸¹ P, supported by B/DK/NL/IRL/S, suggests an additional two paragraphs for this Article, as follows:

"2. Where environmental damage has occurred the competent authority of the Member State in whose territory the damaging operation of an occupational activity listed in Annex I or the biodiversity damage took place shall provide the sufficient information to the potentially affected Member States.

3. Where a Member State identifies a damage that has not been caused within its boundaries it may report the issue to the Commission and any other Member State concerned and may make recommendations for the adoption of preventive or restorative measures".

A/D: scrutiny reservation; EL: positive scrutiny reservation; FIN: reservation; UK: supports paragraph 2 and scrutiny reservation on paragraph 3.

Article 16A

Committee

1. The Commission shall be assisted by the committee instituted by Article 19 of Decision 96/61/EEC.⁸²
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its rule of procedure.

Article 17

Temporal application

1. This Directive shall not apply to:
 - damage caused by an emission, event or incident that took place before the date referred to in Article 19(1);
 - damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific operation of an activity that took place and finished before the said date⁸³.
- 1A. ⁸⁴ This Directive shall not apply to damage which results from an emission, event or incident which took place more than 30 years earlier⁸⁵.

⁸² Note: In order to avoid the creation of a new Committee, the Presidency suggests using an existing Committee.

⁸³ D/F/I/UK: scrutiny reservation; EL: reservation; B/S: positive scrutiny reservation; A: scrutiny reservation on deletion of former paragraph 2.

⁸⁴ B: replace the first 6 words by "The obligations of the operators to take preventive and remedial actions, laid down in Articles 5 and 6, will not apply if it concerns damage...".

⁸⁵ S: reservation; F: scrutiny reservation; NL: scrutiny reservation on exact wording. P: prefers 5-year period.

Article 18

Reports and review⁸⁶

1. Member States shall report to the Commission on the experience gained in the application of this Directive by [date (six years after the date referred to in Article 19)] at the latest. The national reports shall include the information and data set out in Annex III.⁸⁷
2. On that basis the Commission shall submit a report to the Council and the European Parliament within seven years from the date referred to in Article 19, which shall include any appropriate proposals for amendment.
3. The Report, referred to in paragraph 2, shall include a review of:
 - the application of Article 4(2) and (3) in relation to the exclusion of marine and other pollution, covered by the Conventions contained in Annex A to Annex I, and of the nuclear industry from the scope of the Directive, particularly in the light of experience within relevant international fora and Conventions, such as the IMO and Euratom and the extent to which these instruments have entered into force and/or have been implemented by Member States and taking account of all relevant instances of environmental damage resulting from such activities and the remediation action undertaken.

⁸⁶ A/IRL: reference to nuclear should be more explicit; D/F/S/UK: delete references to marine and nuclear; E: delete this reference to marine pollution, given the urgency of this question. I: scrutiny reservation. D/F: Annex III is currently too detailed.

⁸⁷ D: suggests alternative para 1, to be in line with Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, "1. Member States and the Commission shall exchange information on the experience gained in applying this Directive."

- the application of the directive to environmental damage caused by GMOs, particularly in the light of experience within relevant international fora and Conventions, such as the Convention on Biological Diversity and the Cartagena Protocol on Biosafety as well as the results of any incidents of environmental damage caused by GMOs.
- the instruments that may be eligible for incorporation into Annex I Parts A and B, Annex A to Annex I and Annex B to Annex I.

Article 19

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [date (x years after entry into force of this Directive)]⁸⁸ at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive and a correlation table between this Directive and the national provisions adopted.

Article 20

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

⁸⁸ Time span x to be further discussed.

Article 21
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ACTIVITIES REFERRED TO IN ARTICLE 3(1)

Part A

1. The operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control ^{*} . ⁹⁰
2. The operation of installations subject to permit in pursuance of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community ^{**} in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.
3. The operation of installations subject to permit for discharging any of the dangerous substances in pursuance of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances ^{***} in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

⁸⁹ All delegations: scrutiny reservation, D/UK: require a system which will provide legal certainty and foreseeability, UK considers that a list of activities would be unmanageable and inevitably leave gaps. F: suggests a system with two strict regimes and so two separate annexes, the first would cover a list of installations requiring authorisation and the second activities relating to products.

B/D/EL/I would prefer a list specific operators or activities, B suggests using Seveso wording.

A/EL/IRL/L: nuclear industry should be included, A suggests list should include "activities in accordance with Article 2(1) of Directive 96/29/EURATOM of the Council of 13 May 1996".

^{*} OJ L 257, 10.10.1996, p. 26.

⁹⁰ F suggests the relevant Articles of the Directive and the activities concerned should be identified.

^{**} OJ L 129, 18.5.1976, p. 23.

^{***} OJ L 20, 26.1.1980, p. 43.

4. The operation of installations subject to permit, authorisation or registration in pursuance of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy * in relation to the discharge of any of the dangerous substances ⁹¹ covered by the aforementioned Directive. [...]
5. Waste management operations, including the collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after-care of disposal sites, subject to permit or registration in pursuance of Council Directive 75/442/EEC of 15 July 1975 on waste ** and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste ***.

Those operations include, *inter alia*, the operation of landfill sites under Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste **** and the operation of incineration plants under Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste *****.

* OJ L 327, 22.12.2000, p. 1.

⁹¹ P suggests "dangerous substances" should be replaced by "pollutants" to ensure consistency with Directive.

** OJ L 194, 25.7.1975, p. 39. Directive as last amended by Commission Decision 96/350/EC of 24 May 1996 adapting its Annexes IIA and IIB (OJ L 135, 6.6.1996, p. 32).

*** OJ L 377, 31.12.1991, p. 20. Directive as amended by Council Directive 94/31/EC of 27 June 1994 (OJ L 168, 2.7.1994, p. 28).

**** OJ L 182, 16.7.1999, p. 1.

***** OJ L 332, 28.12.2000, p. 91.

Part B

1. The operation of installations subject to authorisation in pursuance of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants * in relation to the release into air of any of the polluting substances covered by the aforementioned Directive.
2. Water abstraction and impoundment of water subject to prior authorisation in pursuance of Directive 2000/60/EC of the European Parliament and of the Council.
3. Manufacture, use, storage, transport within the perimeter of the same undertaking or release into the environment of dangerous substances as defined and within the scope of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances **.
4. Manufacture, use, storage, transport within the perimeter of the same undertaking or release into the environment of dangerous preparations as defined and within the scope of Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations ***.

* OJ L 188, 16.7.1984, p. 20.

** OJ L 196, 16.8.1967, p. 1. Directive as last amended by Commission Directive 2001/59/EC of 6 August 2001 adapting to technical progress for the 28th time Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ L 225, 21.8.2001, p. 1).

*** OJ L 200, 30.7.1999, p. 1. Commission Directive 2001/60/EC of 7 August 2001 adapting to technical progress Directive 1999/45/EC of the European Parliament and of the Council concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ L 226, 22.8.2001, p. 5).

5. Manufacture, use, storage, transport or release into the environment of plant protection products or active substances used in plant protection products as defined and within the scope of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market *.
6. Manufacture, use, storage, transport or release into the environment of biocidal products or active substances used in biocidal products as defined and within the scope of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market **.
7. Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods as defined either in Annex A to Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road *** or in the Annex to Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail **** or as defined in Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods *****.

* OJ L 230, 19.8.1991, p. 1. Directive as last amended by Commission Directive 2001/103/EC of 28 November 2001 (OJ L 313, 30.11.2001, p. 37).

** OJ L 123, 24.4.1998, p. 1. Directive as last amended by Commission Directive 2001/87/EC of 12 October 2001 (OJ L 276, 19.10.2001, p. 17).

*** OJ L 319, 12.12.1994, p. 7. Directive as last amended by Commission Directive 2001/7/EC of 29 January 2001 (OJ L 30, 1.2.2001, p. 43).

**** OJ L 235, 17.9.1996, p. 25. Directive as last amended by Commission Directive 2001/6/EC of 29 January 2001 (OJ L 30, 1.2.2001, p. 42).

***** OJ L 247, 5.10.1993, p. 19. Directive as last amended by Commission Directive 98/74/EC of 1 October 1998 (OJ 276, 13.10.1998, p. 7).

8. Any contained use, including transport, of genetically modified micro-organisms as defined and within the scope of Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms *.

9. Any deliberate release into the environment, which requires an authorisation, including the placing on the market, or transport of genetically modified organisms as defined and within the scope of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment, of genetically modified organisms and repealing Council Directive 90/220/EEC. **

* OJ L 117, 8.5.1990, p. 1. Directive as amended by Council Directive 98/81/EC of 26 October 1998 (OJ L 330, 5.12.1998, p. 13).

** OJ L 106, 17.4.2001, p. 1.

INTERNATIONAL CONVENTIONS REFERRED TO IN ARTICLE 4(2) ⁹²

- (a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
- (b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- (c) the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;
- (d) the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
- (e) the Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.
- (f) the Convention of 19 November 1976 on Limitation of Liability for Maritime Claims ⁹³.

⁹² D/DK/EL/F/FIN/IRL/L/P/UK: concerned about how the list would be updated.

D: reservation on how to deal with the Basel Protocol on Civil Liability.

⁹³ Cion: reservation.

INTERNATIONAL CONVENTIONS REFERRED TO IN ARTICLE 4(3)⁹⁴

- (a) the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963;
- (b) the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, and the Vienna Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage⁹⁵;
- (c) the Joint Protocol of 21 September 1988 relating to the Application of the Vienna Convention and the Paris Convention;
- (d) the Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

⁹⁴ A: delete this Annex.

⁹⁵ B: point (b) should be two separate points, since two different conventions.

REMEDYING OF ENVIRONMENTAL DAMAGE ^{96 97}

This Annex sets out the rules ⁹⁸ to be followed in order to ensure the remedying of environmental damage.

1. REMEDIATION OF BIODIVERSITY AND WATER DAMAGE

Remedying of environmental damage, in terms of biodiversity and water damage, is achieved through the restoration of the environment to its baseline condition ⁹⁹.

Where primary remediation does not result in recovery then complementary remediation ¹⁰⁰ will be undertaken. In addition, compensatory remediation will be undertaken to compensate for the interim losses.

Remedying of environmental damage, in terms of biodiversity and water damage, also implies that any significant risk of human health being adversely affected be removed.

⁹⁶ A/B/D/FIN/I/L/P/UK: general scrutiny reservation on Annex; E/S: positive scrutiny reservation.

⁹⁷ The term "biodiversity" will be reviewed in light of the deliberations on Article 2.

⁹⁸ FIN: reservation on use of word "rules", suggests chapeau should read: "This Annex sets out the guidelines for the remedying of environmental damage", A/P also support idea that it is guidelines (See A suggestion to Article 7(2)); D/E/EL/F/NL: prefer Cion proposal, i.e. Annex II is binding. I/UK: would like to ensure that there is sufficient flexibility for Member States.

⁹⁹ D: suggest primary remediation should be identified as first option, probably already covered through wording of first paragraph.

¹⁰⁰ I: add "and secondary remediation".

1.1 Remediation objectives

Purpose of primary remedial actions

- 1.1.1 The purpose of primary remedial actions is to restore the damaged natural resources and/or services to, or towards, baseline condition which will include the requirement to immediately contain the relevant contaminants and/or any other damage factors in order to limit and to prevent further environmental damage of natural resources and/or impaired services in the concerned sites.¹⁰¹

Purpose of complementary remedial actions

- 1.1.2 Where the damaged natural resources and/or services do not return to their baseline condition, then complementary remedial actions shall be undertaken. The purpose of complementary remedial actions is to provide a similar level of natural resources and/or services, including, as appropriate, at an alternative site¹⁰², as would have been provided if the damaged site had been returned to its baseline condition.

Purpose of compensatory remedial actions

- 1.1.3 Compensatory remedial actions shall be undertaken to compensate for the interim loss of natural resources and services pending recovery¹⁰³. This compensation consists of additional improvements to biodiversity or water at either the damaged site or at an alternative site. It does not consist of financial compensation to members of the public.

¹⁰¹ All delegations except DK/E/EL/I: scrutiny reservation.

¹⁰² I: add at end of this para "Where possible and appropriate the alternative site should be geographically linked to the damaged site, taking into account the interests of the affected population"; F/UK: scrutiny reservation.

¹⁰³ A: change references in this paragraph from "interim loss" to "losses" and add here "if natural recovery measures, where no human intervention would be taken, are considered as remedial measures." and delete the last 9 words of the second sentence.

1.2. Identification of remedial actions

Identification of primary remedial actions

- 1.2.1. Options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame, or through natural recovery, shall be considered.

Identification of complementary and compensatory remedial actions ¹⁰⁴

- 1.2.2 When determining the scale of complementary and compensatory remedial actions, the use of resource-to-resource or service-to-service equivalence approaches shall be considered first. Under these approaches, actions that provide natural resources and/or services of the same type, quality and quantity as those damaged shall be considered first. Where this is not possible, then alternative natural resources and/or services shall be provided. For example, a reduction in quality could be offset by an increase in the quantity of remedial actions.
- 1.2.3 If it is not possible to use the first choice resource-to-resource or service-to-service equivalence approaches, then alternative valuation techniques shall be used. The competent authority may prescribe the method, for example monetary valuation, to determine the extent of the necessary complementary and compensatory remedial actions. If valuation of the lost resources and/or services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time-frame or at a reasonable cost, then the competent authority may choose remedial actions whose cost is equivalent to the estimated monetary value of the lost natural resources and/or services.

¹⁰⁴ A/DK/F/UK: scrutiny reservation on the principle of complementary or compensatory remedial actions, problem of evaluation.

The complementary and compensatory remedial actions should be so designed that they provide for additional natural resources and/or services to reflect time preferences and the time profile of the remedial actions. For example, the longer the period of time before the baseline condition is reached, then the greater the amount of compensatory remedial actions that will be undertaken (other things being equal).

1.3. Choice of the remedial options

1.3.1. The reasonable remedial options shall be evaluated, using best available technologies, where defined,¹⁰⁵ based¹⁰⁶ on the following criteria:

- The effect of each option on public health and safety;
- The cost to carry out the option;
- The likelihood of success of each option;
- The extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option; and
- The extent to which each option benefits to each component of the natural resource and/or service;
- The extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality;
- The length of time it will take for the restoration of the environmental damage to be effective;
- The extent to which each option achieves the restoration of site of the environmental damage;
- The geographical linkage to the damaged site.¹⁰⁷

1.3.2. If several options are likely to deliver the same level of remediation, the least costly one shall be selected.

¹⁰⁵ I suggests: "in all cases where possible"; A: against addition of "where defined".

¹⁰⁶ A: add "inter alia".

¹⁰⁷ FIN/S/UK: use Habitats Directive terminology (biogeographical region); E/F/UK: scrutiny reservation ; A: against addition of "geographical linkage".

- 1.3.3. When assessing the different identified remedial options, primary remedial actions that do not fully restore the damaged bio-diversity or water to baseline or that restore it more slowly can be chosen. This decision can be taken only if the natural resources and/or services foregone at the primary site as a result of the decision are compensated for by increasing complementary or compensatory actions to provide a similar level of natural resources and/or services as were foregone. This will be the case, for example, when the equivalent natural resources and/or services could be provided elsewhere at a lower cost. These additional remedial actions shall be determined in accordance with the rules set out in section 1.2.2.
- 1.3.4. Notwithstanding the rules set out in section 1.3.3., the competent authority is entitled to choose primary, complementary or compensatory remedial actions that do not fully restore the damaged biodiversity or water to baseline or that restore it more slowly, if the damage does not pose any significant risk of adversely affecting human health, biodiversity or water and the cost of the remedial measures that should be taken would be disproportionate to the environmental benefits to be obtained.¹⁰⁸

¹⁰⁸ Presidency proposal, supported by E, to include proportionality principle. D/S: scrutiny reservation. E: add after "section 1.3.3" in the first line "and in accordance with Article 7(3)". Some further consideration to be given to whether this paragraph should appear here or in the Articles. IRL asked that Cion consider further the links with the Water Framework Directive. A: against addition of proportionality clause due to fact that obligations to remedy damage should not be weakened.

2. REMEDIATION OF LAND DAMAGE

The necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current or [...] future use ¹⁰⁹, no longer poses any significant risk of adversely affecting human health ¹¹⁰. [...]Future use shall be ascertained on the basis of the land use regulations, or other relevant regulations, in force, if any, when the damage occurred. ¹¹¹

A natural recovery option, that is an option in which no direct human intervention in the recovery process would be taken, shall be considered ¹¹².

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- ¹⁰⁹ A: deletion of "[plausible] future use". EL/FIN/UK: this phrase must be part of the consideration when remediating land, UK: offered to provide a definition. A suggests "taking account of the function of the specific land use area and of the BATNEEC principle" and in the last sentence "Plausible use" would be replaced by "The function of the specific land use area". Note: there may be a translation problem in relation to using the word "use" instead of "function" in German, preference for phrase "function of the specific area of land". F suggests the following redrafting: "The necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its [...] use, no longer poses any significant risk of adversely affecting human health. If the use of the land is changed, all necessary measures shall be taken to prevent any adverse risk on human health [...]. A natural recovery option, that is an option in which no direct human intervention in the [...] remediation process would be taken, shall be considered."
- ¹¹⁰ EL/S: reservation, problem is wider than human health; UK: should go further than human health, not convinced that this is the right text. B/I/S: should add "or natural resources".
- ¹¹¹ A/D suggest addition "If land use regulations are lacking, the nature of the relevant area where the damage occurred, taking into account its expected development, shall determine the (use) function of the specific area of land", all delegations: scrutiny reservation.
- ¹¹² EL/S: both have concerns about second para, particularly reference to "no human intervention"; all delegations: scrutiny reservation on added text; EL suggests that this paragraph should be replaced by para 1.2.1: "Options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame, or through natural recovery, shall be considered".

INFORMATION AND DATA REFERRED TO IN ARTICLE 18(1)¹¹³

The national reports referred to Article 18(1) shall include a list of instances of environmental damage and instances of liability under this Directive, (including those which have been caused by an activity regulated by a permit) with the following information and data for each instance:

- 1) Date of occurrence of environmental damage and date on which proceedings were initiated under this Directive.
- 2) Activity classification code¹¹⁴ of the liable legal person(s).
- 3) Type of environmental damage.
- 4) Costs incurred with restoration and prevention measures, as defined in this Directive:
paid for directly by liable parties, when this information is available;
recovered ex post facto from liable parties;
unrecovered from liable parties. (Reasons for non-recovery shall be specified.)
- 4A) Results of the actions to promote and the implementation of the financial security instruments used in accordance with this Directive.
- 5) An assessment of the additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce this Directive.

¹¹³ D/F: reservation as too detailed; UK: scrutiny reservation.

¹¹⁴ Cion suggests use of NACE Code.

- 6) Whether there has been resort to judicial review proceedings either by liable parties or qualified entities. (The type of claimants and the outcome of proceedings shall be specified.)
- 7) Outcome of the restoration process.
- 8) Date of closure of proceedings.

Member States may include in their reports any other information and data they deem useful to allow a proper assessment of the functioning of this Directive.

