The impact of environmental liability on industry competitiveness

*Terms of reference for a study on the impacts on competitiveness of the US Superfund*

**Policy context**

The European Commission has just approved a White Paper on Environmental Liability (WP) whereby it commits itself to launch further studies on the economic impact of environmental liability. The findings of these studies, it is said in the White Paper, will be profoundly assessed and given due weight in the preparation of the Commission’s future initiatives in this field.

One of the economic issues that raise more interest in the European Union is the potential impact of environmental liability on the competitiveness of industry. This will be the theme of this study.

The WP proposes a Council Directive that would impose liability for three types of damage: traditional damage (damage to private property and personal injury) caused by activities potentially dangerous to the environment, contamination of sites and damage to biological diversity (in Natura 2000 areas).

Liability for damage to private property and personal injury caused by activities potentially dangerous to the environment already exists in the legal systems in place in the Member States of the European Union. Community initiatives in this area would not raise significant competitiveness issues. Therefore, this study does not need to address them.

The novelty in the approach suggested in the White Paper lies in the introduction of liability for the clean up of contaminated sites, which include the soil, surface water and groundwater and also for damage to biological diversity.

Most Member States have special laws or programmes to deal with clean up of contaminated sites, both old and new, but these laws or programmes do not necessarily rely on legal liability. Liability for damage to biological diversity does not exist in Member states.

Then the aim of this study is to research the impact on competitiveness of liability for the clean up of contaminated sites and for damage to biological diversity.

The study will focus on the U.S. experience since the U.S. is the country with the longest tradition in the use of environmental liability. The U.S. is also the country where more research is available on the costs of the environmental programs that rely on liability as a policy instrument.

**Study objective**

*Focus on U.S. experience and specifically on Superfund*
More specifically, the study will describe and assess existing evidence on the costs of Superfund. This U.S. program deals with a) the clean up of sites contaminated by the release of hazardous substances and b) with damage to natural resources caused by the release of those substances.

The difference between clean up costs and costs with natural resources damage

There is extensive, albeit imperfect, data on the costs of Superfund related clean ups. This information will be the backbone of the study and it will be expected that the available information will be described and assessed.

Superfund also imposes liability for natural resources damage (NRD) and this type of liability is similar in many respects to the liability for damage to biodiversity proposed in the WP. However, it is recognised that available evidence on the U.S. experience with this type of liability is quite thin. The study will be expected to refer to available evidence but it is clear that the level of ambition here is much lower than for what regards evidence on costs with clean up. Suggestions on how to improve research on costs with NRD will be appreciated.

Complement Superfund-related evidence with evidence from other regulatory programs that include environmental liability as a policy instrument

The study should focus on evidence on Superfund. However, there are other U.S. regulatory programs in the field of the environment that also include liability provisions. Then, information on the expected and perceived competitiveness impact of the liability feature of these other programs (e.g. RCRA, OPA) will be useful.

Focus on concrete cost data

The impacts on competitiveness can be interpreted in a variety of ways. For the purposes of this study data on costs shouldered with clean up of contaminated sites, including transaction costs, are considered the most relevant to support the analysis of the impact on competitiveness. It is understood that the likelihood of having to incur costs under certain circumstances, even when no such costs have actually been disbursed may have a significant competitiveness impact (after all this is the basis for the alleged effect of liability on attitudes towards prevention). To the extent that the study will be able to assess meaningfully this effect, this will be useful.

It would also be useful to review briefly evidence on the costs with Superfund taxes, including the transaction costs of their collection. It should however be understood that this is an added and interesting feature of the study rather than a main research issue in this context. At EU level no such mechanism of financing is envisaged.

Specific data on the distribution of costs per type of site

The distribution of costs per type of site should be specifically analysed. Any available updates of the situation as reported in “Footing the Bill for Superfund Cleanups” by K. Probst et al, RFF 1995, would be most useful.

Specific data on the distribution of costs per industry sector
The distribution of costs per industry sector should be specifically analysed. Any available updates of the situation as reported in “Footing the Bill for Superfund Cleanups” by K. Probst et al, RFF 1995, would be most useful. The approach followed in that research project, of evaluating the significance of the cost impact by reference to industry level profits or, in the absence of profitability data, value added or turnover, is valuable and should be followed in the study.

*Differences between the Superfund regulatory approach and the WP approach*

Inevitably, there will be a tendency to extrapolate U.S. data to the EU. The study should caution against crude extrapolations, namely by identifying differences in the two regulatory approaches and pointing to the likely impact on competitiveness of those differences. The following differences are especially relevant:

- retroactive application of Superfund
- sources of damage covered (e.g., WP covers damage caused by waste while Superfund only covers damage caused by releases of hazardous substances). For memory, the WP suggests covering damage to contaminated sites caused by activities regulated in the following categories of EC legislation: legislation which contains discharge or emission limits for hazardous substances into water or air, legislation dealing with dangerous substances and preparations with a view (also) to protecting the environment, legislation with the objective to prevent and control risks of accidents and pollution, namely the IPPC Directive and the revised Seveso II Directive, legislation on the production, handling, treatment, recovery, recycling, reduction, storage, transport, trans-frontier shipment and disposal of hazardous and other waste, legislation in the field of biotechnology and legislation in the field of transport of dangerous substances.
- Superfund is based on a list of national priority sites designated according to specific criteria; the EU approach to this criteria remains to be sketched out.
- the way natural resource damage is covered. In the EU this is intended to be covered by attaching liability to damage to biological diversity in an EU-wide network of Member States-designated special conservation status sites (Natura 2000).
- the persons potentially liable; the U.S approach has a wider reach
- access to justice; this is wider in the EU approach
- liability exemptions foreseen

*Tasks*

Researching available evidence on the issues above identified, analyze the data and report the information in a structured way. Particular attention should be given to communicate the findings in a way that is clear to other technical experts while still accessible to a general audience.

*Study duration*

The study should be finalised in six months.

*Deliverables*
A draft final report followed, after comments by the Commission, by a final report that will take account of the Commission’s comments.

The Commission will validate the study internally and this will take some time. The report is expected to be disclosed to the public by July 2000.

**Type of contract**

The study will be the final deliverable of an internshipship with the Commission by Janet Stone Mcguigan, a U.S. expert with relevant research experience on Superfund.