- AUSTRIA

- *European Professional NGOs*

- *Contaminated Land Rehabilitation Network for Environmental Technologies*

- General comments: CLARINET is a network of experts in the area of contaminated site management which is funded by the Commission's DG Research as a "concerted action". Its purpose is to promote the exchange of technical and scientific ideas and information and to develop research and technological tools. CLARINET does not seek to make any overall comment on the issues and principles discussed in the WP and so its response does not imply any comment, either positive or negative, on the proposals for harmonisation of environmental liabilities rules. But it does wish to provide the firm scientific and technical advice that any resulting regime should not include any provision for common numerical standards for soil. Rather than creating any harmonisation at a practical level, common numerical standards would result in a disparate application of any common principles of protection of human health and the environment.

- Contaminated sites: Any use of numerical values within a policy or legal regime has to be explicit as to which type of values are intended - "limit values" (i.e. mandatory numerical values which are directly enforceable through legal or other means) or "guideline values" (i.e. numerical values which are not mandatory but may be used as tools to assist in assessing compliance with mandatory qualitative objectives). Contaminated sites often represent very complex situations and use of a "limit value" will often not produce the same answer to the question of whether intervention is needed, or of what clean-up target is appropriate, to the answer that would be reached through the direct application of the underlying qualitative objectives. It is therefore difficult to achieve harmonisation of qualitative objectives by the application of "limit values". CLARINET strongly supports the risk based approach to contaminated site management since this approach allows the particular circumstances of a site to be taken into account when assessing the actual risk to human health and the environment.

- Governments

- *Austrian Government*

- General comments: The EC proposal is very welcome. In particular, Austria agrees that there is no need for different vertical liability regimes, provided that the new horizontal liability regime enters into force as soon as possible. The preference for a civil liability regime might cause application problems when the damaged good is unowned. There should be a "twin-tracked" regime with a combination of private and public instruments in order to deal with both private damaged goods and damage to biodiversity. The WP says that an environmental liability regime should boost implementation of EC environmental legislation but it does not clarify how this objective can be reached since strict liability will apply regardless of an operator's compliance with the regulations.

- No retroactivity: Austria supports the principle of no retroactivity, which it considers is also important for the quantification of damage and consequently for the insurability of the relevant risks. The regime should cover damage which becomes known after the entry into force of the regime - however, Austria considers that the insurance industry and the economic sector would refuse such a wide scope. Rules might be needed to deal with ongoing damage.
- Damage to be covered: Diffuse pollution is correctly not covered by the regime. Nevertheless, the inherent inadequacy of a civil liability regime for dealing with this type of damage should be replaced by other systems, such as compensation funds. The Directive should indicate clearly which types of damage are expressly excluded by the regime.

- Activities to be covered: A clear concept of the activities covered by the regime will provide legal certainty and enable the quantification of the relevant risks. The Product Liability Directive with its simple rules should serve as an example. The Austrian Government would not accept a Directive whose scope is related to legislation which is inherently complex and capable of being interpreted in different ways. The new Directive is proposed to apply to a list of dangerous activities already regulated by EC legislation. Such legislation might not always be subject to the same interpretation and this could create loopholes and uncertainty, with possible high transaction costs. Instead of limiting the scope of the regime to a list of dangerous activities and substances, it should be linked with the wider concept of "dangerous operation". This concept could be illustrated by reference to positive and negative lists of dangerous installations and substances. Some dangerous activities are not covered by the regime. For instance, in the nuclear sector, the conventions which are currently in force are not adequate to deal with the possible consequences of an accident. Their main aim is not the protection of the environment but the promotion of economic interests. In addition, such agreements cap liability and could lead to unacceptable distortions of competition in the European energy market. Austria believes that an environmental liability regime which does not deal with the nuclear sector would lack an essential component.

- Type and other features of liability: Austria supports strict liability. The preference for a civil liability regime might cause application problems when the damaged good is unowned. There should be a "twin-tracked" regime with a combination of private and public instruments in order to deal with both private damaged goods and damage to biodiversity.

- Defences: Development risk should not be allowed as a defence. In Austria it is only admitted by the law implementing the Product Liability Directive and the Austrian Government does not agree that this defence should not be extended to the liability regime. Compliance with regulations and permits should also not be allowed as a defence - only a binding order from the competent public authority should exempt a party from liability.

- Burden of proof: The burden of proof should rest with the plaintiff but could be alleviated in cases where the traditional distribution of the burden of proof could lead to unfair results. Courts should be able to deal with this matter in a flexible way.

- Liable party/parties: Public authorities should not be held (partially) liable in cases where the damage was caused entirely by emissions authorised by them. This would be in contradiction with the polluter pays principle.

- Environmental damage: The concepts of "environmental damage" and "traditional damage" often cannot be separated in practice. This can lead to the necessity of attributing a different weight to each kind of damage, in particular if compensation is not sufficient.

- Biodiversity damage: It is not clear which kind of damage would lead to the obligation to compensate. The criteria mentioned in the WP are vague and need to be further discussed. The regime is applicable to a very limited field. The Austrian concept of
"environmental damage" encompasses not only damage to biodiversity but also damage to the ecological function of any environmental good.

- Contaminated sites: The WP is not clear as regards the clean up of contaminated sites. Austria considers that it would be unnecessary for the liability regime to contain specific provisions on this and that the clean up of contaminated sites would be better dealt with by public law.

- Traditional damage: The EC should provide some clarification on the concept of traditional damage because if this task if left exclusively to the Member States it might lead to a disparity of treatment due to the different legal systems in force.

- Relation with Product Liability Directive: In the Austrian liability regime, the plaintiff can always choose any of the legal instruments at his disposal. Therefore, Austria cannot accept the proposal in the WP that where damage is already covered by the product liability regime that regime should take precedence over the environmental liability regime.

- Ensuring effective restoration: Compensation should not be limited to market value.

- Access to justice: It is sensible to open access to justice to public interest groups. Appropriate criteria should be established in order to allow only genuinely interested organisations to take action and to avoid abusive initiatives. The Directive should contain at least basic criteria - it should not be left exclusively to the Member States to establish such criteria. The same right of access should be given to some economic organisations. The two-tier approach proposed in the WP could weaken the constitutional principle of the separation between administrative and judicial power. The proposals in the WP on this matter are not yet sufficiently developed. The details should be left to the Member States.

- Financial security: The Directive should contain the obligation of covering the relevant risks with financial security. The risks must be quantifiable, in particular as regards damage to biodiversity.

- Different options: Austria is of the opinion that a framework Directive would be the best option.

- Economic impact: The competitiveness of European companies should not be weakened.

- National Agricultural NGOs
  - Landwirtschaftskammern Österreichs

  - General comments: The Landwirtschaftskammern Österreichs points out that although the scope of 1990 German Environmental Law is very clear, its implementation did not succeed. It considers that the provisions in respect of dangerous installations and activities should be improved, whilst other elements are less essential.

  - No retroactivity: The Landwirtschaftskammern Österreichs agrees that the regime should not apply retrospectively but considers that there is still the problem of determining the cut-off point between damage which is to be covered by the regime and damage
which is not.

- **Damage to be covered**: The WP does not clarify sufficiently how damage caused by a number of polluting actions and diffuse damage should be dealt with. Further environmental political instruments should be foreseen and special funds should be established to cover such damage.

- **Activities to be covered**: The concept of dangerous and potentially dangerous and non-dangerous activities should be clearly defined. The activities covered by the regime should be contained in a closed list. The agricultural utilisation of the soil (or the domestic or the small industrial activities) – when carried out in compliance with the legal provisions should be never considered dangerous. “Potentially dangerous activity” should never mean “any activity that might have any influence on environment”. Liability for non-dangerous activities should not be dealt with at EC-level.

- **Type and other features of liability**: Strict liability should only apply to dangerous activities.

- **Defences**: The polluter pays principle should not be applied when an activity is carried out in good faith and in compliance with the legal provisions in force and with the state of the art. In case of a potentially dangerous activity, the validity of the polluter pays principle is always justified.

- **Burden of proof**: An alleviation of the burden of proof in favour of the plaintiff should only be allowed in cases where damage has been caused by a number of strictly determined dangerous activities or installations. The causality presumption should be regulated referring to praxis.

- **Liable party/parties**: In the case of damage caused by GMOs, it is the producer, rather than the last user (i.e. the farmer), who should be liable.

- **Environmental damage**: The concept of “significant damage” should be better defined in order to avoid different interpretations in the different Member States.

- **Biodiversity damage**: It is not possible to predict the consequences of the proposed regime since the concept of liability for damage to biodiversity in Natura 2000 sites is a novel one. The Natura 2000 network is neither complete nor well harmonised in the various Member States. The connection of the concept of “biodiversity” to the Habitats Directive, whose implementation is so difficult, does not seem to be very appropriate. Legal certainty would be better assured by providing transparent legal environmental standards.

- **Traditional damage**: The WP does not deal sufficiently with the practical difficulties of implementing a liability regime for traditional damage.

- **Access to justice**: Only the State should be entitled to take action against a polluter. The proposal to give public interest groups a similar right is considered with great scepticism.

- **Financial security**: Insurability is an important prerequisite for the introduction of the new regime. The Landwirtschaftskammern Österreichts considers that insurance should be compulsory.
- **National Industrial NGOs; general**

- **Industriellenvereinigung Wien**

  - General comments: The fundamental features of the regime (such as, identifiable polluter; damage which is concrete, measurable and significant; and the causal link) deserve to be supported. However, the WP does not explain why a civil liability system would be the most efficient one. Industriellenvereinigung believe that public law is the best tool. The existing public rules should be coherently implemented. A new regime should be introduced into the existing legal systems of the Member States in such a way as to avoid legal uncertainty and redundancies. An EU-wide study on the existing legal systems is necessary. The proposals contained in the WP are insufficiently detailed to form the basis for a framework directive – the proposals need to be revised and completed. Only after a further revision and an analysis of the necessary additional studies will it be possible to start drafting a directive.

  - No retroactivity: Industriellenvereinigung agrees with the proposal in respect of non-retroactivity - provided that this means that damage caused before the entry into force of the regime is excluded.

  - Damage to be covered: The concept of “diffuse pollution” should be better defined.

  - Type and other features of liability: The WP does not deal with the question of setting up a prescription deadline. A prescription deadline is an important element both in terms of access to justice and in terms of insurability of damage.

  - Defences: In the Member States there are different rules in the environmental field and the new regime might have different effects. Austria has very strict environmental rules which would no longer be very effective if an operator could be held liable even if he complied with those rules. Therefore, in order to ensure a coherent introduction of the new regime into the existing national legislation it will be necessary to foresee a defence of compliance with legislation and permits. “Development risk” and “state of the art” should also be allowed as defences.

  - Burden of proof: Any further alleviation of the burden of proof in favour of the plaintiff (e.g. “close-to-certainty probability”, “prevalent probability”) would lead to a “responsibility for suspicion”, which is legally and politically unacceptable.

  - Liable party/parties: The liability of the legal person needs further consideration.

  - Biodiversity damage: Since liability for damage to biodiversity is the core of the new regime, and since it cannot be compared with any other existing regime, its features should be exhaustively and carefully determined in order to ensure legal certainty and avoid negative consequences in its implementation. People, society and the economy should not become guinea-pigs for “legal experiments”. Many important concepts (such as, potentially dangerous activities and significant damage) are not precise. The WP does not sufficiently deal with the establishment of a valuation system.

  - Traditional damage: The concept of traditional damage should be carefully
redefined.

- Access to justice: Opening access to justice to public interest groups would lead to a heavy interference with the national civil procedural systems. Past experience shows that public pressure groups could abuse their rights. The proposed system might also lead to an enormous number of un-founded trials with very high costs and with consequent damage for the image of the relevant company. The WP does not deal with the question of setting up a prescription deadline. A prescription deadline is an important element both in terms of access to justice and in terms of insurability of damage.

- Financial security: An efficient insurance system is a fundamental requisite of the regime. Nevertheless, the WP does not provide a number of key-elements: clear rules, certainty in respect of the causal link between polluter and damage, defences (in particular, compliance with legislation and permits), appropriate prescription deadline, and practicable methods for the identification and the quantification of damage. More attention needs to be paid to the development of a financial security system before introducing an EU-wide environmental liability regime. Otherwise there will be high costs for the economy and SMEs’ existence might be endangered.

- Subsidiarity and proportionality: In the Member States there are different rules in the environmental field and the new regime might have different effects. Austria has very strict environmental rules which would no longer be very effective if an operator could be held liable even if he complied with those rules. A new regime should be introduced into the existing legal systems of the Member States in such a way as to avoid legal uncertainty and redundancies. An EU-wide study on the existing legal systems is necessary.

- Economic impact: More attention needs to be paid to the development of a financial security system before introducing an EU-wide environmental liability regime. Otherwise there will be high costs for the economy and SMEs’ existence might be endangered.

- Wirtschaftskammer Osterreich

- General comments: The WP is most welcome. The fundamental features of the regime (identifiable polluter; concrete, measurable and significant damage; causal link) deserve to be supported. Nevertheless, the WP is still rather vague on several important themes and therefore the concrete features of a future environmental liability regime are not yet clear. There is a lack of important data regarding competition, valuation of damage to biodiversity and financial security.

- No retroactivity: The Austrian Chamber of Commerce agrees with the proposal that the regime not apply retrospectively.

- Activities to be covered: The limitation of the regime to all dangerous activities covered by EU directives is too imprecise from the point of view of legal certainty because such directives deal partly with certain dangerous substances and partly with dangerous installations.

- Liable party/parties: In the case of legal persons, only the legal entity and not the individual managers or employees should be liable. The suggestion that a permitting authority might share liability in cases where the damage is caused by emissions authorised under a permit will induce the authority to impose unduly high conditions when authorising an
activity in order to avoid any liability.

- Environmental damage : The Austrian Chamber of Commerce considers that the parameter of "significant damage" is reasonable.

- Biodiversity damage : The Natura 2000 network in its actual configuration does not seem to be the best reference point for liability for damage to biodiversity. Member States have identified Natura 2000 sites without taking into account the consequences of the proposals in respect of environmental liability.

- Traditional damage : As regards traditional damage, the WP does not clarify the possible relation with other pieces of legislation where a similar right for protection is based (e.g. the Product Liability Directive).

- Relation with Product Liability Directive : The relationship between the rights arising from the defective products liability regime and those arising from the proposed regime has not been clarified.

- Ensuring effective restoration : The Austrian Chamber of Commerce considers that only proportionate restoration should be pursued.

- Access to justice : The proposals on access to justice represent the main problem with the proposed regime. If the first tier of the proposals is to allow the State to take action against the polluter, then this means that the State will be in a position of issuing a permit and later suing the company to whom the permit was issued. Under Austrian legislation, the State has at its disposal many administrative means in order to assure the implementation of the environmental legislation. Rather high qualitative criteria should be established in order to identify the public interest groups which are to be allowed to take action and in order to avoid an abuse of this right.

- Financial security : Financial security is a necessary prerequisite of the regime. Although it is left to the market to find the most appropriate solutions for the coverage of environmental damage, the EC and the Member States should set at least the most basic elements for its concrete implementation (such as, set parameters for the valuation of biodiversity damage).

- Different options : The Austrian Chamber of Commerce agrees that a framework Directive is the most appropriate instrument but urges the EC to avoid the danger of allowing Member States to give the Directive the “golden-plating” treatment at the implementation stage (that is, setting more stringent standards than those required under the Directive).

- National and Regional Environmental NGOs

  - EU UMWELTB\RO

- General comments : The WP does not satisfy at all the need of better implementation of the principle of prevention and, above all, of the polluter pays principle. The current version of the WP represents a backwards step in respect of earlier drafts.

- No retroactivity : The regime should be also applicable to damage which
known after the entry into force of the regime but which was caused before that entry into force.

- Activities to be covered: Strict liability should not be restricted to (potentially) dangerous activities already regulated by EC legislation.

- Type and other features of liability: There should be strict liability for any damage to biodiversity, that is to say: strict liability should not be restricted to the (potentially) dangerous activities that are regulated by EC legislation; there should be strict liability for “non-dangerous” activities as well; and the scope of liability for damage to biodiversity should not be restricted to the areas belonging to the Natura 2000 network.

- Defences: Risk of development and state of the art should not be allowed as defences.

- Burden of proof: The reversal or an alleviation of the burden of proof in favour of the plaintiff should be clearly defined. The WP is too vague in this respect.

- Liable party/parties: Permitting authorities should not be (partially) held liable in cases where the damage is wholly caused by emissions which were explicitly allowed by a permit. Banks which know of the dangerousness of the activities supported by their loans should also be held liable.

- Environmental damage: The concept of “significant damage” should be clearly defined.

- Biodiversity damage: Liability for biodiversity damage should not be limited to those areas covered by the Natura 2000 network – liability should be extended to all “natural environments”.

- Ensuring effective restoration: The application of a cost-benefit or of a reasonableness test would render the environmental liability regime ineffective in cases where the damage in question is particularly significant. A reasonableness test might be used only in order to choose between effective restoration of the damage and compensation of the corresponding value.

- Access to justice: Access to justice for public interest groups should not have any limitations. A “two tier approach” is not acceptable. There is no need to involve the State in a trial which often will be a civil one. Also, there is no need to provide public authorities a right of priority. Public interest groups should not be submitted to a prior recognition from the Member States. That might lead to arbitrary decisions. Public interest groups should be financially supported by the establishment of a special fund or by being exempted from the costs of trials.

- Financial security: There should be compulsory insurance. In addition, there should be some liability funds for the compensation of damages which are otherwise non-refundable damages, such as in the case of an unidentifiable polluter or of diffuse pollution.

- Different options: An EC Directive is the best option.

- OKOBURO (Koordinationsstelle Österreichischer Umweltorganisationen)
General comments: VKOB\RO is an umbrella organisation of Austrian environmental NGOs, including Greenpeace Austria, WWF Austria and GLOBAL 2000. Although VKOB\RO’s comments are generally positive, it fears that a new tool on environmental liability might be counterproductive in that it may have the effect of reducing the importance (and therefore the application) of other legislative tools for environmental protection (e.g. EIA). The new regime should not replace the existing tools, but integrate them. VKOB\RO points out that from an Austrian point of view, the EC initiative is very late. In Austria some very advanced drafts of environmental liability regimes have been blocked only because an EC regime was expected.

No retroactivity: What should be relevant is the time at which the damage becomes known, and not the time at which the act or omission which caused damage was carried out. This is particularly important in order to deal with past pollution (contamination of soil or of groundwater).

Damage to be covered: Unfortunately, the WP does not speak about a possible fund for the compensation of environmental damage caused by several non-identifiable polluters.

Activities to be covered: Any economic activity should be covered by the regime, not only those activities which are dangerous. VKOB\RO does not agree that the scope of the regime should be limited to dangerous activities which are regulated by EC legislation. EC environmental legislation is quite unsystematic and there might be several loopholes. The activities covered by the regime should be defined in an abstract way in order to guarantee the necessary flexibility of the regime in the future.

Type and other features of liability: Fault-based liability for damage caused by non-dangerous activities should not be limited to those areas covered by the Natura 2000 network.

Defences: Development risk and compliance with a permit should not be allowed as defences.

Burden of proof: The WP recognises the need to alleviate the burden of proof in favour of the plaintiff but does not clarify exactly how this should be done. The defendant should be obliged to disclose any useful documentation in his possession.

Liable party/parties: Permitting authorities should never be held liable when damage has been caused by releases which are carried out in full compliance with a permit. Austrian laws foresee fault-based liability for permitting authorities.

Biodiversity damage: Liability for damage to biodiversity should not be limited to the Natura 2000 network. The requirement that damage be “significant” is problematic since it is difficult to determine what this means exactly. Appropriate valuation methods are needed for the cases where the restoration of the damage is not feasible.

Contaminated sites: Is there no solution regarding the problem of the possible inactivity of the owner of a contaminated site? Should a public authority – against the will of the owner – take action against the polluter and provide for the decontamination of the site?
- Access to justice: Although the proposals in respect of access to justice are very welcome, VKOB/RO considers that they are vague and unclear. The reimbursement of reasonable costs incurred in taking urgent preventive measures is a crucial element of a future regime providing a wider access to justice for public interest groups. Moreover, financial assistance should be provided for such groups in order to make it easier for them bring civil claims directly against polluters. Out-of-court solutions would also be very welcome in order to make it easier for public interest groups to sue the polluter.

- Financial security: Financial security should be made compulsory. The future Directive should contain clear rules for the valuation of environmental damage.

- Economic impact: A harmonised liability regime will reduce obstacles to competition which are caused by different environmental standards.

- Miscellaneous: An EC liability regime should be established before the accession to the Community by some Eastern European countries.

- Other Public bodies

- MD - Verfassungs und Rechtsmittelb/ro

- General comments: An environmental liability regime for all Member States is very welcome. It will limit competition discriminations caused by different environmental standards.

- Damage to be covered: It might be difficult to assess some damage, for example damage to human health. In particular, it should be clarified whether the regime can be applied not only to direct damage or also to damage that becomes evident after a certain period as a consequence of the pollution.

- Activities to be covered: The list of the activities covered by the regime should be as precise as possible in order to avoid any interpretation that could limit its application. An activity should not be estimated dangerous according to too high parameters - in any case, anything should be avoided that could determine a problematic implementation of the regime. A specific liability regime for GMOs should be avoided. A horizontal approach will be much more effective.

- Type and other features of liability: The polluter should be responsible in the first stage for restoration of the polluted environment and it is only if he cannot provide for this in a convenient way that the obligation could pass to the State. Liability should not be capped. It is true that this could facilitate the establishment of an insurance system for this new type of risk, but an environmental liability regime should have as its first aim the protection of the environment and not the protection of the polluter from the risks that he runs in his dangerous activity.

- Defences: “Development risk” should never be allowed as a defence. It is the polluter, rather than society, who should bear the responsibility for the utilisation of new techniques.

- Burden of proof: The reversal of the burden of proof is absolutely necessary because it is often impossible for the plaintiff to demonstrate the causal link.
- Biodiversity damage: The regime should not be restricted to the Natura 2000 network. Its general effectiveness would be compromised. The quantification and valuation of biodiversity damage should not be helped by establishing a cap for liability. This would compromise the implementation of the polluter pays principle.

- Ensuring effective restoration: The quantification and valuation of biodiversity damage should not be helped by establishing a cap for liability. This would compromise the implementation of the polluter pays principle.

- Access to justice: The involvement of public interest groups will help the better implementation of the regime, although some measures could be taken in order to limit unjustified actions. Public interest groups should only be allowed to take action after the intervention of a public authority.

- Financial security: Financial security is a necessary element of a working environmental liability regime. Liability should not be capped. It is true that this could facilitate the establishment of an insurance system for this new type of risk, but an environmental liability regime should have as its first aim the protection of the environment and not the protection of the polluter from the risks that he runs in his dangerous activity.

- Different options: A framework Directive is the best tool for implementing an environmental liability regime. A specific liability regime for GMOs should be avoided. A horizontal approach will be much more effective. In addition, vertical regimes could have economic disadvantages and cause discriminations in the field of competition.

- Economic impact: A horizontal approach to environmental liability is the best one - vertical regimes could have economic disadvantages and cause discriminations in the field of competition.

- Österreichischer Gemeindebund

- General comments: The Österreichischer Gemeindebund represents 2,346 out of 2,359 Austrian municipalities.

- Liable party/parties: The Österreichischer Gemeindebund categorically refuses that a public authority might be held partially liable in cases where the operator who caused the damage can prove that the damage was entirely and exclusively caused by emissions that were explicitly allowed by his permit. Liability of permitting authorities towards third parties can only be justified if the damage was caused by an unlawful behaviour. If the permitting procedure was carried out correctly, the permitting authority should never be held liable.

- Others

- Bundeskammer für Arbeiter und Angestellte

- General comments: Public law should be improved in order to prevent environmental damage and achieve effective restoration. The establishment of binding minimum criteria for environmental inspections could be a first step. The judicial position of public interest groups should be stronger. Civil law is less effective in order to strengthen the
rights of public interest groups and of NGOs.

- No retroactivity: Past pollution should be dealt with by means of the general existing principles (restoration of the previous conditions of the site).

- Activities to be covered: The regime should have a wide scope, not necessarily linked with specific administrative provisions - similar to the scope of the Product Liability Directive which refers in general to all "defective products". The scope of the proposed regime should refer to all activities which imply an inherent danger for the environment. The proposed regime should apply to dangerous activities irrespectively of the inherent dangerousness of the single action carried out within their framework. An activity is dangerous when it is very likely to cause damage or when it is likely to cause extraordinarily serious damage. Nuclear activities should be included.

- Defences: Compliance with a permit should not be allowed as a defence.

- Burden of proof: The WP is disappointing on this point. The burden of proof should follow the principle of "proximity to the proof" - that is, the defendant should have to demonstrate the absence of a causal link.

- Liable party/parties: Joint and several liability should be applied when the control on the activity and the profits arising therefrom are separated. The profit gained by banks is usually not taken into account in such respect. Proportionate liability should be foreseen when the damage has been caused by several identified polluters. Permitting authorities should never be held liable in cases where damage occurs despite the fact that the polluter has complied with a permit.

- Biodiversity damage: There is a disparity of treatment between sites belonging to the Natura 2000 network and other sites which also deserve to be protected but have not been designated.

- Contaminated sites: The existing clean-up standards and objectives should not be lowered. Some standards can be reduced according to the specific future use of a particular site only if special attention is paid to the overall restoration of all contaminated sites.

- Traditional damage: Even a pure outset loss should be covered by the regime.

- Relation with Product Liability Directive: The concept of damage as in the Product Liability Directive should be widened to environmental damage. The two directives should be applied at the same time if possible. In case of environmental damage caused by a product there should be an obligation of restoring the damage.

- Access to justice: The aim of improving implementation of environmental legislation would be much better met by the establishment of binding minimum criteria for environmental inspections than by giving private citizens and public interest groups direct access to justice. In any case, they should be exempted from any costs.

- Financial security: Dangerous activities should be compulsorily insured. Specific rules for particularly dangerous activities should be established.
- Miscellaneous: The tools which are already available under civil law should be improved in order to allow the "neighbours" and public interest groups to better prevent the risk of environmental damage. Under no circumstances should Community legislation lead to a worse situation than that existing in Austria nowadays.

- BELGIUM

- Banking Sector

- Fidiration Bancaire de l'Union Europienne

  - General comments: The Federation welcomes the approach proposed in the WP which would exempt lenders from liability unless they exercise operational control of the damaging activity. However, it considers that the notion of operational control needs to be properly defined so as to ensure legal certainty. It is often assumed that lenders are able to exert more influence over borrowers than they are able to. The taking of security interests is merely a means for banks to secure the financing of their client's activity without there being generally any intention of exercising operational control at any time over the activity. It is important that the EU learn from the mistakes made in the US where lack of clarity in the legislation resulted in costly litigation and made a legislative change necessary in order to clarify the position of the lender. The Federation considers it essential that the forthcoming directive address the specific situation of secured lenders with a view to exempting them from liability, otherwise banks and other financial institutions might be deterred from investing in the financing of goods and activities potentially hazardous to the environment. The Swedish Environment Code (and Banking Business Act) provides an explicit exclusion for banks concerning the question of liability of the buyer of contaminated sites and may prove to be a useful example.

  - Defences: In the event of strict liability, where it is not necessary to prove fault, a state of the art defence should be permitted.

  - Burden of proof: The Federation points out that it is very hard to prove innocence and queries why environmental legislation should differ from all other legislation.

  - Liable party/parties: The Federation calls for a clearer definition of operational control and refers to the definition in the Swedish Environmental Code as an example (i.e. the person (or persons) who pursue or have pursued an activity or taken a measure that is a contributory and a direct cause of the damage is the liable party). The question of lender liability under the current definition of operational control is not clear. For example, a lender in possession of a secured immovable property in case of a debtor's failure would run the risk of being held liable under the current definition. In addition, under some Member States legislation control of goods constituting security is required to be transferred to the pledgee (e.g. a bank). This would mean that the pledgee would be liable during the period of control for any damage caused by the pledged good. There is a similar risk of liability if a pledgee chooses to enforce his security interest by entering into possession of the pledged good pending its sale. The definition of the term operator (which emanates from the Lugano Convention) is also defined too vaguely as the person who exercises operational control of a dangerous activity. The Federation is anxious that there be adequate safeguards against joint and several liability.

  - Environmental damage: The Federation considers that while what is proposed in relation to environmental damage is laudable, it is unlikely to be practical.
Definitions are going to prove to be very difficult, as is the means of attributing costs to different types of biodiversity damage or loss. In relation to biodiversity, the Federation queries how it is possible to put a value on endangered species. If lenders cannot quantify the risk faced by a customer, the result inevitably will be business uncertainty.

- Contaminated sites: The Federation is concerned that the meaning of the term plausible in the phrase fit for actual or plausible future use is too wide and it wonders if the problem lies with the English translation of this phrase. The Federation would prefer that the term proposed or planned be used instead.

- Access to justice: The Federation is concerned with the proposals to give public interest groups an unfettered right to litigate and considers that it may be more appropriate for restoration in cases of damage to the unowned environment to be pursued by means of administrative measures instigated by State authorities.

- Financial security: The Federation welcomes the fact that the Commission does not propose to make insurance compulsory. The Federation emphasises that if something is not insurable, lenders will not be able to lend. Taking biodiversity for example, if there is no means to assess the potential magnitude of the liability then it is difficult for banks to structure a commercially viable instrument to provide adequate financial security.

- Economic impact: No one has yet attempted to estimate the costs to SMEs. This is a real issue and one that cannot be overlooked. The Federation considers it crucial that such enterprises are not overburdened so as to prejudice their competitiveness in other non-European markets. It is also important that any future legislation be drafted so as to ensure that competitiveness between Member States is maintained.

- Committee of the Regions

- General comments: Committee welcomes the proposal and considers that a holistic approach such as this is long overdue. This proposal addresses one of the main areas outstanding from the Fifth Environmental Action Programme.

- Damage to be covered: Committee believes an assessment of the implications of the proposed liability regime for GMOs is essential, given the public health concerns of consumers and the potential damage to biodiversity.

- Type and other features of liability: Committee considers that the imposition of ceilings on claims is a necessary complement to the strict liability regime being proposed.

- Burden of proof: Committee considers this to be one of the critical elements to be resolved.

- Liable party/parties: Committee does not agree with the proposal that permitting authorities should be made liable in cases where damage is the result of emissions explicitly authorised under a permit.

- Environmental damage: Committee is concerned that the concepts of
"significant damage" and "cost-benefit analysis" may imply unacceptable thresholds and ceilings on the level of damage to be covered by the liability regime.

- Biodiversity damage: Committee is concerned with the proposal to limit liability for biodiversity damage to the Natura 2000 network since this remains incomplete. However, considers that this may lead to further pressure for the network to be extended.

- Contaminated sites: Committee is concerned at the implications for 3rd parties undertaking the clean-up of local and regional authority sites where those authorities own the sites and have failed to act since WP is unclear as to the level of restoration which will be required and the mechanism for transferring the costs of clean-up to the relevant authority.

- Ensuring effective restoration: Committee is concerned that the absence of compulsory insurance may put at risk the regime’s ability to ensure full restoration of damaged sites.

- Access to justice: Committee welcomes the proposal to extend access to justice to public interest groups in environmental damage cases and considers this to be in line with the Aarhus Convention.

- Financial security: Committee is concerned that the absence of compulsory insurance may act as a disincentive to changes in operators’ behaviour and that this absence could also put at risk the regime’s ability to ensure full restoration of damaged sites. Imposition of ceilings on claims is a necessary complement to the strict liability regime being proposed.

- Different options: Committee agrees with proposal to set up a framework regime intended to fix overall objectives and leaving Member States and local and regional authorities to decide on ways and means of implementing those objectives.

- Subsidiarity and proportionality: EU initiative is justified because of the insufficiency in Member State’s existing regimes for addressing all aspects of environmental damage.

- Economic impact: Committee is awaiting with interest the outcome of the further economic studies commissioned by the Commission.

- Miscellaneous: In respect of enlargement, the Committee believes the establishment of a liability regime will facilitate candidate countries’ efforts to adopt the EU environmental acquis. Committee calls for the Commission to publish its assessment of the environmental benefit of integrating the provisions of the proposed liability regime into other EU policy areas.

- Economic and Social Committee

- Economic and Social Committee

- General comments: National laws on environmental liability differ greatly and some Member States still have no legislation on the subject. This makes it difficult to address environmental problems effectively (especially incidents such as the Doqana and the Erika).
- No retroactivity: Committee welcomes the non-retroactive nature of the proposed regime.

- Damage to be covered: Committee stresses the importance of a broad liability regime which covers not only traditional damage but also environmental damage. The drafting of the provisions in the framework directive in respect of GMOs will be particularly delicate. Products containing GMOs are already covered by the Product Liability Directive and as the WP points out that Directive prevails when compensation is sought for traditional damage. However, the liability regime for damage to the environment and biodiversity needs to be clarified urgently.

- Activities to be covered: The two proposed liability regimes (strict liability for dangerous activities and fault-based liability for non-dangerous activities) should be clearly distinguished so that there are no grounds for confusion. An Annex should specify the Community provisions which determine liability for dangerous activities and those which determine liability for non-dangerous activities.

- Type and other features of liability: The Committee supports the Commission’s proposal in respect of strict and fault-based liability and considers that the two liability regimes (strict liability for dangerous activities and fault-based liability for non-dangerous activities) should be clearly distinguished so that there are no grounds for confusion. An Annex should specify the Community provisions which determine liability for dangerous activities and those which determine liability for non-dangerous activities.

- Defences: The benefits brought about by an environmental liability regime must not be undermined by the recognition of certain defences. The only defences which should be permitted are Act of God and acting in accordance with a compulsory order by a public authority. Any other suggestions should be considered only as extenuating circumstances serving to reduce rather than exempt from liability.

- Burden of proof: The fact that there are two different types of liability being proposed (that is, strict and fault-based liability) will affect any proposals in respect of the alleviation of the burden of proof. In the case of strict liability, the claimant need only prove the causal link between the damage and the polluter and in the case of fault-based liability, the claimant must also prove that there was a deliberate intent.

- Liable party/parties: In cases where environmental damage results from the actions of both an operator and a public authority, both parties would be liable.

- Environmental damage: The cost of repairing environmental damage could be used as one of the criteria for calculating this type of damage. It is essential to continue to seek criteria which uphold the principle of equity in repairing damage. In order to develop evaluation criteria it seems helpful to use “benefit-transfer” databases similar to the Environmental Valuation Resource Inventory (EVRI). Criteria for calculating compensation to be paid by the polluter should include whether environmental regulations have been complied with, whether the activity was licensed, whether more than one party is liable and the defences and extenuating circumstances which might reduce liability. There is a need to clarify what is meant by “thresholds” and “significant damage”. The decision as to whether damage is significant should not be based solely on economic factors but should also relate to the damage to biodiversity and the pollution of sites.
- Biodiversity damage: Since liability for damage to biodiversity under the proposed regime would only apply to the Natura 2000 network, it is vital that the Commission adopt a list of sites of EU importance as soon as possible. Committee calls on Member States to meet their obligations under the Habitats Directive 92/43 and submit national lists.

- Contaminated sites: There is a need to clarify what is meant by “thresholds” and “significant damage”. The decision as to whether damage is significant should not be based solely on economic factors but should also relate to the pollution of sites.

- Traditional damage: Criteria for calculating compensation to be paid by the polluter should include whether environmental regulations have been complied with, whether the activity was licensed, whether more than one party is liable and the defences and mitigating circumstances which might reduce liability.

- Relation with Product Liability Directive: Products containing GMOs are already covered by the Product Liability Directive and as the WP points out that Directive prevails when compensation is sought for traditional damage. However, the liability regime for damage to the environment and biodiversity needs to be clarified urgently.

- Access to justice: Committee considers it necessary for concerned parties to be able to challenge possible procrastination or negligence on the part of public authorities in bringing actions against polluters. Committee welcomes the proposal for allowing public interest groups to seek injunctions in urgent cases.

- Relation with international conventions: EU should propose in the context of international agreements that environmental liability regulations be aligned in all countries (especially within the WTO) so as to avoid distortions of competitiveness.

- Financial security: Committee considers that compulsory insurance for all dangerous activities affecting the environment is a matter of vital importance to the effectiveness of the proposed regime. Implementation of Directive 85/374 has proven not to have had a significant impact on financial costs to businesses. A requirement to obtain compulsory insurance under the proposed regime would put the regime on the same footing as other forms of compulsory insurance already regulated in the EU (e.g. motor-vehicle and defective products insurance). However, Committee thinks companies should be allowed flexibility in the choice of financial guarantee (e.g. reserves or letter of intent).

- Different options: Committee supports the proposal for a framework directive as this will allow the subsidiarity principle to be clearly applied and so best accommodate the different situations within the EU.

- Subsidiarity and proportionality: National laws on environmental liability differ greatly and some Member States still have no legislation on the subject. This makes it difficult to address environmental problems effectively (especially incidents such as the Doqana and the Erika). Committee supports the proposal for a framework directive as this will allow the subsidiarity principle to be clearly applied and so best accommodate the different situations within the EU.

- Economic impact: Measures are needed to help SMEs adapt their production systems to environmental needs. Funds could be provided to help SMEs adjust to the new requirements of a liability regime, especially as regards the cost of insurance. The fact that
most OECD countries have environmental liability legislation should minimise the impact on the EU’s external competitiveness.

- Miscellaneous : The crucial question of information is not addressed in the WP. In order for the proposed regime to be effective, it requires the involvement of several different parties. Therefore, the Committee considers that there is a need for an information network which would channel information from public authorities and vice versa.

- European Agricultural NGOs

- Comité des Organisations Professionnelles Agricoles de l’UE & Comité de la Coopération Agricole de l’UE

- General comments : A horizontal regime for environmental liability is a better solution than a number of vertical regimes. Community rules should not only fix objectives but must also be precise in order to achieve legal security for the various operators. Under no circumstances should the polluter pays principle be applied in an abusive way - there should an official recognition that non-polluters should not pay. An overall assessment is not possible at this stage.

- Activities to be covered : The distinction between (potentially) dangerous activities and non-dangerous activities is appropriate. Agricultural, fisheries and forestry production need specific consideration because these processes take place in the open space and depend very much on factors such as water, soil and climatic conditions. Farmers cannot be held liable for environmental harm caused by plant health products, fertilisers or genetically modified seeds used within the limits of the existing provisions. Only the company that has put the product on the market should be liable. COPA-COGECA supports the initiative of having a closed list of (potentially) dangerous activities. "Potentially dangerous" should not be interpreted in such a way that every activity which might have an impact on the environment would be included. Biotechnology should be included among the (potentially) dangerous activities. Biotechnology companies must bear full liability for any environmental damage caused by GMOs.

- Burden of proof : The burden of proof should remain on the plaintiff, who should prove the facts concerning the casual link between an activity carried out by the defendant and the damage.

- Biodiversity damage : The introduction of a liability regime for damage to biodiversity needs further discussion, in particular in respect of the feasibility and the economic impact of such a regime. A definition of "significant damage" has to be established at the European level in order to avoid different interpretations in Member States. A cost-benefit analysis should be the starting point for the establishment of criteria for the assessment and the restoration of damage.

- Access to justice : Access to justice for public interest groups needs further consideration, in particular as regards the recognition of these groups.

- Financial security : There should not be an obligation to have a financial security. The insurability of environmental risks is a precondition to the introduction of such a regime.
- General comments: Although the ELO considers that there have been improvements on the earlier drafts of the proposals, it remains of the view that the Commission has failed to explain why Member States’ legislation is insufficient to deal with environmental liability and thus has yet to prove why the proposed regime is necessary. ELO considers that the proposals fail to meet the tests of subsidiarity and proportionality. Amongst other things, the WP fails to understand or distinguish properly between public and private law aspects of environmental protection. Due to this and the lack of certainty in the proposals there is potential for significant economic impact on SMEs.

- No retroactivity: ELO agrees that the regime should not be retroactive. However, WP is unclear as to how historic and future pollution can be separated. In addition, WP is not clear as to why it is that Member States are sufficiently competent to deal with historic pollution but not with future pollution.

- Activities to be covered: It should be clearly stated that agriculture comes within the definition of non-hazardous activities. Under the current proposals almost any enterprise is potentially hazardous and brings with it almost unlimited liability. Liability for damage caused by the release of a GMO should lie with the producer of the GMO rather than with a user such as a farmer. There should certainly be no liability where a farmer accidentally releases GMOs – for example, where a farmer is given, without his knowledge or consent, genetically modified rape seed oil by a biotech firm.

- Type and other features of liability: Liability should be subject to a test of foreseeability.

- Defences: There should be a state of the art defence. Recognised defences in some Member States based on best available techniques not entailing excessive cost and the best practicable environmental option should be maintained. Compliance with a permit should also be a defence.

- Burden of proof: Given that there is no need to prove fault in a strict liability regime, the plaintiff would merely have to prove causation. If the burden of proof were reversed the defendant would have to prove his innocence by proving a negative and this is virtually impossible.

- Liable party/parties: It is essential that the non-polluting owner of land be exempted from liability where the polluter cannot be found. Liability for damage caused by the release of a GMO should lie with the producer of the GMO rather than with a user such as a farmer.

- Environmental damage: Environmental damage should be defined in accordance with significant damage or significant risk of damage and ELO calls for a clear definition of “significant damage”. WP fails to acknowledge that property forms part of the environment.

- Ensuring effective restoration: The suggested standard of clean-up which includes plausible future use in addition to actual use is far too onerous and uncertain. A suitable for use approach should be based on current use. There should be a cost analysis and where hardship might be caused the cost should be linked to the actual value of the land.
- **Access to justice**: Major problems will arise if NGOs are entitled to act as public authorities – such as, the question of whether NGOs should be able to proceed without providing cross-undertakings in damages, how to monitor an NGO’s use of any damages it is awarded, how to impose similar controls on NGOs as exist with regard to public authorities and how to deal with the question of access to land. ELO considers that the current system of judicial review is satisfactory and that the most appropriate route for NGOs is to allow them to pursue the State if it fails to act rather than allowing them to pursue individuals directly. There must be costs provisions in respect of vexatious claims and in some instances security in respect of costs where an NGO has no means of covering the costs of a successful defence.

- **Financial security**: At present, it would be unrealistic for the Commission to expect the insurance industry to cover the uncertainties that accompany the proposed regime.

- **Subsidiarity and proportionality**: Although the ELO considers that there have been improvements on the earlier drafts of the proposals, it remains of the view that the Commission has failed to explain why Member States’ legislation is insufficient to deal with environmental liability and thus has yet to prove why the proposed regime is necessary. ELO considers that the proposals fail to meet the tests of subsidiarity and proportionality.

- **Economic impact**: Amongst other things, the WP fails to understand or distinguish properly between public and private law aspects of environmental protection. Due to this and the lack of certainty in the proposals there is potential for significant economic impact on SMEs. WP itself acknowledges that it is not clear that differences in Member States’ environmental liability legislation result in distortion of competition and therefore ELO considers that there is merit in postponing the proposals until they can be justified.

- **European Environmental NGOs**

- **European Environmental Bureau**

- **General comments**: The EC must go ahead with a legislative proposal as soon as possible. Unfortunately the EC seems to have weakened in the WP most elements of an effective liability system.

- **Activities to be covered**: Installations and substances not yet covered by EU legislation should also be included in later stages in order to make the system comprehensive.

- **Type and other features of liability**: Strict liability should be applied not only for dangerous activities which are covered by EU legislation but also to all biodiversity damage. There should not be any apportionment of liability in multiple party liability cases. There should not be an absolute time bar for bringing legal claims but there should be a time limitation running from the date of manifestation of the damage (this limitation should not be less than five years).

- **Burden of proof**: The Commission should re-introduce the concepts of “plausible causation”, “rebuttable presumption” and “prevailing probability” in order to alleviate the burden of proof for the plaintiff.

- **Liable party/parties**: The principle of “piercing the corporate veil” should
be introduced. There should not be any apportionment of liability in multiple party liability cases. Apportionment should be allowed only in cases of negligible contribution to the damage. Banks should be held responsible if a loan was granted knowing the possible negative effects of the activity.

- Environmental damage: The EC should develop a concept of “significant damage” which allows for a wide application of the proposed regime.

- Biodiversity damage: The scope of the regime should be gradually extended to “ordinary nature”.

- Contaminated sites: Restoration up to clean-up standards should not mean a restriction of liability.

- Traditional damage: The inclusion of traditional damage in the system is one of the positive elements of the WP.

- Relation with Product Liability Directive: Liability for defective products and environmental liability are different systems and should be applied at the same time.

- Ensuring effective restoration: A cost-benefit test to assess the level of damage is not acceptable. A reasonability test should not become an upper threshold for the damage covered. It should only be used to decide if restoration is the best option. A distinction should be drawn between damage caused by several identifiable sources and a diffuse source.

- Access to justice: EEB is against a two-stage model in the field of access to justice for public interest groups. There is no need to involve public authorities in a lawsuit of a basically civil nature. This is not relevant in a system of strict liability which is widely independent of the eventual existence of permits. It should be optional for public interest groups to instruct state authorities to deal with the problem before suing the polluter himself. There should be reimbursement or exemption from all judicial costs in respect of actions brought by public interest groups.

- Financial security: There should be mandatory insurance. Lack of insurance may imply a “moral hazard”. In addition, complementary liability funds should be set up for contamination of sites which occurred before the entry into force of the regime, for unidentifiable polluters and for diffuse damage. If unforeseeable natural disasters can be insured, why not environmental damage which is caused by human activities?

- Economic impact: By internalising the potential social costs of risk, economic operators will determine themselves the level of precaution based upon their calculation on the probability of harm. The trial and error approach inherent to markets will simply be extended to risk management.

- Miscellaneous: The polluter pays principle could also be implemented by establishing a tax on harmful materials which should converge in a liability fund.

- European Industrial NGOs; general

- European Round Table of Industrialists
General comments: ERT believe that the main focus should be on how to ensure environmental protection rather than on liability, and so consider that the Commission’s priority should not be the development of legal instruments but rather of more flexible ways of bringing about better practice on environmental protection (e.g. codes of best practice). ERT are of the opinion that legal instruments are unlikely to affect the behaviour of irresponsible companies. ERT are not aware of any study which shows that the differences in the various liability regimes in the different Member States are a problem. Therefore, more work should be done to show that an EC-wide liability regime would actually lead to better environmental protection. In the event that an EC-wide liability regime is shown to be necessary, it should focus on prevention and on encouraging best practice in environmental risk management. Although environmental liability would be an important part of such a regime, it should be a last recourse when things go wrong and damage is caused. The main tests of any proposals should be how they will contribute to ensuring prompt, efficient and effective remediation of any damage caused and what effect they are likely to have on the behaviour of responsible companies which are already striving to improve their environmental performance. ERT consider it essential that the following principles be safeguarded in any forthcoming draft: that liability rest with the person or entity in operational control of a situation; that there be a requirement to demonstrate a causal link between an operation and the damage and that the scope of the damage covered by the regime be clearly defined in order to enable insurability.

- Damage to be covered: ERT consider it essential that the scope of the damage to be covered by the regime be clearly defined in order to enable insurability.

- Type and other features of liability: ERT draw the Commission’s attention to the proposal discussed in the Legal Committee of the European Parliament whereby companies implementing EMAS, ISO 14001 or an equivalent audit system would be subject to fault-based liability if it were established that the precautions specified by the audit system had not been followed and companies which do not implement such audit systems would be subject to strict liability. ERT consider that this proposal would provide a powerful and effective incentive for responsible environmental conduct amongst all actors in the EU and so merits inclusion in any forthcoming draft.

- Defences: Providing appropriate defences is the way to encourage responsible operation by companies that are proactive in protecting the environment. The WP leaves great uncertainty as to what defences should be allowed. Compliance with an operating permit must be allowed at least to mitigate fault, even if responsibility to remediate the damage would still remain. State of the art needs to be allowed as a valid defence in relation to development risks, otherwise innovation will be severely inhibited. Member States should be allowed, as is the case under the Product Liability Directive, to provide in national laws a defence of “state of the art” and/or specifically for development risk itself.

- Burden of proof: ERT are opposed to any reversal of the burden of proof which would remove the obligation to demonstrate a causal link. This would lead to considerable legal uncertainty and have implications for insurability.

- Liable party/parties: ERT consider it essential that liability rest with the person or entity in operational control of a situation. In cases where more than one operator is responsible for the damage, liability should be allocated in an equitable way and there should be no question of one polluter being expected to pay for other polluters. The proposal to combine the responsibilities of the operator and permitting authority seem to be quite impractical.
- Biodiversity damage: ERT recognise the need for further efforts to protect biodiversity and consider that the starting point should be a transparent system for evaluating damage and for deciding what constitutes proper restitution – including definitions, criteria and thresholds. ERT consider that the WP is quite imprecise in respect of these issues. Using Natura 2000 to define the scope of liability for damage to biodiversity would be a helpful initial step to making things clear and so criteria for defining significant damage might also be derived from the Habitats Directive.

- Contaminated sites: An EU environmental liability regime should not be proposed for categories of damage that are already adequately covered by Members States’ liability regimes – as is the case with traditional damage and with contaminated industrial sites where the damage is contained within the site and there are no transboundary effects.

- Traditional damage: An EU environmental liability regime should not be proposed for categories of damage that are already adequately covered by Members States’ liability regimes – as is the case with traditional damage and with contaminated industrial sites where the damage is contained within the site and there are no transboundary effects.

- Relation with Product Liability Directive: Member States should be allowed, as is the case under the Product Liability Directive, to provide in national laws a defence of “state of the art” and/or specifically for development risk itself.

- Access to justice: Under the Aarhus Convention, the Community undertook to provide transparency in respect of environmental information, including allowing legal challenges by individuals and public interest groups and the Commission has made a proposal to implement those obligations. ERT do not believe that a proposal for an EU environmental liability regime would be an appropriate place to include provisions which go beyond the Aarhus Convention. Where public interest groups are given access to justice it is important that they be required to demonstrate a causal link and that they remain accountable for their actions.

- Financial security: Insurability of an operation requires that potential damage and the consequences of that damage be reasonably predictable both to the operator and to the insurer. Major uncertainties can lead to an inability to insure. This cannot be solved by attempting to force insurance on operators. It will help insurability if there is a clear threshold established of what constitutes environmental damage and if operators’ exposure to liability is capped. Any reversal of the burden proof which would remove the obligation to demonstrate a causal link would lead to considerable legal uncertainty and have implications for insurability.

- Subsidiarity and proportionality: An EU environmental liability regime should not be proposed for categories of damage that are already adequately covered by Members States’ liability regimes – as is the case with traditional damage and with contaminated industrial sites where the damage is contained within the site and there are no transboundary effects. Therefore, on grounds of subsidiarity and proportionality, ERT consider that an EU environmental liability regime should be limited to covering damage to biodiversity and to environmental damage with transboundary impacts.

- Economic impact: ERT understand that a study is being undertaken by the Commission to reassess the economic justification for proposing a Community environmental liability regime, including the potential impact on industrial competitiveness. The results of this study should be an important test of options being considered.
- General comments: UEAPME do not support the adoption of an EU framework directive on environmental liability. They consider that there is a lack of reliable information on the following issues: competition problems inside the EU due to different national liability regimes; the level of competitiveness reduction that European businesses will be likely to face because of the adoption of the proposed regime; the real impact of the proposed liability regime on European SMEs. In addition, there is no widespread financial security mechanism available for businesses on the market. The polluter pays principle should not be automatically linked to other legal principles, such a strict liability and the reversal of the burden of proof.

- No retroactivity: UEAPME support the fact that an environmental liability regime should be not retroactive. A common definition of “past pollution” is nevertheless necessary in order to avoid different national interpretations and a consequent distortion of competition inside the internal market.

- Type and other features of liability: UEAPME do not support the principle of strict liability. This is too burdensome for SMEs and prevents them from taking any further initiative in the field of environmental protection. Liability under the regime should be fault-based.

- Defences: Allowing only traditional defences in a regime of strict liability with a reversal of the burden of proof means discriminating against SMEs in favour of environmental protection. Compliance with a permit, state of the art and development risk should be allowed as defences. Adequate consideration should be given to EMAS registered sites, since EMAs provides evidence of legal compliance.

- Burden of proof: There should not be any reversal of the burden of proof. The combination of strict liability and reversal of the burden of proof is lethal for SMEs.

- Liable party/parties: Liability should rest on the legal person and not on managers or other employees. The obligation to pay a part of the compensation might lead permitting authorities, in order to protect themselves, to disproportionately increase the requirements for companies to obtain permits.

- Biodiversity damage: UEAPME support fault-based liability for damage to biodiversity caused by a non-dangerous activity. The sites to be included in the Natura 2000 network have been designated by the Member States without having in mind a possible European environmental liability regime. Some Member States have designated more sites than others. The Natura 2000 network is not the right criterion on which to base the proposed liability regime. Member States should proceed to a new designation with a view to the proposed environmental liability regime. A common definition of “significant damage” should be developed in order to prevent a different interpretations at Member State level. Natural resources should be taken back to a comparable condition and not to the same condition existing prior to the damage.

- Contaminated sites: Best available techniques under economically and technically viable conditions (and not simply best available techniques) should be the tool to measure clean-up objectives. Since the criterion of “plausible future use” might have very different interpretations, UEAPME consider that this concept it is too uncertain to be taken as a
Ensuring effective restoration: UEAPME support the EC’s view that compensation paid by the polluter should be used for the decontamination and restoration of the environment. Cost-effectiveness should always be the basis on which to carry out restoration activities.

Access to justice: UEAPME do not support the idea of giving public interest groups an enhanced access to justice since they might abuse this right by acting against businesses instrumentally – namely, to achieve aims which are not really linked to environmental protection. This situation could be facilitated if the burden of proof were reversed. UEAPME very much support the suggestion that out-of-court solutions should be explored since this would help to avoid excessive red tape and reduce legal expenses.

Financial security: No EU environmental regime should be approved without ensuring SMEs the possibility to cover themselves from the financial consequences of possible environmental damage. UEAPME consider that the current lack of insurance schemes (as well as bank guarantees) for environmental liability, coupled with strict liability, reversal of the burden of proof and traditional defences, will result in the bankruptcy of thousands of SMEs. Before adopting any form of environmental liability regime, the EC should contribute to the setting up of a reasonable, effective and generally accepted method to quantify environmental damage and make sure that insurance and banking instruments are developed to cover environmental liability. The Commission should persuade insurers to set up insurance pools. These pools could reduce risk by sharing it among all participants. UEAPME consider that this should diminish the insurance sector’s resistance against covering environmental damage and could prevent insurers from limiting the amount of cover.

Subsidiarity and proportionality: A framework directive would be contrary to the subsidiarity principle since it is not proven that Community intervention is really needed in place of Member State’s own action.

Economic impact: Without certain and reliable statistics on the impact of the current national environmental liability regimes inside the EU on the competitiveness of businesses, there is no urge to adopt a framework directive in this field. Reduction of competitiveness due to an EC environmental liability regime should be monitored as precisely as possible. Stating “uncertainty” is not a proper basis for action at Community level. The EC should carry out urgently an in-depth SME impact assessment before taking any binding initiatives.

Miscellaneous: SMEs should be informed and trained on aspects related to their environmental impact, as well as on environmental liability.

Union des Confidirations de l’Industrie et des Employeurs d’Europe

General comments: Although UNICE regards civil liability an unsuitable instrument for environmental policy, it is encouraged to see that the Commission considers that an EC environmental liability regime should only work prospectively, that disproportionate costs of restoration should be avoided and the regime should be insurable and thus quantifiable. However, given the fact that many of the wide ranging proposals and definitions of the WP are still unclear, UNICE is worried that it may be difficult to attain these objectives and would therefore welcome more explanation on several very important issues. UNICE is concerned that
the Commission’s proposals will create major legal and economic uncertainty for European companies.

- No retroactivity: UNICE agrees that, for reasons of legal certainty and legitimate expectations, the regime should work prospectively. However, the WP does not explain how new pollution should be distinguished from old pollution. UNICE suggests as a solution that there be a legal presumption that pollution was caused before the entry into force of the EC regime, a presumption which a plaintiff could then rebut by providing evidence beyond reasonable doubt that the pollution was caused after the entry into force of the regime.

- Activities to be covered: UNICE notes that what the Commission calls a closed scope, in fact appears to be quite wide and encompass almost any activity involving almost any substance that is likely to adversely affect the environment. Moreover, the fact that those activities are carried out in conformity with the applicable EC legislation that regulates them does not exclude operators from liability under the proposals. In light of this, UNICE has difficulty in understanding the Commission’s statement that its proposed closed scope has the advantage of ensuring legal certainty. UNICE suggests that the Commission narrow down the scope of the regime to those activities which are infringing the applicable EC environmental legislation which regulates them. UNICE also suggests that the Commission define more clearly what constitutes a dangerous activity, a potentially dangerous activity and a non-dangerous activity. In addition, UNICE suggests that there be no liability for activities carried out in conformity with the Habitats Directive.

- Defences: The following should be allowed as defences: compliance with the applicable legislation; compliance with a permit issued by the competent authority; state of the art; and development risk.

- Burden of proof: UNICE is pleased that the Commission does not specifically propose a reversal of the burden of proof, something which it would strongly oppose. It points out that in combination with a strict liability regime, causation is essential for responsible companies to defend themselves against liability. UNICE suggests that a solution to the problem of distinguishing between new pollution and past pollution is the establishment of a legal presumption that pollution was caused before the entry into force of the EC regime, a presumption which a plaintiff could then rebut by providing evidence beyond reasonable doubt that the pollution was caused after the entry into force of the regime. UNICE considers that reversal of the burden of proof on this matter would give rise to significant legal uncertainty.

- Liable party/parties: UNICE questions how liability of the permitting authorities would work where, for example damage is entirely and exclusively caused by emissions explicitly allowed by a permit - in particular in light of the fact that liability of public authorities is often submitted to different rules. UNICE considers that the proposal could lead to public authorities trying to avoid liability by imposing draconian conditions when issuing permits.

- Biodiversity damage: Given the lack of clarity on the issue of biodiversity damage, UNICE finds it surprising that the Commission nevertheless proposed liability for biodiversity damage. To date, the Natura 2000 network has not yet been established. In the absence of any clarity as regards the location of protected areas and criteria for quantifying damage, business is unable to consider the extent to which this proposal may affect their activities. Therefore, UNICE calls on the Commission to define more clearly what exactly
constitutes significant biodiversity damage, to provide concrete measures aimed at avoiding disproportionate and ruinous claims and to provide more transparency as regards the criteria it considers should be applied in the designation of protected areas and in the quantification of biodiversity damage. UNICE also questions how the liability proposals will relate to provisions of the Habitats Directive which allow the carrying out of plans or projects that adversely affect the integrity of a protected site for reasons of overriding public interest, including those of a social or economic nature.

- Contaminated sites: UNICE agrees that the main objective for contaminated sites should be the removal of any serious threat to man and the environment but would prefer to see a more flexible, site-by-site approach to clean up standards which enables local circumstances to be taken into account.

- Traditional damage: Although liability for damage to health and property is already covered satisfactorily by national liability rules without significantly distorting competition, the Commission argues that for reasons of equity the proposed liability regime should also cover traditional damage. Harmonisation of liability rules in respect of traditional damage would require harmonisation of several important requirements of Member States national laws of tort (e.g. burden of proof, causation, defences). Therefore, UNICE questions whether the EC’s legislative competence in the field of environment would allow for such wide-ranging harmonisation measures.

- Access to justice: UNICE fears that implementation of the proposed two-tier approach would give rise to a number of procedural and practical difficulties and it strongly opposes public interest groups bringing direct actions. The Aarhus Convention does not require public interest groups to be given a right to bring direct actions against companies. UNICE considers that the right to bring claims for damage to the unowned environment belongs to the State as guardian of the public interest and that the involvement of public interest groups should be limited to being allowed to question decisions taken by the public authorities. UNICE is worried that direct claims by public interest groups, in particular for injunctions, would expose companies to harassment through abuse of proceedings.

- Financial security: UNICE considers insurability to be an absolute prerequisite for any form of liability. UNICE notes that if risk cannot be defined or evaluated, it is unlikely that the insurance market would be able to offer appropriate coverage. UNICE regrets that the WP is not sufficiently clear to allow for a proper analysis of the effects of the proposals that are set out therein.

- Subsidiarity and proportionality: Harmonisation of liability rules in respect of traditional damage would require harmonisation of several important requirements of Member States national laws of tort (e.g. burden of proof, causation, defences). Therefore, UNICE questions whether the EC’s legislative competence in the field of environment would allow for such wide-ranging harmonisation measures.

- Economic impact: UNICE is concerned that the Commission’s proposals will create major legal and economic uncertainty for European companies.

- European Industrial NGOs; sectorwise

- Association des Constructeurs Europiens d’Automobiles
- General comments: ACEA finds it difficult to make a precise assessment of the exact implications of the proposed regime since various basic concepts of the regime either have not been defined or have not been defined in sufficient detail.

- No retroactivity: ACEA fully supports the non-retroactive nature of the proposal and agrees that this will require a precise definition of what constitutes past pollution. Any such definition should refer to the action that caused the damage and not to the damage itself. Companies should not be liable for activities that occurred before the entry into force of the regime but the effects of which are only discovered after the entry into force of the regime.

- Damage to be covered: Since traditional damage is already covered by existing Member States laws, ACEA fails to see any reason why existing liability regimes in this domain should be re-defined.

- Type and other features of liability: A strict liability regime is only fair and equitable if the plaintiff has to prove causation and if compliance with environmental permits or authorisations is available as a defence.

- Defences: Defences under the regime should include compliance with discharge permits, use of licensed waste disposal facilities, use of state of the art technology and development risk.

- Burden of proof: ACEA is concerned that alleviation of the burden of proof would put companies in the impossible situation of having to prove a negative, therefore there should be no such alleviation. ACEA accepts that there may be instances where a court knows that the defendant possesses information which a plaintiff needs in order to make his case, however, this does not need to be addressed by EC legislation. In most jurisdictions, courts can shift the burden of proof after the plaintiff has produced prima facie evidence. However, if the Commission decides to proceed with this particular proposal, ACEA is of the view that there should be no alleviation with regard to facilities which operate under certified environmental management systems such as EMAS or ISO 14001.

- Liable party/parties: ACEA supports the Commission’s proposal regarding who should be liable. Liability should not be assigned to parties such as parent and sister companies or managers who have no direct influence over the damaging activities in question. In respect of contaminated sites, property-owners who did not cause or exacerbate site contamination and new purchasers of previously contaminated property should be granted an exemption from liability for past activities if a baseline environmental assessment is performed. At the very least the Commission should determine more precisely under what conditions third parties, such as permitting authorities, might be held (partly) liable. Although not raised in the WP, ACEA supports proportionate liability as opposed to joint and several liability. Experience with the US Superfund legislation shows that a joint and several scheme does not effectively implement the polluter pays principle.

- Biodiversity damage: It is essential that the Commission define clearly what is meant by significant damage. Commission should also provide precise indications regarding methods to be used in the economic valuation of biodiversity damage. To avoid any disputes with regard to historical damage ACEA suggests that restoration should aim at the return of the natural resource to the state it was immediately prior to the occurrence of the damage. ACEA endorses the Commission’s proposal that function and presumed future use of
the damaged resource should be considered when determining restoration requirements. Cost-effectiveness of different restoration alternatives should also be considered. However, damages unrelated to restoration (loss of use or non-use) should be disallowed.

- Contaminated sites: Definition of significant damage in the context of contamination of sites should include clean-up standards that are risk-based and determined on a site-specific basis rather than at EU level. Varying circumstances, such as geology, climate and envisaged land use should be factored in. Cost-effectiveness and technical limitations should be major considerations for remedy selection.

- Traditional damage: Since traditional damage is already covered by existing Member States laws, ACEA fails to see any reason why existing liability regimes in this domain should be re-defined. Moreover, ACEA feels that the harmonisation of rules relating to basic concepts of civil law such as the burden of proof, causation and defences would exceed the Commission’s legislative competence.

- Access to justice: Ensuring adequate environmental protection and compliance with standards and regulations is first and foremost the responsibility of public authorities. As long as the authorities carry out these tasks properly there is no need to involve third parties. Public interest groups should not be allowed to sue potentially liable parties or to apply for injunctions. The Aarhus Convention only contains the idea of giving public interest groups the right to challenge a decision of a public authority before a court—this is very different from allowing such groups to bring direct claims against private parties. If public interest groups are to be granted access to justice in order to prevent environmental damage in urgent cases, then it would be necessary to set up a register of such groups at national level.

- Financial security: ACEA is of the view that in the absence of a financial cap, insurance schemes for environmental liability are unlikely to develop.

- Subsidiarity and proportionality: ACEA questions whether the reasons given by the Commission for establishing an EC regime comply with the principle of subsidiarity. For example, it does not appear to be necessary or appropriate to lay down rules for contaminated sites since such rules already exist at national level and there does not seem to be any evidence that differences in environmental liability would have a significant impact on trade and competition between Member States.

- Economic impact: ACEA is concerned that an environmental liability regime with far-reaching consequences for its competitiveness could be adopted without a comprehensive and transparent economic impact assessment having been carried out. At the very least, a proper assessment should be carried out before the Commission issues a draft Directive, once the regime to be proposed has been defined in more detail.

- Conseil Européen de l’Industrie Chimique

- General comments: The approach to an environmental liability regime must be cautious and gradual.

- No retroactivity: Legal certainty will be preserved if the concept of past pollution is clearly defined.

- Damage to be covered: Damage caused by emissions or activities
complying with a permit should not be considered as such and should not give rise to liability.

- Activities to be covered: The essential aim of such a regime should be to repair any environmental damage regardless of which activity caused the damage. It is crucial to redefine what the term activity that bears an inherent risk of causing damage means following an effect-based approach.

- Type and other features of liability: If activities have been conducted in conformity with a permit liability should be based on fault.

- Defences: State of the art and development risk should be included as defences for the sake of predictability and innovation. Otherwise liability would be unpredictable and insurance would imply too high costs. If activities have been conducted in conformity with a permit liability should be based on fault.

- Burden of proof: The traditional principle acti quem incriminat probatio should not be modified. However, in cases where it would be unreasonably hard for the plaintiff to fully establish the causal link any possible alleviation of the burden of proof should be left to the national legal systems.

- Liable party/parties: The environmental liability regime is correctly linked to operational control of the activity, but consequently an operator should only be held liable for the part of damage that he caused. The WP does not mention proportionate liability. Joint and several liability would transform the regime into a deep pocket approach with negative economic effects and should therefore be excluded.

- Biodiversity damage: Biodiversity has been clearly defined on the basis of a territorial criterion related to EC legislation. However, there are yet no quantitative criteria to assess biodiversity damage. Such criteria must be established before setting up the regime.

- Contaminated sites: CEFIC strongly doubts the need to harmonise this field. Before introducing a harmonised regime EC should establish clear methods to assess the damage and should clearly define the concept of soil pollution. The development of standards will not be sufficient to actually establish the existence of damage. Soil contamination can only be included in an environmental liability regime if it is related to actual damage.

- Traditional damage: Traditional damage is already covered by national regimes. In the legal regime being proposed in the WP, no indication is given of the criteria for defining the extent of damage to persons or property occurring through an environmental channel. Incoherence will be increased if as the WP says it is left to the Member States to define the concept of traditional damage.

- Access to justice: There is a need to prevent unjustified, abusive and disproportionate claims. The decision to clean up the environment should remain within the strict competence of the injured owner, or where the environment is unowned, of the State itself.

- Financial security: A financial security system must be a prerequisite to the development of a liability regime. Liability should be defined in such a way that insurers are able and willing to provide proper cover at reasonable conditions. This could be achieved by capping liability. The EC should promote the development of insurance products.
- Council of European Producers of Materials for Construction

- General comments: CEPMC agrees with UNICE that the Commission’s proposals will create major legal and economic uncertainty for European companies. In particular, the proposals on the scope of the regime, on access to justice and on the type of liability should be reconsidered and further clarified. See also UNICE’s comment on the WP.

- Biodiversity damage: With regard to mineral-based construction materials, the Commission should: define what constitutes “significant biodiversity damage”; provide measures to avoid disproportionate and ruinous claims; provide transparent criteria for designating protected areas; provide transparent criteria for quantifying damage; and not introduce liability for activities carried out in conformity with the Habitats Directive.

- Miscellaneous: There is no evidence that SMEs cause disproportionately higher environmental impacts.

- European Association for BioIndustries

- General comments: EuropaBio’s comments are specifically aimed at addressing biotechnology derived products and related activities. EuropaBio welcomes the WP’s intent to follow a risk-based approach and the view expressed in the WP that a general as opposed to a technology-specific approach to liability legislation with regards to biotechnology is required. This is in line with the recent vote in the European Parliament on Directive 90/220. However, EuropaBio are concerned that the WP does not appear to be consistent in actually implementing those two key principles.

- Type and other features of liability: EuropaBio welcomes the WP’s intent to follow a risk-based approach, reflected in a differentiation between inherently dangerous activities or substances on the one hand and activities and products that are not inherently dangerous on the other hand. EuropaBio also welcomes the view in the WP that a general as opposed to a technology-specific approach to liability legislation with regard to biotechnology derived products and related activities is required. Only a general liability regime will allow a risk-based coverage of biotechnology derived products and activities. However, EuropaBio is concerned that the WP is not consistent in actually implementing these two key elements. In particular, the intent in the WP to treat all biotechnology products, activities and GMOs alike with activities and products recognised by law as hazardous is not only inconsistent with the risk-based approach advocated in the WP, but it is also discriminatory and disproportionate and does not reflect today’s scientific knowledge. In addition, a truly general, non-specific approach to biotechnology would have to cover all activities and products that are comparable from a risk point of view. However, the WP’s approach to biotechnology is actually technology-specific by singling out biotechnology. EuropaBio believes that in order to achieve a truly risk-based approach, biotechnology will have to be covered in a truly general, non technology-specific manner.

- European Cement Association

- General comments: CEMBUREAU supports the views and shares the concerns and recommendations expressed by UNICE’s comments on the WP. Although CEMBUREAU welcomes the idea of using a WP as a mechanism through which the relevant stakeholders can discuss their respective views, it regrets that certain aspects of the highest importance have not been developed sufficiently. These gaps make it difficult to have a real
exchange of views on a number of crucial points, such as who should be responsible for cleaning up contaminated sites (the respective liabilities of the State, the owner and/or the polluter are unclear); how the proposed scheme in respect of biodiversity damage would be extended to new areas beyond those currently covered by the Habitats and Birds Directives; what form of alleviation of the burden of proof is envisaged; the meaning of “significant damage”; how to value biodiversity damage; etc. Unless these questions are tackled at an early stage the consultation process will be of little use.

- No retroactivity: This is obviously welcomed by industry. However, the question remains of who should have to bear the burden of proof of demonstrating that the damage in question is not covered by the regime because it took place prior to its entry into force. Since this is not a defence but rather one of the preconditions for the application of the regime, it should be up to the plaintiff to demonstrate that the damage is indeed covered by the regime. The fact that the WP leaves for a “later stage” the definition of past pollution goes to show how difficult this question is.

- Damage to be covered: Exclusion of diffuse damage is inevitable and reasonable. Traditional damage should be excluded from the scope of the proposed regime. In fact, it could be argued that its inclusion would lead to greater inequity since the same type of damage (i.e. personal injury and damage to property) would receive different treatment depending on whether or not it fell within the scope of the environmental liability scheme.

- Activities to be covered: When referring to “dangerous activities” the WP confuses “danger” with “risk”. The definition of “dangerous activities” suggested in the WP is at once too broad (since it covers virtually all industrial activities of some importance) and too narrow (since it does not cover important sources of pollution such as agriculture). In this respect, the WP shows an anti-industry bias which is not acceptable.

- Type and other features of liability: No fault (i.e. strict) liability seems to be a feature that must be accepted since it can already be found in national legislation and in many EU and/or international instruments. However, the acceptance of no fault liability should be conditioned by the requirement that causation be demonstrated, by a cap on liability (except where malicious intent or gross negligence can be established) and by a short limitation period (e.g. extinction of liability 10 years after the occurrence of the damage and an obligation to bring an action within 3 years of discovery, as in the Product Liability Directive).

- Defences: Even though it states that “commonly acceptable defences” should be allowed, the WP is very restrictive regarding admissible defences. The scope of the defences available under the Product Liability Directive is preferable. It is hard to imagine how a combination of polluter liability and that of a permitting authority could work in practice. How would this work in legal systems where the liability of public authorities is subject to different rules from those applicable to a private individual or a company and where different courts might exercise jurisdiction over public and private matters?

- Burden of proof: How can industry make its view known if the Commission does not spell out what it intends by some form of alleviation of the burden of proof? CEMBUREAU is clearly against any reversal of the burden of proof. Such a reversal is not compatible with a strict liability regime – where there is strict liability establishing causation becomes all the more essential. In addition, the establishment of a causal link is essential in securing insurability of the relevant risk.
- Environmental damage: It is clear that a threshold of “significant damage” applies to biodiversity damage but it is not clear whether it also applies to contaminated sites.

- Contaminated sites: The section in the WP dealing with contamination of sites is too summary—more legal analysis is required.

- Ensuring effective restoration: Any legislation which might be adopted should spell out that a remedy in kind should be “the best ecological solution subject always to proportionality, the social impact and the economic cost to the operator being relevant in identifying such best solution (best practicable environmental option)”. And if a remedy in kind is not available (particularly relevant in the case of pure ecological damage), the cost of restoration should not be the only measure of the damage. Loss of use should also be introduced, together with other parameters (to be identified). Given the uncertainty and inequities which “contingent assessment of damage” has generated in the USA, this method should be ruled out.

- Access to justice: CEMBUREAU suggests that the following alternative would be acceptable—that the Directive make it optional (rather than mandatory) for Member States to broaden the locus standi to public interest groups. The Directive should spell out the criteria which such groups would have to meet in order to qualify and such criteria should be capable of judicial review. Examples of some such criteria are given. Injunctive relief should continue to fall within the sphere of remedies available under the national laws of the Member States and remain outside the scope of any potential EU legislation. The proposed regime should prescribe how money awarded to NGOs which succeed in claims in respect of biodiversity damage are to be allocated, setting out certain criteria (which should be capable of judicial review). Examples of some such criteria are given.

- Financial security: The establishment of a causal link is essential in securing insurability of the relevant risk.

- Subsidiarity and proportionality: Whilst it may be considered that biodiversity damage is not properly covered by Member States’ legal regimes, all other types of environmental liability are adequately dealt with. The introduction of a broad EU environmental liability scheme would require a study of the impact which such a scheme would have on national liability rules. CEMBUREAU is of the opinion that it would be more appropriate for the EU to legislate solely in respect of biodiversity damage.

- Economic impact: To facilitate action by plaintiffs whilst depriving business of normal defences would lead to uncertainty and higher transaction costs. The assumption in the WP that transaction costs would not increase substantially is not demonstrated.

- Miscellaneous: WP invites Member States to establish funding mechanisms to deal with existing contamination of sites and biodiversity damage as a supplement to an EU liability regime. Such an approach will add to the already unacceptable level of uncertainty generated by the WP’s proposals.

- European Community Shipowners' Associations

- General comments: ECSA represent the EEA shipping industry. ECSA’s and ICS’s (International Chamber of Shipping) members jointly represent more than 50% of the
world’s merchant tonnage. Rather than send a separate response in respect of the WP, ECSA have sent a copy of the joint ECSA / ICS response to the Commission’s Communication on tanker safety dated 21 March 2000. In light of this, the remaining sections of this summary have not been filled in seeing as the ECSA/ICS response addressed the proposals set out in the Communication rather than those set out in the WP. ECSA urge the Commission to recognise the importance of international instruments as regards pollution from ships and to avoid conflict and duplication in the context of future EU legislation on environmental damage. Improvements to the regime for liability and compensation from oil pollution should be considered within the framework of the existing international regime – as suggested in the Commission’s Communication on tanker safety. ECSA also refer to the international arrangements on liability and compensation under the HNS Convention on the transport of hazardous and noxious substances and a new Convention currently under consideration by the IMO on compensation for pollution from ships’ bunkers. ECSA question the need for complementary EU legislation in this field since this could undermine rather than improve the existing international structures - in particular with reference to the proposal in the Communication that an EU regime be introduced which would impose sanctions on any party who caused or contributed to an oil pollution incident by “grossly negligent behaviour”.

- Relation with international conventions : ECSA urge the Commission to recognise the importance of international instruments as regards pollution from ships and to avoid conflict and duplication in the context of future EU legislation on environmental damage. Improvements to the regime for liability and compensation from oil pollution should be considered within the framework of the existing international regime – as suggested in the Commission’s Communication on tanker safety. ECSA also refer to the international arrangements on liability and compensation under the HNS Convention on the transport of hazardous and noxious substances and a new Convention currently under consideration by the IMO on compensation for pollution from ships’ bunkers. ECSA question the need for complementary EU legislation in this field since this could undermine rather than improve the existing international structures - in particular with reference to the proposal in the Communication that an EU regime be introduced which would impose sanctions on any party who caused or contributed to an oil pollution incident by “grossly negligent behaviour”.

- European Construction Industry Federation

- General comments : Whilst the WP may represent some improvements in comparison with the 1993 Green Paper, it remains nevertheless in its present form very much a subject of discussion and cannot be considered as having been exhaustively debated. FIEC has profound reservations about the principle of developing a European regulation in this field. Liability regimes along the lines proposed by the Commission would in effect overthrow national approaches in an area already regulated by most, if not all Member States and therefore EC competence has to be justified.

- No retroactivity : FIEC is pleased to note that their suggestion of non-retroactivity put forward in light of the consultation on the 1993 Green Paper has been taken into account in the WP.

- Activities to be covered : Specifically defining the difference between “hazardous” and “non-hazardous” activities will be absolutely essential. FIEC is of the opinion that construction activities are per se “non-dangerous” activities in the environmental context precisely because all Member States have regulatory regimes requiring construction projects to respect strict environmental criteria.
- Type and other features of liability: In the event that an EU liability regime is introduced, FIEC believes that such a regime should be fault-based. A system based on strict liability would be disastrous unless it were limited to inherently dangerous activities which in turn would need to be clearly defined and categorised and would need specifically to exclude construction activities.

- Defences: Defences such as state of the art and force majeure would need to be available. The absence or inadequate recognition of development risk and the efforts of contractors investing in research in order to advance the protection of the environment will tend to inhibit initiatives which are necessary in this field.

- Liable party/parties: Contractors will be concerned that under the proposed regime they could be at risk as potential contributors where they have merely complied with the instructions or requirements of a client. Any legislation should ensure that a contractor is not liable for the consequences of his client’s requirements and decisions.

- Environmental damage: It is inherently difficult to quantify damage to the environment, especially as concerns biodiversity.

- Traditional damage: There could be a certain risk of complex overlapping with various legal systems: administrative law, classic civil responsibility, environmental liability and consequently a significant future source of disputes.

- Financial security: The fact that the proposed regime envisages liability for unfortuitous events such as those that would normally arise from the activities of an enterprise and the absence of a precise method of provisionally estimating costs, together constitute effective obstacles to the establishment of a viable economic system of insurance. A ceiling on liability would need to be imposed for there to be an opportunity of obtaining insurance cover, since liability without limit could put companies at risk. Insurance against environmental damage is not always available and any system that produces liabilities that cannot be insured is unlikely to be successful. It should be noted that in some Member States, for example in the field of professional indemnity, there have been moves to exclude claims for pollution and contamination.

- Subsidiarity and proportionality: EC competence has to be justified. The principle of subsidiarity and the existence of effective national regulations for the protection of the environment could imply that the field of application for European environmental liability will be limited to those areas not already covered by regulations in Member States – that is, damage to biodiversity caused by “dangerous activities”.

- Economic impact: The absence or inadequate recognition of development risk and the efforts of contractors investing in research in order to advance the protection of the environment will tend to inhibit initiatives which are necessary in this field. The economic impact and the incidence on competition should also be the subject of more detailed studies.

- Miscellaneous: Any proposal aimed at introducing environmental audits calls for careful consideration. Any attempt to introduce these to cover all industrial activities must be resisted. In any event, this would constitute an intolerable burden and would be impracticable where SMEs are concerned.
- European Petroleum Industry Association

- General comments: The reasons which the EC puts forward for proposing an EU-wide liability regime are not convincing. It will not create an incentive for companies to comply with the existing environmental laws. In general, the WP leaves many issues unresolved and so it is difficult to comment on it usefully. The proposals made by the Commission only seem to introduce more uncertainty and unfairness in the process. There is no need of one EU Directive. Would a framework directive be followed by further “daughter” directives?

- No retroactivity: It is very difficult to prove when exactly a specific pollution started, unless operators perform very expensive audits on all their sites. If an operator can prove such a fact, it will generally be self-incriminating if past pollution is, as the WP suggests, covered by national liability laws. EUROPIA supports UNICE’s suggestion that there be a legal presumption that pollution was caused before the entry into force of the new regime, and it would then be up to plaintiffs to rebut such a presumption.

- Damage to be covered: Nothing is said about “gradual” or “chronic” pollution or damage which started before the EU regime comes into force but which continues after its entry into force.

- Activities to be covered: The scope of the activities to be covered is very imprecise - the concept of “dangerous activity” is interpreted very widely.

- Defences: The proposal to not to allow a legal defence based on compliance with permits and laws may be counterproductive in respect of the purpose of improving general compliance with environmental laws, since some companies may lose the basic incentive to comply with the already stringent existing regulations. It is absolutely essential that compliance with permits be accepted as a defence. The notion of “application of equity” with respect to permit compliance seems very difficult to apply in practice and unduly restrictive. The defences relating to state of the art and to development risks is available under the Product Liability Directive and should be available in the proposed environmental liability regime for the same reasons.

- Burden of proof: It is always much more difficult to prove a negative circumstance (i.e. for the operator to prove that he did not cause the damage) than a positive one (i.e. for the plaintiff to prove that the operator did cause the damage). If the alleviation of the burden of proof means de facto a reversal of the burden of proof, this would result in an unacceptably unfair position for operators. They would be deemed guilty unless they could prove that they were innocent. Alleviation of the burden of proof can raise serious issues with respect to insurability. The Commission must clarify its position on the crucial issue of joint and several liability versus proportional liability.

- Environmental damage: References to the Andalusia and Hessen regimes are cryptic - the notion of “benefits transfer techniques” needs to be explained further.

- Biodiversity damage: Most countries have not yet fully defined what areas are covered by Natura 2000.

- Traditional damage: Traditional damage is already well covered by national legislation and therefore, on the basis of the subsidiarity principle should not be included in the proposed environmental liability regime.
- **Relation with Product Liability Directive**: The defences relating to state of the art and to development risks is available under the Product Liability Directive and should be available in the proposed environmental liability regime for the same reasons.

- **Access to justice**: NGOs should in every case go to the State with their grievances and it should be up to the State to decide whether action is required. If the State does not act, the NGO should then be entitled to take the State to court for failure to act. However, the notion of ‘failure to act’ by the State needs to be precisely defined. In respect of the proposals for a right to seek an injunction, due to the potentially immediate and serious impact on the economic viability of the operator’s activities, all possible defences should be available and the burden of proof should rest entirely with the plaintiff. In general, every precaution should be taken to discourage frivolous lawsuits.

- **Financial security**: A cap on the amount of potential liability is absolutely essential for insurance companies, who otherwise will not be able to calculate the relevant premiums. The proposals in respect of alleviation of the burden of proof could also have consequences for insurability.

- **Subsidiarity and proportionality**: Traditional damage is already well covered by national legislation and therefore, on the basis of the subsidiarity principle should not be included in the proposed environmental liability regime.

- **Economic impact**: A study should be undertaken to ascertain the economic impact of the WP proposals.

  - **European Property Federation**

- **General comments**: EPF note that many important aspects of the final version of the WP have taken into account previous consultations – notably the proposals on non-retroactivity, clean-up standards and clean-up objectives for contaminated sites and financial security. This will help make the forthcoming directive more workable and more compatible with the existing Member State regimes.

- **No retroactivity**: The definition of “past pollution” is indeed crucial to the application of the principle of non-retroactivity. EPF have valuable experience to offer in this respect and so ask the Commission to include them in future consultations on this point.

- **Liable party/parties**: Earlier drafts of the WP proposed that liability rest with the operator, left it open for Member States to provide for liability of other parties (e.g. landowners, lenders) but contained the caveat that in such cases “the plaintiff must be obliged to claim from the polluter first”. EPF consider that the deletion of this caveat means that it would be open for Member States to opt for “deep pocket” liability, that this is a fundamental political question and one which cannot be avoided. EPF calls for the safeguards against “deep pocket” liability which were present in earlier drafts of the WP to be reinstated.

  - **European Sea Ports Organisation**

- **General comments**: ESPO support the polluter pays principle and the adoption of principles which will allow a common regime to develop.
- No retroactivity: ESPO support the view that an EU liability regime should not be retroactive.

- Biodiversity damage: ESPO consider it right that liability for damage to biodiversity in Natura 2000 sites should be fault-based, rather than strict, since activity in these sites would normally be carried out within the framework of a plan agreed between the Member States’ environmental authorities and (among others) those operating within or near the relevant site. Clarification is needed for cases where an operator is at fault in carrying out an activity which had an adverse impact but where this was done in agreement with the relevant authorities. In such cases, ESPO believe that the cost of restoration should not fall on the operator.

- Contaminated sites: ESPO agree that clean up should be done to a standard which removes “any serious threat to man and the environment” but that Member States should then be allowed to determine their clean up objectives on a case by case basis based on a realistic assessment of the land’s future use.

- Access to justice: ESPO are concerned with the potential for abuse in the proposals on access set out in the WP – e.g. the proposals in respect of injunctions. Many European legal systems require a financial guarantee to be provided by a group applying for an injunction, in the event their claim should subsequently fail. ESPO believe that an EU regime should include a similar provision. ESPO also raises the question of how “public interest groups” are to be defined.

- Relation with international conventions: There is a potential for conflict between the strict liability regime proposed and the defences available under the MARPOL Convention. For example, where a ship needs to be lightened for salvage purposes, under the proposed regime the owners of the ship or the salvors might be held liable.

- Different options: A directive would be the best way of implementing the Commission’s proposals and ESPO agree that the Directive should aim at fixing the objectives and results but let Member States chose the ways and instruments to achieve this.

- Federation of European Private Port Operators

- General comments: FEPORT support the harmonisation of liability regimes and of clean up standards and objectives at a European level in order to create a level playing field for terminal operators and stevedores in Europe.

- Activities to be covered: It is essential to have a definition of “dangerous activities” and a list of all the relevant pieces of EC legislation to be linked with the liability regime. FEPORT consider that strict liability should be limited to specific facilities.

- Type and other features of liability: The amount of liability should be limited – as is the case for the other parties in the transport chain.

- Liable party/parties: Since the packaging and securing of goods is not the responsibility of the terminal operator or stevedore, they should not be held liable in case an accident is caused as a result of either improper packaging and/or securing and/or improper reporting on the content.

- Access to justice: Access to justice by third parties should be possible only
in very urgent cases and it should not be possible for third parties to misuse this access for political reasons.

- Relation with international conventions: FEPORT raise the question of what the relationship will be between the future environmental liability directive and the various regimes which are already in place or in preparation.

- Economic impact: Terminal operators and stevedores, as well as their clients, increasingly operate on a global market instead of just on the EU market and so FEPORT agree with the WP that EU industry - and in particular those sectors of industry which are export/import orientated – should be safeguarded by all means possible. Therefore, minimising possible impacts on the EU industry’s external competitiveness should be an important objective of the future directive.

- Fidiration Europienne des Activitis du Dichet et de l'Environnement

- General comments: FEAD acknowledges that there are compelling pressures to ensure that those who cause environmental damage are subject to appropriate penalties and that those who suffer damage are able to benefit from appropriate remedies. FEAD considers that in striving to ensure a just and fair solution to environmental liability disputes, it is important that a proper balance be struck between the rights of the injured party and those of the person alleged to have caused the problem. FEAD has some concerns about the WP proposals in this regard. FEAD welcomes the fact that the emphasis of the proposals is placed on remediation rather than on compensation since it considers that it should not be the purpose of any liability scheme to award punitive damages, nor (with limited exception) to provide monetary compensation other than for the purpose of undertaking restoration or remediation.

- No retroactivity: FEAD welcomes the clear statement that the proposed regime shall not be retrospective but points out the importance of being aware of the difficulties in defining a cut-off point between historic damage and damage covered by the regime. FEAD believes that there is no encouragement to operate to higher standards by penalising what has already taken place and so considers that damage detected after the entry into force of the new regime but attributable to events preceding that entry into force should not be covered by the regime. For example, in the case of landfill where the deposit of waste ceased prior to the entry into force of the proposed regime but in respect of which post-closure monitoring and prevention conditions continue to apply, FEAD considers that if the underlying spirit of non-retrospectivity is to be respected, the determining event for the purposes of liability should be the original activity which eventually lead to the alleged damage (i.e. the deposit of waste).

- Activities to be covered: If the concern is environmental damage then that damage should be covered irrespective of the source. FEAD sees little point in deliberately excluding the possibility of action in a clear case of damage just because the cause of the damage is not one of a designated list of activities. However, FEAD does acknowledge the sense of a step-wise implementation of the regime and that it is sensible first to go for areas where experience suggests that risks are perhaps higher, provided that less urgent areas are not ignored forever.

- Type and other features of liability: FEAD has consistently supported the concept of fault-based liability, in the belief that is intrinsically unfair to expect industrial and commercial activities to assume liability for matters where they are not at fault. However, FEAD acknowledges that existing liability regimes in many Member States are already inclined
toward the strict approach and that other liability initiatives, such as the Lugano Convention, are also based on strict liability. One of FEAD’s concerns with strict liability is that operators may be penalised for events over which they actually had little control and it considers that a strict liability regime with certain defences would make some move towards acceptability. FEAD sees value in considering limits for the amount of money that can be awarded for each case and/or time periods within which actions must be initiated. The capping of liability could be attractive to insurers since it places a ceiling on claims, therefore making evaluation of underwriting risks easier. There is ample precedent in existing legislation for putting a time limit on the bringing of actions in relation to the date at which the actionable matter first became known limiting actions to a period within which the causal event took place is more problematic (e.g. in cases of gradual pollution).

- Defences: One of FEAD’s concerns with strict liability is that operators may be penalised for events over which they actually had little control and it considers that a strict liability regime with certain defences would make some move towards acceptability. The sort of defences FEAD has in mind include contributory negligence on the part of the plaintiff, absence of significant damage or economic loss and the fact that an activity was carried out in accordance with specific defined standards laid down in legislation, codes of practice and permits. Any environmental damage arising in these circumstances must, at least in part, be a consequence of inadequate legislation or the imposition of insufficiently rigorous conditions and limits. If it is felt appropriate that those suffering damage in these circumstances should received a remedy then other mechanisms (such as the use of public funds) should be provided.

- Burden of proof: FEAD considers that if a strict liability regime is to be put in place then there should be no lessening of the burden of proof to make liability independent of fault and lessen the burden of proof would represent an wholly unacceptable erosion of natural justice. Although FEAD acknowledges that allegations of environmental damage may sometimes be very difficult to prove, it believes that justice is not served by arranging matters such that a complainant succeeds in an action against a defendant when it has not been adequately proved that the defendant was responsible.

- Liable party/parties: Liability should be placed where it fairly and reasonably belongs and while the person exercising control of an activity may in most cases be the operator, this is not necessarily always the case. It is not unusual across the whole of industry for the owner of a facility to have been responsible for the planning, designing and construction of the facility but to then seek someone else to run it on his behalf. In such cases the operator should be responsible for damage caused by day-to-day compliance with operational requirements but it is fair to hold him responsible where the damage is due to such things as the design of the facility? FEAD is pleased to note that the concept of joint and several liability appears to have been removed from the proposals. FEAD believes that the liability of any party should be limited to the proportion of the damage for which that party is responsible.

- Access to justice: FEAD believes there is scope for simple fast-track systems for dealing with cases and suggests that arbitration might have a role to play or that special tribunals could be created. Such tribunals could adopt simplified and friendlier procedures, could allow for evidence to be gathered in a fair but more efficient manner and allow decisions to be reached promptly and at far less monetary and emotional cost. FEAD suggests that expert assessors could be appointed to assist such tribunals. As for who should be entitled to initiate actions for environmental damage, FEAD considers that only the parties sustaining the damage or governmental agencies/authorities should be entitled to bring such actions. In the interests of fairness, public interest groups and environmental pressure groups
should not be entitled to initiative such actions since their choice of case might be based more on political considerations than the environmental merits of the case. It should be possible for such groups to provide technical support and advice to parties initiating actions but such groups should not be permitted to fund or underwrite actions brought by others.

- Relation with international conventions: FEAD considers that nuclear incidents are a special case with their own international treaty agreements and therefore outside the scope of the general environmental liability debate.

- Financial security: As long as the underwriting risks remain ill-defined, insurance companies are likely to remain reluctant to offer cover. FEAD is opposed to compulsory sectoral funds (that is, funds that all operators must join) since it considers that well managed companies with lower risks of claims will end up subsidising those companies which pose greater risks. The capping of liability could be attractive to insurers since it places a ceiling on claims, therefore making evaluation of underwriting risks easier.

- Subsidiarity and proportionality: Whilst FEAD recognises a need for the existence of liability mechanisms, it is not wholly convinced of the need to define and determine these at the Community level. FEAD is well aware that most Member States already address some of these matters in their national legislation and whilst these are by no means of equivalent scope and effect, some of the differences are merely reflections of the differing legal philosophies that exist and of the systems and procedures that have evolved. Unless it is proposed to harmonise Community legal mechanisms generally, it would seem difficult to envisage an exact and complete bringing together of environmental liability measures across the Community. On the other hand, FEAD does see some scope for defining basic requirements in terms of minimum objectives that must be met by Member States using national mechanisms compatible with their existing legal processes. However, FEAD considers that any such basic objectives should include clear procedures for addressing transboundary claims and disputes even if such incidents are likely to be few.

- Economic impact: The existence of a punitive liability regime in one Member State may indeed have significant effects on industrial costs which are not mirrored in other Member States with no comparable regimes. This might therefore seem anti-competitive. However, most European environmental legislation allows individual Member States to adopt stricter measures than the defined minimum, so that if they chose to do so it will place that particular Member State at an economic disadvantage.

- Liaison Group of the European Mechanical, Electrical, Electronic and Metalworking Industries

- General comments: ORGALIME represents 30 trade federations which in turn represent some 100,000 companies in the mechanical, electrical, electronic and metalworking industries in 20 European countries. ORGALIME seriously questions the inclusion of liability for ecological damage in the proposals for an EU-wide environmental liability regime because of the expected severe negative effects on the economy, in particular for SMEs.

- No retroactivity: ORGALIME supports non-retroactivity. The decision of what to do with past pollution should be left to Member States. The concept of “past pollution” should be well defined in the future Community regime in order to ensure a harmonised application of the future regime.
- Damage to be covered: ORGALIME considers that a directive on environmental liability should focus on liability for personal injury and damage to property caused by environmental pollution as well as on contaminated sites.

- Activities to be covered: ORGALIME supports a scope which would be limited to activities bearing an inherent risk of causing damage. These activities should be very clearly defined for the sake of legal certainty since the list of EU legislation mentioned in the White Paper does not provide sufficient precision. Therefore, ORGALIME proposed to develop a list of facilities defined as dangerous to be covered by the liability regime. Such a list could be drawn, for example, on the basis of the list or projects covered by the Environmental Impact Assessment Directive.

- Defences: ORGALIME proposes that damage caused by emissions which are allowed under permits and licenses should be exempted from liability. The same applies if best available techniques are used.

- Biodiversity damage: Liability in relation to ecological damage is a legal novelty since it is unknown in any Member State and therefore can lead to significant uncertainties and risks for the affected undertakings. In particular, it is unclear how irreparable ecological damage should be quantified.

- Access to justice: ORGALIME strongly objects to the system proposed in the White Paper on access to justice for public interest groups in so far it would allow such groups to bring a direct action for an injunction against operators. This objection stems from the fact that public interest groups are not subject to the same legal obligations as are public authorities (neutrality, respect of fundamental constitutional rights). ORGALIME also considers that the two-tier approach of the White Paper is not sufficient to prevent unjustified legal actions being brought by public interest groups.

- Financial security: ORGALIME considers that the uncertainties in respect of the possible amount of damages to be paid has major effects on the insurability of those risks. ORGALIME refers to the views of the insurance industry, according to which insurers will not be able to offer insurance coverage for ecological damage within the foreseeable future.

- Economic impact: ORGALIME considers that environmental liability and related costs, specifically insurance premiums, are a serious economic burden for the engineering industry, which should not be underestimated. It will negatively affect the international competitiveness of industry as a whole. ORGALIME is particularly concerned with the potential adverse effects of the future regime on SMEs.

- Miscellaneous: Environmental liability is not justified by environmental protection considerations since the European engineering industry has already achieved significant progress in this respect without being under pressure of such a scheme.

- Union Européenne des Promoteurs-Constructeurs

- General comments: UEPC agrees with the general principles of the proposals set out in the WP and is particularly interested in the proposals relating to contaminated sites. Developers and house builders are particularly affected when contamination present on a development site jeopardises the development plans, results in clean-costs and
endangers persons working on those sites. Land which is available for development and house building is increasingly affected by contamination and due to the scarcity of land available for these purposes there is an increasing need to resort to brownfield sites. In the absence of clear rules in the domain of contaminated land, a landowner could be face with considerable clean-up costs, even if he were not responsible for the contamination. Therefore, UEPC supports the application of the polluter pays principle to land available for development and house building. It considers that it is only fair that the financial consequences of contaminated land be borne by those responsible for the contamination.

- Contaminated sites: Land which is available for development and house building is increasingly affected by contamination and due to the scarcity of land available for these purposes there is an increasing need to resort to brownfield sites. Developers and house builders are particularly affected when contamination present on a development site jeopardises development plans, results in clean-up costs and endangers persons working on those sites. In the absence of clear rules in the domain of contaminated land, a landowner could face considerable clean-up costs, even if he were not responsible for the contamination. Therefore, UEPC considers that on the sale of land a seller should be required to provide the buyer with a declaration stating what the contaminated status of the land is vis-a-vis the environmental laws of the relevant State. UEPC considers that such a provision could favour harmonisation at the European level of the different definitions of contaminated land.

- Financial security: UEPC wishes to draw attention to the fact that the application of any environmental liability regime implies that insurance should be voluntary rather than obligatory.

- Union of the Electricity Industry

- General comments: Further work is necessary in order to find a workable arrangement. A number of fundamental terms (such as, damage, minimum threshold and significant damage) are not defined. EURELECTRIC would be very concerned if the Commission continued to pursue the present proposals.

- No retroactivity: With regard to past pollution, who will determine the level of pollution which exists at the time the regime is implemented?

- Activities to be covered: Any extension in coverage should require formal adoption by the Council and the EP.

- Type and other features of liability: The Commission should relieve the burden of liability on undertakings which adopted measures to minimise environmental damage. It is not clear whether the polluter must directly restore the damage or whether he must pay compensation to a third party who would carry out the work. The Commission needs to ensure a consistent approach between the proposals for environmental liability and other policy measures, such as the IPPC Directive 96/61/EC.

- Defences: The proposed range of defences must be expanded. Compliance with a permit or with legislation should be allowed as a defence. “State of the art” should also be allowed as a defence.

- Burden of proof: There should be no change in the burden of proof.
- Liable party/parties: The Commission must clarify who will be considered the person exercising control of any activity. Will a person who takes over the control of an activity be responsible for the acts of his predecessor? In case the liable party cannot be pursued, will liability pass to the owner or occupier of the land? A defendant should be allowed to join other possible contributors into the proceedings and have liability apportioned between them.

- Biodiversity damage: The whole issue of the valuation of damage to biodiversity needs to be recognised.

- Traditional damage: It is not clear why separate rules should apply to claims for traditional damage arising from dangerous activities and to those arising from other circumstances. The purpose of the proposals is to ensure the protection and restoration of the environment.

- Ensuring effective restoration: It is not sufficiently clear how an effective restoration can be achieved. There is no indication in the proposals as to who would be responsible for drawing up an “action plan” in order to make good the damage, the mechanism for establishing and agreeing the plan and how implementation would be achieved. Compliance with such an “action plan” should discharge the undertaking from any further obligation and should be a defence against any further claim. It must be better explained how historical data and reference data will be established in order to identify the original conditions of the polluted land. Restoration standards are not in existence for the time being. These need to be established involving all interested parties. For the sake of transparency and uniformity, there should be standardised methods of measuring emissions and discharges.

- Access to justice: The protection of the environment should be the responsibility of State authorities. The rights of public interest groups should be limited to challenging whether the competent authorities have exercised their responsibilities properly.

- Relation with international conventions: There should not be an overlap between the existing regime in respect of nuclear liability and the proposed environmental liability regime. Nuclear liability must be kept separate.

- Financial security: Any regime based on strict liability must be supported by a robust environmental insurance market, otherwise industrial undertakings would face an unacceptable cost burden. Insurance from damage to biodiversity is not available. Liability must be capable of being covered by insurance and accordingly a cap on liability must be provided. There must be a cap both on the overall annual exposure of an organisation to claims and on individual claims or series of claims.

- Economic impact: Any regime based on strict liability must be supported by a robust environmental insurance market, otherwise industrial undertakings would face an unacceptable cost burden.

- Miscellaneous: Any future liability regime should provide incentives for undertakings to adopt voluntary measures to prevent environmental damage/best available practices in environmental management.

- European Parliament
Consumer Policy

- General comments: Committee welcomes the preparation of a legislative proposal on environmental liability by the Commission but considers that many of the essential elements of an effective liability system are still too weak. Committee considers that the following elements need further elaboration:
  - strict liability for biodiversity damage, wide scope, coverage of damage, access to justice for the public, alleviation of the burden of proof and insurability.

- No retroactivity: The regime should have retroactive effect, at least in cases where the fundamental cause of the damage took place before the regime came into effect or if an effect causing damage to the environment extended before the entry into force of the temporal scope of the EU liability regime.

- Damage to be covered: Limiting the scope of the type of damage to be covered by the regime to existing nature protection legislation should only be seen as a starting point from which the scope can be extended gradually to cover other areas of nature which are not protected by specific directives.

- Activities to be covered: There is a risk that activities which do not yet fall under EU environmental legislation will remain free from liability. This applies in general to small industrial installations and many unregulated but potentially hazardous chemicals. Committee considers that the scope of the regime should be extended to cover these activities which are still unclassified. The proposed regime should also include genetic engineering and nuclear plants and activities. A list of all Community legislation concerning rules on liability should be drawn up.

- Type and other features of liability: Committee considers that strict liability should apply to all activities causing damage to biodiversity, nature reserves, soil and water - regardless of whether the activity in question is dangerous or not. Committee considers that this would create an incentive for more careful behaviour than that required under the existing environmental protection standards. Joint and several liability should be introduced in multiple party liability cases.

- Defences: It is important to restrict the number and kinds of defences available under the proposed regime. In particular, defences such as development risk and compliance with a permit should not be allowed. These do not usually exist in national environmental liability legislation and would undermine the precautionary principle. In the field of nuclear liability, plant operators should not be entitled to claim as a defence the fact that the damage was the result of force majeure.

- Burden of proof: Reversal or alleviation of the burden of proof should be considered one of the most essential principles of environmental liability. It creates a balance of power between the plaintiff and the polluter, since the former normally lacks the capacities and resources to prove a causal link between a certain activity and the resulting damage. Committee considers that it should be sufficient in the first place for the plaintiff to prove the damage and its origin and a plausible causality between the two and that it should then be up to the defendant to rebut the presumption that his activity caused the damage.

- Liable party/parties: There needs to be clarity as to who is liable under the regime: the principal, the contractor, sub-contractor, manager, operator or architect. Joint and
several liability should be introduced in multiple party liability cases. The Commission’s proposals for a liability regime should tackle the problem of large firms attempting to circumvent liability by delegating risky activities to smaller daughter companies. A possible solution to this problem might be the principle of "piercing the corporate veil" which exists in British legislation which allows a victim to bring an action against the mother company where a daughter company has caused the damage. Committee also raises the possibility of guaranteeing the personal responsibility of a mother company’s management.

- Biodiversity damage: Committee considers that strict liability should apply to all activities causing damage to biodiversity, nature reserves, soil and water - regardless of whether the activity in question is dangerous or not. The vagueness of the concept of "significant damage" with respect to biodiversity damage would allow different thresholds to be applied, which would severely restrict the applicability of the regime. Therefore, the definition of "significant damage" should be specified.

- Traditional damage: It is important that a regime of strict environmental liability also cover damage to persons and goods if they are caused by a dangerous or potentially dangerous activity regulated by EC environmental law.

- Relation with Product Liability Directive: In the event of overlap between the two liability regimes, the regime with the more beneficial effect on the environment should apply.

- Ensuring effective restoration: The cost-benefit and reasonability tests proposed by the WP should not be used to assess the level of damages. Such an approach risks undermining an effective liability regime in cases of extreme damage since these tests would lead to the setting of an ceiling in respect of the amount of damages which can be recovered. Therefore, the Committee considers that these two tests should only be applied in order to decide between alternatives of restoration or compensation.

- Access to justice: Committee considers that public interest groups should be given direct access to justice and that this would be in line with the Aarhus Convention. The two-stage approach proposed in the WP carries the risk of prolonged legal procedures which could result in further environmental damage. In addition, the two-stage approach would not be applicable where the State is at the origin of the environmental damage.

- Financial security: A system of financial security should form part of the liability regime, including mandatory insurance in the case of dangerous activities (which should be defined so as to include the working with and transportation of dangerous substances and GMOs and the operation of waste-processing plants and facilities). The lack of obligatory insurance leaves unresolved the problem of clean-up and restoration costs which exceed a polluter’s financial capacities. In addition, this contradicts the WPA’s approach of capping liability for natural resource damage in order to improve the development of an insurance market.

- Different options: Committee considers that a directive would ensure that environmental principles and environmental law are transposed efficiently.

- Miscellaneous: Parliament calls upon all the Member States to ratify the Lugano Convention as soon as possible.
- European Professional NGOs

- European Federation of Engineering Consultancy Associations

- General comments: EFCA is the Brussels based European representative of the private engineering consultancy sector in the 15 Member States, together with Norway, Switzerland, Poland, the Czech Republic, Hungary and Slovenia. Along with its comments on the WP, EFCA has also included a copy of its earlier comments on the Green Paper. EFCA is concerned about several aspects of the proposed environmental liability regime. Firstly, EFCA is not convinced that “impact on external competitiveness of an EC liability regime is likely to be limited” since it considers that the evidence to support the competitiveness argument is limited and inconclusive. Secondly, crucial aspects of the regime have yet to be worked out, aspects which will determine the cost and effectiveness of the regime.

- No retroactivity: EFCA welcomes the Commission’s proposal that the scope of the regime should not be retroactive. However, “new” pollution should be defined not only as damage that both becomes known after the entry into force of the regime but also as damage which results from an act or omission occurred after such entry into force. The definition of “past pollution” should probably call for the preparation of an inventory of “past pollution” or of an assessment of the pollution existing at a cut-off date.

- Damage to be covered: The WP correctly states that liability is not a suitable instrument for dealing with pollution of a widespread diffuse character. However, given the prevalence of diffuse damage and the small percentage of environmental damage which can be attributed to one or more identifiable polluters, there must some doubt as to whether the cost of implementing a Europe-wide regime is justified given the likely environmental gain.

- Defences: State of the art should be allowed as a defence because it encourages the use of the highest possible available standards in the management of environmental risk. The imposition of strict liability without this defence places the operator in a position such that he may not necessarily wish to incur the additional costs of using and maintaining the highest possible standards since this would increase costs without necessarily providing protection against liability. This could lead to a position whereby the operator simply relies on his insurance rather than ensuring that the highest standards possible are adopted at the outset so as to reduce the risk of pollution. EFCA points out that this defence has a very limited application since very rarely will it be called in aid successfully and that it will provide a degree of comfort to those involved in cutting edge technologies.

- Burden of proof: EFCA firmly opposes the development of any proposal to alleviate the burden of proof concerning fault or causation. Such alleviation in favour of the plaintiff would impose on a defendant a frequently impossible burden to discharge. However, in the event of the defendant being allowed a defence of state of the art, he would then bear the burden of proof of proving certain facts to support his defence.

- Liable party/parties: EFCA agrees that those who operate the activities should be liable. However, EFCA has concerns over the definition of “operator” as set out in the WP. It is not always possible to decide who exercises control of an activity, particularly where a number of consultants, contractors and suppliers are involved in a project. EFCA suggests that the operator should be defined as the person who commissions the work (i.e. the employer) and that consultants, contractors and suppliers of the operator should not bear primary liability with the operator. If these persons provide services which lead to environmental damage then they
will be liable to the employer if they acted negligently or in breach of contract. EFCA points out that it is generally the employer’s budget which determines the extent to which consultants and contractors can invest in safety.

- Biodiversity damage: EFCA is concerned by the assumption in the WP that natural resources will often be located away from polluting industrial activities. It seems to EFCA that in many countries the opposite is often the case. In a desire to locate dangerous activities away from cities and towns, they are often located near to important ecosystems. EFCA believes that the imposition of strict liability for such damage, combined with substantial uncertainty about the criteria for identifying damage and restoration standards, will result in an increase in costs. EFCA considers that the phrase “damage to biodiversity” is confusing and potentially misleading. The Commission should indicate clearly both the definition of biodiversity and the full range of areas to which it applies so that the full implications of covering biodiversity damage in the proposed regime can be assessed. It is also of paramount importance that clarification be provided in respect of what is capable of amounting to damage to an ecosystem. EFCA suggests that EC action should cover damage to the environment in general and not be limited to protected areas (such as Natura 2000 sites).

- Contaminated sites: The highest aim of any state-enforced remediation of a contaminated site (whether land or water) should be to remove the harm which caused the site to be so designated. An obvious criticism of this approach is that the site is not necessarily returned to its original pre-damaged condition. However, to do so would be to ignore the importance of planning controls. All EU countries have systems controlling the development of land and this leads to the clean up of sites through its sale and purchase and the desire to develop these sites for economic use. EFCA is concerned that the stated objective “to make the soil fit for actual and plausible future use of the land” could be interpreted more widely than would be reasonable and so it believes that the objective of remediation should be to make the land suitable for actual use or any future use permitted by current planning controls.

- Traditional damage: EFCA is concerned to see that the WP proposes to impose strict liability for damage to persons and goods (i.e. what it calls “traditional damage”) arising out of certain designated dangerous activities. EFCA considers that this could have very wide-ranging implications and that the remediation of contaminated sites and of ecosystems can be separated from compensation for injury to persons and damage to property. The latter should be dealt with by national systems which already offer mechanisms for dealing with such liabilities. EFCA queries whether the proposed regime is intended to alter national regimes for dealing with occupational health and safety. Surely this is not intended to be the case, in which case this would lead to the bizarre result of employees being less well protected than members of the public. In addition, if strict liability is to apply to traditional damage in cases where the polluter has no further power to remove the pollution, this will lead to a regime that has far too much potential to damage business and to the development of a “claimant’s charter”. Therefore, EFCA suggests that an EC-wide environmental liability regime deal only with the remediation of contaminated sites and ecosystems.

- Access to justice: The know-how of consulting engineers should be put to use for finding out-of-court solutions and proper assessment of clean up and restoration standards.

- Economic impact: EFCA warns against premature conclusions in respect of the reported findings that “environmental liability regimes in place in Member States...have not lead to any significant competitiveness problems”. These findings may be explained by the fact
that many of these environmental liability regimes are still young and therefore have not yet been properly applied. Nonetheless, although EFCA is aware of the steep rise in costs which the regime will cause, it remains convinced that the benefit to be gained is worth the price but that given the likely effect on the EU’s external competitiveness the Commission should use all available means to control and restrict the costs of the regime for industry.

- **Fidiration des Experts Comptables Europiens**

  - General comments: FEE welcomes the WP but considers that it remains in places somewhat underdeveloped and that further explanations are needed - for example, in respect of the terms "dangerous activities", "significant harm" and "economic loss".

  - No retroactivity: FEE agrees with the proposal not to introduce retrospective legislation in respect of environmental liability but considers that further thought needs to be given to the problem of what exactly is "past pollution". Further clarification is also needed to establish who would be responsible for clean-up costs of any damage classified as "past pollution".

  - Liable party/parties: It should be made clear that any external professionals working for an organisation - such as accountants in an advisory or consultancy role - are exempt from liability.

  - Biodiversity damage: FEE notes that it is proposed to place a value on biodiversity without any indication as to how such a value should be derived.

  - Access to justice: The word "urgent" should be defined and examples of "urgent cases" included in order to prevent the potential outbreak of unwarranted and unnecessary litigation by single issue pressure groups or others.

  - Financial security: The calculation of risk-related tariffs might be a crucial point for insurance undertakings. FEE underlines the role of accountants in contributing to these measurement processes.

- **Governments**

  - **Belgian Government**

    - General comments: Belgian Government welcomes a Community initiative in this field and hopes to be able to proceed diligently on this issue during its forthcoming Presidency.

    - No retroactivity: Belgian Government agrees that the Community regime should not be retroactive. There is a need to clarify what will be the cut-off point in cases where the pollution results from an activity which started before the entry into force of the regime but continues after that entry into force. In any case, the directive should not prevent Member States from dealing under national law with cases of historic pollution.

    - Damage to be covered: Belgian Government considers that further work should be done on the definition of the damage to be covered. In any case, the Belgian Government considers that traditional damages should be covered and it has no objection in principle to introducing a threshold below which damage would not be covered. Belgian
Government sees no reason why environmental damage should be confined to biodiversity damage as defined in WP. The concept of environmental damage should be extended to cover damage to other unowned elements of the environment (such as open air, running water, etc).

- Activities to be covered: Belgium favours a scope of application which is as broad as possible. If this were not possible, Belgium would accept a scope which is limited to dangerous activities regulated at Community level. IPPC and Seveso II activities would the strictest minimum but the scope should not be limited to large facilities.

- Type and other features of liability: Belgian Government considers that liability should be strict in all cases and that retaining fault-based liability would result in a Community regime with no added value.

- Defences: Belgian Government considers that usual defences such as armed conflicts, civil war, insurrection or an exceptional, irresistible and unavoidable natural phenomenon should be provided for. State of the art and development risk cannot be accepted as defences. Although not expressly stated in these terms, the response from the Belgian Government seems to imply that complying with a permit would not be a good defence since operating a licensed activity does not discharge the operator from his general duty of care vis-a-vis third parties in general.

- Burden of proof: Belgian Government considers that establishing a causal link is directly connected with the apportionment of the burden of proof between parties. Belgian law uses the "equivalence of conditions" doctrine whereby an action is deemed to have caused the damage if it can be shown that where it not for this action the damage would not have occurred, notwithstanding the fact that others events might have contributed to the cause of damage. Belgium does not favour a complete reversal of the burden of proof but it considers that it should be enough that the plaintiff establish that it is highly probable that a certain event has caused the damage.

- Liable party/parties: Belgian Government sees no reason why non-professional activities and public authorities should be excluded provided that permitting authorities are not held liable - otherwise the issuing of permits would become impossible in practice. Shared liability would occur in cases where damage has occurred partly because of the actions of the victim or a third party. The Community regime should contain provisions (such as provisions relating to "piercing the corporate veil") which prevent risky activities being operated by undercapitalised companies.

- Environmental damage: Belgian Government sees no reason why environmental damage should be confined to biodiversity damage as defined in WP. The concept of environmental damage should be extended to cover damage to other unowned elements of the environment (such as open air, running water, etc). Belgian Government has no objection in principle to the introduction of a threshold below which damage would not be covered. It is better to leave out pollution which is not unusual given the local circumstances and usual level of nuisance. Belgium also considers that referring to the Habitats Directive does not provide useful guidance for defining when damage is "significant" and it hopes that the Commission’s studies will be of assistance in this respect. If need be, Belgium proposes that, in a first stage, specifying what is "significant" be left to national courts acting on the basis of general guidelines.

- Biodiversity damage: Belgian Government sees no reason why biodiversity
- Traditional damage: Belgian Government considers that traditional damage should be covered. It also considers that a minimal definition thereof should be provided for in the future Community regime to avoid distortions of competition. If a threshold of "significant damage" is to be introduced for damage to biodiversity, Belgium sees no reason why such a threshold should not also apply to traditional damage.

- Relation with Product Liability Directive: Belgian Government considers that consistency with existing Community legislation should be ensured. A case in point is that of GMOs for which there is a risk of overlapping with the Product Liability Directive. Since that Directive establishes a non-exclusive liability regime, Belgium considers that it should be possible to rely both on the Product Liability Directive and the future environmental liability regime before a national court.

- Ensuring effective restoration: In light of the precautionary principle, uncertainties in evaluating environmental damage do not result in the value of natural resources being overrated. Belgium also considers that the same valuation and restoration rules should apply as far as possible to all types of damage. In this respect, valuation based on "lump-sums" seems more workable – and on the whole less expensive – than other forms of monetary valuation. Belgian Government considers that the public interest in protecting the environment should prevail over the freedom of choice of the victim and that therefore it should be ensured that the money should be spent in effective restoration.

- Access to justice: Belgian Government supports to a great extent the WP option of a "two-tier" approach - provided that if action has been commenced by the public authorities any further legal proceedings by public interest groups would be barred. Belgium also notes that public interest groups perform in practice a useful subsidiary role as far as unowned elements of the environment are concerned.

- Relation with international conventions: Belgian Government considers that, insofar as this is possible, integration of the international framework (where this touches upon environmental liability) would serve the interests of both legal certainty and clarity.

- Financial security: Belgian Government is aware that financial security is a complex and sensitive issue but wishes to stress its importance. Although much depends on the insurance market in each Member State, the Community regime should contain provisions on financial security/insurance of environmental damage. Belgium stresses the fact that the success of liability regimes is to a great extent dependent upon the underlying financial provisions (cf. oil pollution liability regime). Before submitting any concrete proposal in this respect, Belgium will wait for the Commission’s insurance studies to be completed.


- Subsidiarity and proportionality: Belgian Government considers that there is a need for minimum harmonisation at Community level in order to avoid distortions of competition. The Community regime should also ensure that it would apply without prejudice to Member States’ environmental liability laws where these laws go further than the Community regime.
- Miscellaneous: Belgian Government wonders what should be done in relation to elements of the environment which are privately owned but where their ecological value is incomparably greater than their economic value. Belgian Government also suggests that there should be compensation for the costs of preventative measures which have been taken. However, this raises the question of whether the causal link has been broken between a polluter and the damage in cases where a public authority intervenes in pursuance of a duty of their own.

- Individual Companies

- Ford of Europe Inc

- General comments: Ford welcomes the Commission’s policy paper on environmental liability but is of the opinion that a fully harmonised EU legislative action in the area of environmental liability is not necessary. Prevention of damage can be achieved through Member State’s national liability regimes and by following Commission’s guidelines.

- No retroactivity: Ford supports a policy that is non-retroactive and considers that the definition of “past pollution” should support non-retroactivity by referring to the action causing the damage, rather than to the damage itself. Liability under the regime should accrue only in respect of activities occurring after the system has come into force and not in respect of activities which occurred earlier but whose effects are only discovered after the regime has come into force.

- Type and other features of liability: Strict liability does not distinguish between companies that act lawfully and those that do not operate in compliance with legal requirements. However, this system is fair if the plaintiff must prove causation and if compliance with discharge permits/authorisations and utilisation of licensed/permitted waste disposal facilities are defences. In cases where there are multiple liable parties, liability should be proportionate rather than joint and several - particularly when not all parties are known or solvent. Ford is against a joint and several liability scheme (similar to that in existence under the US Superfund legislation) because it: leads to high legal and transaction costs; provides disincentives to fair enforcement by regulatory agencies; discourages co-operation and settlement by liable parties; and unfairly penalises “deep pocket” liable parties while allowing other parties to avoid their “fair share”. The proposed liability scheme should include a cap on the total costs any liable party must pay.

- Defences: Ford recommends that the following be allowed as defences under the regime:- compliance with discharge permits and authorisations; utilisation of licensed/ permitted waste disposal facilities; and use of state of the art technology.

- Burden of proof: The burden of proof concerning causation of damage should not be alleviated where a facility was operating under a certified environmental management system (e.g. ISO 14001) or if other defences are applicable.

- Liable party/parties: Ford supports the Commission’s proposals in respect of making the operator liable. However, Ford considers that liability should not be assigned to parties such as parent or sister companies or managers who have no direct influence over the damaging activities as this would violate accepted corporate liability principles. There should be an exemption from liability for property owners who did not cause or exacerbate site contamination and for new purchasers of previously contaminated sites if a baseline environmental assessment (BEA) is performed. In respect of waste management, only the
operator of a site who is in control of the waste when damage occurred should be liable. Other parties associated with the waste should not be liable, provided they acted lawfully.

- **Biodiversity damage**: The Commission must clearly define what is meant by “significant damage” and limit the definition of this to quantifiable damage caused by one or more identifiable actors. Ford fully endorses the Commission’s proposal that function and presumed future use of damaged resources should be considered when determining restoration requirements but considers that the cost-effectiveness of restoration alternatives should also be considered. Biodiversity damage should be evaluated in the context of the ecosystem as it existed before the release which gave rise to liability occurred. Damages which are unrelated to restoration (such as loss of use or non-use) should be disallowed.

- **Contaminated sites**: The definition of “significant damage” should include clean-up standards which are risk-based and determined on a site-specific basis applying realistic exposure/land use assumptions. Clean-up objectives should be determined using similar principles and cost-effectiveness and technical limitations should be major considerations for remedy selection. Incremental costs for remediation of a contaminated site beyond the standard of its previous use (e.g. by making a former industrial site fit for use as a playground) should be borne by the party who wants to put the land to the new use or those who will benefit from it.

- **Traditional damage**: The Commission does not clarify why it should be necessary to re-define liability for damage to property and personal injury at a European level. Existing national liability laws are adequate and rooted in national legal traditions.

- **Access to justice**: Public interest groups should only be allowed to act against public authorities which fail to comply with the law – they should not allowed to sue potentially liable parties or to apply for injunctions. However, public interest groups should be allowed to participate during the decision-making process concerning remedial actions. A public interest group register should be defined at national level, and should be composed of those groups which are entitled to have access to justice in order to prevent environmental damage in urgent cases. Criteria for inclusion in the register should be based on representativeness and should be capable of judicial review (see full text of Ford’s response for examples of possible criteria).

- **Financial security**: In the absence of a financial cap, insurance schemes are unlikely to develop and Ford points to the experiences in the US, Germany and with the EC Product Liability Directive. A financial cap could be defined as an absolute value or determined on the basis of a baseline environmental assessment (BEA) performed for a site during transfer of ownership.

- **Economic impact**: An EU liability regime which incorporates Ford’s suggested recommendations could improve implementation of Community environmental law and minimise potential negative economic impacts. Several of Ford’s recommendations (including risk-based site and land specific clean-up standards and objectives) have been incorporated in the successful environmental programme implemented by the US State of Michigan with the result of promoting redevelopment of contaminated property (“brownfields”) and the creation of employment.

- **Tracetebel**

- **General comments**: The forthcoming regime should provide incentives for
operators who voluntarily adopt preventative measures. Tractebel suggests that there should be a reduction in liability for operators who can demonstrate that they adopted measures to prevent the risk of environmental damage. Where an environmental damage regime is based on strict liability, insurance needs to be available for the type of risks covered by that regime. Since a number of fundamental concepts have not been defined in the WP (in particular, the concept of "minimum threshold" and of "significant damage"), Tractebel does not consider it possible to evaluate the extent of the risks likely to be involved. Tractebel is of the opinion that the Commission needs to give further thought to the underlying concepts before it can go ahead and formulate precise proposals for an environmental liability regime.

- No retroactivity: What should be done in cases where the activity which caused the damage occurred prior to the entry into force of the regime but the damage only becomes apparent after its entry into force? In cases of gradual or on-going pollution who will determine the extent of the pollution which occurred prior to the entry into force of the regime?

- Damage to be covered: The proposals in the WP to limit the scope of the regime to dangerous activities which are regulated by existing EC environmental law and to limit the definition of biodiversity damage by reference to the Habitats and Wild Birds Directives should be formally adopted by the Council and the European Parliament.

- Activities to be covered: The proposals in the WP to limit the scope of the regime to dangerous activities which are regulated by existing EC environmental law and to limit the definition of biodiversity damage by reference to the Habitats and Wild Birds Directives should be formally adopted by the Council and the European Parliament.

- Type and other features of liability: In cases where damage has been caused by more than one party, is liability to be joint and several? Tractebel is of the opinion that liability in such cases should be apportioned proportionately between all the relevant parties. Tractebel considers that liability under the proposed regime should be capped and that this is particularly important in order to ensure the insurability of the proposed regime.

- Defences: Operators should be allowed to avail themselves of the defences of "state of the art" and of compliance with a permit or environmental laws.

- Burden of proof: Any move in the direction of a reversal of the burden of proof, such as the proposal in the WP to "alleviate" the burden of proof, should be avoided. In particular, this would be contrary to the desire to provide operators with incentives to operate in a more environmentally responsible manner.

- Liable party/parties: Will an operator be liable for the actions of his sub-contractors or his agents? Will an operator who takes control of an activity be liable for damage caused by the acts of the preceding operator? Clarification is need on whether owners and occupiers might also be held liable under the regime. For example, where the owner or occupier of contaminated site is not responsible for the contamination, could he still be held liable for remediation of that site if the person who caused the contamination cannot be pursued for whatever reason? In cases where damage has been caused by more than one party, is liability to be joint and several? Tractebel is of the opinion that liability in such cases should be apportioned proportionately between all the relevant parties.

- Environmental damage: WP does not specify the measures which an operator would have to take in order to carry out remediation or restoration of environmental
damage. Tractebel suggests that "action plans" should be established identifying who will be responsible for its implementation and identifying how the plan should be implemented and agreed upon. There should also be mechanisms for ensuring that the relevant persons have complied with their obligations under the action plan.

- Biodiversity damage: WP proposes that restoration of biodiversity damage should aim at the return of the natural resource to the state it was in prior to the occurrence of the damage. Therefore, the Commission should explain how the prior state of the relevant natural resource should be established.

- Traditional damage: Since all the Member States already have regimes dealing with traditional damage, Tractebel does not understand how the rules in the WP would apply to traditional damage in cases where this results from a dangerous activity rather than from some other cause.

- Relation with international conventions: Any overlap between the proposed environmental liability regime and the existing international and national regimes on liability for nuclear energy should be avoided.

- Financial security: In a strict liability regime, insurance may be the only viable way in which operators can bear certain environmental risks. In the absence of adequate insurance cover, as is currently the case, a strict liability regime would render operators economically vulnerable because they would not be able to take the necessary measures to deal with unforeseen environmental damage. Therefore, the Commission's proposals should ensure that the risks covered by the regime are capable of being insured. With regard to the evaluation of biodiversity damage, insurers need to be able to quantify the risks involved in order to be able to set appropriate premiums. The question of insurability becomes all the more relevant where no maximum ceiling for liability is proposed. Tractebel considers that liability under the proposed regime should be capped.

- Economic impact: In the absence of adequate insurance cover, as is currently the case, a strict liability regime would render operators economically vulnerable because they would not be able to take the necessary measures to deal with unforeseen environmental damage.

- International Environmental NGOs

- Greenpeace International

- General comments: Greenpeace welcomes the WP and considers a liability regime to be an essential component of EC environmental policy since it gives concrete application to the polluter pays principle and can be a useful tool both to prevent and to restore environmental damage.

- No retroactivity: Greenpeace favours the adoption of a retroactive regime for the following reasons. (1) The clean up of past pollution affecting contaminated sites and areas including the Natura 2000 network should not be left for subsequent generations to address. (2) The objectives underlying clean up – that is, of removing any threat to man and the environment and making soil suitable for actual and plausible future use - cannot be achieved if the obligation is only to remediate damage caused after the entry into force of the regime. (3) It would be difficult to distinguish between past and present pollution. (4) Given the specific risks
involved in the use of GMOs, retroactivity is particularly necessary. (5) The concept of retroactively applicable law is not an unknown concept in the laws of the various Member States, and in so far as the proposed regime is intended to harmonise at European level and interpret provisions already in existence in national legislation or deductible from general legal principles, it would be justifiable for an EC liability regime to be retroactive.

- Damage to be covered: Greenpeace considers the limitation of liability for biodiversity damage to the Natura 2000 network to be too narrow. This network covers only 10% of the EU territory and many areas outside of the network are of vital importance in terms of EU natural resources. In addition, this would mean making the effectiveness of a liability regime dependant on a Member State’s diligence in implementing EU legislation regulating the designation of Natura 2000 sites.

- Activities to be covered: Greenpeace believes that any activity which carries a risk to the environment should be covered by the proposed regime and that the decision as to whether an activity carries such a risk should be left to the national courts. Greenpeace does not agree that it is necessary to link strict liability for dangerous activities to activities which are regulated by EC environmental law. This would mean that hazardous activities which are not yet covered at the EC level will be left uncovered and might not apply to legislation which has been adopted on a basis other than the environmental policy articles in the Treaty, such as the GMO Directive which has as its basis article 95/internal market. Although Greenpeace prefers the approach set out above, it considers that the setting up of an open list of activities which is reviewed periodically at the request of Member States or Community institutions would be preferable to the proposal set out in the WP. Greenpeace does not understand why the regime should not cover damage in the form of contamination of sites where this is caused by non-hazardous activities.

- Type and other features of liability: Greenpeace favours the extension of strict liability to non-hazardous activities since these activities are allowed to take place in the Natura 2000 sites, environmental damage in those sites is extremely undesirable and the person responsible should be required to redress any damage caused regardless of the nature of the activity in question. The regime should cover not only the costs of restoring the damage which has been caused but also the costs of investigation, expert assessment, preventative measures and other related expenses.

- Defences: In a strict liability regime only a few defences should be permitted, such as contribution to the damage by the plaintiff and third party intervention. If “Act of God” is to be permitted as a defence it should be interpreted narrowly so as to apply only to extraordinary events which break the causal link between the activity carried out by the defendant and the damage and it should not apply just because the damage was unforeseeable or where the damage could have been avoided if due care and diligence had been applied. Other defences, such as compliance with a permit, state of the art and development risk, must not be permitted under the proposed regime. State of the art and development risk are in contradiction with the precautionary principle and would exclude the application of the regime to damage caused by, for example, GMOs and chemicals.

- Burden of proof: Given the difficulty for a plaintiff to establish a causal link between a polluter’s activity and damage which is suffered and given the fact that in the case of environmental damage the plaintiff is often not the victim but rather a group of individuals acting for the protection of a common good, Greenpeace considers that reversal of the burden of proof is both legally acceptable and desirable. Greenpeace favours a presumption
that the defendant’s activity caused the damage in cases where the substances or activities undertaken by the defendant are in principle capable of resulting in the type of damage which has occurred.

- Liable party/parties: The proposed regime should include imposition of liability on public authorities where these cause the damage, where they authorise the damaging activity and where they do not adequately monitor the damaging activity.

- Environmental damage: Concept of “significant damage” has to be defined. In addition, Greenpeace considers that a cost-benefit assessment should not be used as a threshold for triggering the regime. Cost-benefit analysis should only be used in order to choose between restoration and compensation. Linking liability to a cost-benefit assessment would risk excluding restoration of large-scale environmental damage, such as that caused by the Erika oil tanker.

- Biodiversity damage: Restoration of damage to biodiversity should be ensured irrespective of the geographical area where it occurs, of proving fault on the part of the person who caused the damage and of whether the damaging activity is regulated or not.

- Contaminated sites: Greenpeace does not understand why the regime should not cover damage in the form of contamination of sites where this is caused by non-hazardous activities. Greenpeace does not agree with the suggestion in the WP that where clean up of soil contamination is not feasible, full or partial containment of the contamination might be a possibility. Greenpeace considers that this contradicts the objective of ensuring that the soil is made fit for actual and plausible future use.

- Relation with Product Liability Directive: Greenpeace finds it regrettable that liability provisions were not included in the GMO Directive and considers it unacceptable that under the Product Liability Directive development risk and compliance with a permit are capable of amounting to defences.

- Ensuring effective restoration: Greenpeace considers that a cost-benefit assessment should not be used as a threshold for triggering the regime. Cost-benefit analysis should only be used in order to choose between restoration and compensation. Linking liability to a cost-benefit assessment would risk excluding restoration of large-scale environmental damage, such as that caused by the Erika oil tanker. Greenpeace does not agree with the suggestion in the WP that where clean up of soil contamination is not feasible, full or partial containment of the contamination might be a possibility. Greenpeace considers that this contradicts the objective of ensuring that the soil is made fit for actual and plausible future use.

- Access to justice: Greenpeace believes that allowing environmental organisations to take direct legal action is absolutely crucial and that requiring them to wait for the inaction or improper action of public authorities and then requiring them to have to prove that in court will only result in waste of time and money for such organisations and in the postponement of restoration of environmental damage. Greenpeace considers that the Aarhus Convention gives any person and environmental NGO the right to sue individuals or public authorities for violating environmental laws and obliges Member States to abandon narrow restrictions on access to justice.

- Financial security: Greenpeace calls for insurance to be made compulsory for all dangerous activities under the proposed regime. Greenpeace points out that the larger the
damage is likely to be the more reason there is to require compulsory insurance.

- Different options: Greenpeace supports the idea of a framework Directive and considers it necessary that the Commission go ahead with a legislative proposal as soon as possible.

- World Wildlife Fund and BirdLife International

- General comments: This joint response focuses on damage to biodiversity and does not specifically address the proposed regimes for traditional damage and contaminated sites. In comparison with the Green Paper, the WP shows very little progress in the selection of concrete policy directions and leaves too many crucial issues undecided. WWF and Birdlife International consider that the liability regime as proposed in the WP is too weak and they highlight the following elements as weaknesses in the proposals: exclusion of past damage; a damage threshold which is too high; non-strict liability for certain types of damage; liability only for protected areas despite the approach in the Birds and Habitats Directives and the EC biodiversity strategy to conserve all species and habitats. WWF and Birdlife International also consider that it is clear that a great deal of lobbying has gone on during the preparation of the WP and that the drafting process has been neither open nor transparent. They take the view that NGOs have been severely disadvantaged in contributing to this debate.

- No retroactivity: WWF and Birdlife International consider the exclusion of past damage from the scope of the proposed regime to be a weakness.

- Damage to be covered: WWF and Birdlife International wish to stress that liability for biodiversity damage should form an integral part of a single Community liability instrument and should be included from the outset.

- Type and other features of liability: Covering non-dangerous activities on the basis of fault-based liability weakens the liability regime significantly. These activities should be covered on the basis of strict liability. Clear limitation periods should be established. A long-stop limitation period of substantially more than 30 years should be included. Whichever limitation period is proposed, it should stop running in the event of pre-litigation negotiations and when government regulators are considering whether or not to intervene.

- Defences: The defence of force majeure should only be applied in strictly limited situations - that is, where human intervention or the absence of it has had absolutely no role to play. State of the art should not be permitted as a defence since it would undermine the application of the precautionary principle by effectively turning the strict liability regime into a fault-based regime.

- Burden of proof: A substantial modification of the rules on causation is a crucial part of an effective liability regime. There should be a reversal of the burden of proof after an initial indication of a causal link. Alternatively, the causal link should be required to be shown by means of a predominant probability of harm test.

- Liable party/parties: Not including mitigated joint and several liability will significantly increase the burden on the plaintiff and reduce chances of compensation being obtained.

- Environmental damage: The concept of “significant damage” is introduced
for damage to biodiversity and for contaminated sites but not for the traditional damage. Although the concept of “significant damage” is not defined, it suggests a relatively high threshold. A lower cut-off point may be desirable. One option would be to require compensation for all damage which is not de minimis or negligible. Another would be to have a financial threshold as is the case in the Product Liability Directive. The term “significant damage” should be replaced by “damage threshold” or by “not minimal or negligible”, thus avoiding the setting of an unduly high threshold for the application of the regime. A number of systems could be set up in order to assess in a transparent way whether the damage threshold is crossed: guidelines specifying what would constitute damage for each species, admissibility criteria set for courts (with the question left for them), specialised chambers or judges, committees comprised of regulators, NGO representatives, academics and/or industry. The Commission should urgently propose clear and transparent guidelines for determining whether the damage threshold is crossed in a specific case. The Directive should include the establishment of appropriate structures to apply these guidelines.

- Biodiversity damage: The limitation of the scope of the regime to Natura 2000 areas is insufficient. It is arbitrary and incompatible with the scope of the EC Habitats and Birds Directives, which provide also for the conservation of habitats and species outside that network. The liability regime should, as an absolute minimum, apply to damage caused to habitats and species, inside or outside the Natura 2000 sites, whenever they are protected under EC law or under any of the Conventions ratified by the EC.

- Contaminated sites: The proposed threshold of “serious threat to man and environment” is too high to deter damage to either humans or environment. In addition, damage which serious only to the environment might not be considered always as serious damage to man.

- Traditional damage: The concept of “significant damage” is not foreseen for traditional damage.

- Ensuring effective restoration: The issue of valuation and restoration of environmental damage is not sufficiently addressed in the WP. Concrete consultations on valuation criteria should begin as soon as possible, possibly as part of the consultation on the WP. Postponing such discussion will only delay the adoption of a Community liability regime. The WP dismisses too quickly the fact that there is some experience at the national level which could provide a basis for consultation. Some national attempts to address issues of valuation of compensation for damage to the environment have matured into legislation. Methodologies can be based on an case-by-case approach or on a generic list, “conversion” table or calculation. Please refer to the full text of the response for comments on US valuation methodology and to the annex to the full text of the response for comments on the regional system for the valuation of the environmental value of biotopes and use types put into place in Hessen, Germany. The amount of compensation to be paid should not be limited on the basis of a cost-benefit or reasonableness test. Full compensation of the damage caused should be the norm.

- Access to justice: The environmental liability instrument should contain clear harmonised rules on standing for public interest groups. These rules should give standing to all public interest organisations which are able to show they have a genuine interest in the particular subject matter. Facilitating the active involvement of public interest groups is vital for a credible environmental liability regime. The “two-tier approach” is a serious impediment to access to justice for interest groups. It would unnecessarily delay action and jeopardise the opportunity to obtain compensation. Public interest groups should be allowed to take direct
action against polluters. Please refer to full text of the response for comments on the Aarhus Convention.

- Financial security: The omission of compulsory insurance threatens to make the environmental liability regime a hollow instrument. Compulsory insurance is a key component. In addition, liability funds may need to be set up. The development of a system for the valuation of ecological damage will provide the necessary certainty.

- Different options: WWF and Birdlife International welcome the choice of having the environmental liability regime encapsulated in a single framework Directive and wish to stress that liability for biodiversity damage should form an integral part of a single Community liability instrument and should be included from the outset.

- International Industrial NGOs; sectorwise
  - International Association of Oil and Gas Producers

- General comments: OGP expresses full support for the comments made by UNICE, CEFIC and EUROPIA.

- Burden of proof: Care must be taken to ensure that any alleviation of the burden of proof does not encourage unlawful or tactical actions on the part of public interest groups.

- Biodiversity damage: Exploration and production sites that happen to be in or adjacent to protected areas would be placed at a cost disadvantage by the need to take on additional insurance to cover cases of accidents resulting in damage to biodiversity. It is not clear whether industry responsible for constructing or operating installations (including pipelines) which are situated in protected areas would be relieved from strict liability. The fact that the Natura 2000 network is not yet complete leads to great legal uncertainty. Therefore, OGP strongly recommends that existing production sites and those sites which are already committed and commenced before completion of the Natura 2000 network be excluded from the scope of an environmental liability regime.

- Traditional damage: OGP cautions against merging a harmonised EU environmental liability regime with national regimes for traditional damage. This could compromise the integrity of well-established national traditional damage regimes, thereby causing confusion. OGP is of the view that the introduction of the proposed liability regime would be hampered by the inclusion of traditional damage. In any event, a polluter should not have to pay twice for the same damage - once to satisfy the owner and a second time to restore the environmental damage.

- Ensuring effective restoration: The WP leaves open the question of who would manage compensation paid for environmental damage and who would oversee restoration work. This requires careful consideration since in some jurisdictions political interference and bureaucracy have led to inefficiency and misuse of environmental funds.

- Access to justice: Any extended access to justice for public interest groups should exclude the possibility of abuse. Oil and gas production sites (in particular offshore facilities) frequently fall victim to unlawful occupation by environmental activists seeking to stop legitimate oil and gas field activities. The proposals giving public interest groups that right
to take preventative measures and claim reimbursement for those costs should also exclude the possibility of abuse. Public interest groups should only be allowed to take preventive action if authorised by competent authorities.

- Financial security: OGP agrees that insurability is a vital prerequisite for the introduction of an environmental liability regime and considers that the concept of “significant damage” needs to be further defined and that caps might have to be set. The absence of data on probability and quantification might make the development of competitive insurance markets and the setting of premiums difficult.

- Economic impact: OGP emphasises the importance of creating a regime which enables insurance companies to provide competitive premiums. Increased access to justice should not lead to companies being burdened with undue legal costs. Moreover, capital transaction costs (e.g. the costs involved in commissioning baseline studies to establish existing damage) should also be taken into account in the evaluation of the economic impact. The production of petroleum and natural gas in Europe depends on the possibility to produce cost-effectively.

- International Organisations

- European Free Trade Association

- General comments: The EEA EFTA States welcome the WP and express their support for the main structure of a future EU environmental liability regime as set out in the WP. However, they consider that it would be even better if an EU liability regime were to impose strict liability in respect of all polluting activities, rather than being limited to certain activities comprising an inherent danger and if the regime were to include all environmental damage regardless of the source.

- Damage to be covered: The EEA EFTA States consider that an even better proposal than that set out in the WP would be the inclusion of all environmental damage regardless of the source. Liability for biodiversity damage should not be limited to Natura 2000 areas or to species covered by the Wild Birds Directive. And in addition, the concept of “environmental damage” should include damage to cultural heritage and to cultural landscape.

- Activities to be covered: The EEA EFTA States consider that an even better proposal than that set out in the WP would be the inclusion of all environmental damage regardless of the source. They accept that there are reasons for differential treatment between hazardous and non-hazardous activities but consider that the difference in treatment should be reflected in the question of mandatory insurance rather than in different standards of liability.

- Type and other features of liability: The EEA EFTA States consider that an even better proposal than that set out in the WP would be the inclusion of all environmental damage regardless of the source. They accept that there are reasons for differential treatment between hazardous and non-hazardous activities but consider that the difference in treatment should be reflected in the question of mandatory insurance rather than in different standards of liability.

- Environmental damage: Concept of “environmental damage” should include damage to cultural heritage and to cultural landscape.
- Biodiversity damage: Liability for biodiversity damage should not be limited to Natura 2000 areas or to species covered by the Wild Birds Directive. The EEA EFTA States intend to follow closely the development of suitable valuation methods for biodiversity damage since they find it hard to accept that damage which is evident to everyone is not compensated due to insufficient valuation methods.

- Access to justice: The WP proposals in respect of access to justice for public interest groups need to be considered very closely in light of the Aarhus Convention. One might consider that the environment will be better protected if relevant public interest groups are given direct access to justice, rather than just being entitled to act on a subsidiary basis. Compensation received from liable parties would be used for restoration or for alternative solutions aimed at the establishment of equivalent natural resources where restoration is not possible.

- Relation with international conventions: The proposed EU regime should not interfere unnecessarily with international conventions and protocols dealing with environmental liability which are well established and function effectively. This includes the 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage and the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

- Financial security: The EEA EFTA States accept that it is reasonable at the present time not to make financial security mandatory and they welcome any initiative which could stimulate the further development of specific financial guarantee instruments.

- Different options: The EEA EFTA States consider that accession to the Lugano Convention still merits consideration as an option.

- Law Firms

- Hunton & Williams

- General comments: Hunton & Williams consider that liability is neither sufficient nor necessary for pursuing the objectives of restoring environmental damage and boosting implementation of EC environmental legislation. Liability could promote compliance with environmental regulations only if it were used as a sanction for damage caused by non-compliance. EC should dictate only the ends and leave the Member States free to choose the means which may or (more likely) may not, involve additional liability rules. The proposed regime is driven by the desire to expand the scope of the EC’s jurisdiction.

- No retroactivity: The identification of the act or omission that caused the damage could be critical. The EC should deal with these borderline issues in order to enable an efficient application of the principle of non-retroactivity.

- Damage to be covered: “Self pollution” (i.e. damage caused by a polluter to his own property) should not entail liability. To the extent that cross-border harm is a significant issue in the EC, it would justify only an EC liability regime for cross-border environmental harm.

- Activities to be covered: If the objective of the regime is to cover only activities which present a relatively high risk of environmental damage, the extremely broad
indication given in the WP – which covers almost all industrial and commercial activities – would not appear appropriate. Its scope could be narrowed down by taking into account the German Umwelthaftungsgesetz’s “positive list” approach. It is not clear whether the regime will apply only to the damage caused by an inherently dangerous act or omission or also to damage caused by any aspect (including non-dangerous aspects) of a dangerous activity.

- **Type and other features of liability**: From a deterrence-efficiency point of view, there is no difference between strict and fault liability. Difficulties for a plaintiff in establishing the defendant’s fault do not justify strict liability. Strict liability should not be imposed for unknown, unforeseeable or insignificant risk.

- **Defences**: Compliance with regulations and permits and state of the art should be admitted as defences.

- **Burden of proof**: National courts can well address any injustice that may result from the plaintiff bearing the burden of proof. A court may shift the burden of proof to the defendant, once the plaintiff has produced certain prima facie evidence of fault and causation. A rebuttable presumption in favour of the plaintiff would create an injustice for the defendant. For reasons of subsidiarity, no EC regime on this topic is justified.

- **Liable party/parties**: A clear, unambiguous definition of “operator” is crucial. The operator of an activity should be identified as the holder of the permit to operate the relevant activity. In addition, the operator should be held liable only if he causes the damage. Therefore, if the operator is not the polluter he should not be held liable. In most Member States directors and officers of corporations can be held liable for environmental damage. It is not clear whether they would be protected under the proposed new regime, which contemplates that liability would rest on the company and not on the single persons involved in the activity. Joint and several liability leads to “over-deterrence” and produces unfair results in cases where one or more polluters are insolvent or unavailable. There could be very high administrative costs due to cross-claims. On insurance grounds, proportional liability should have a strong preference, except when polluters acted in a concerted manner. In a fault-based regime, there should not be the problem of identifying who is liable.

- **Biodiversity damage**: Contingent valuation methodology (CVM) surveys measure generalised attitudes and feelings about the environment – they are not a method of economic valuation. This system does not improve damage assessment but merely generates enormous litigation, transaction costs and legal uncertainty. The valuation of natural resources should not be undertaken by the tort system, nor by the government on a case-by-case basis, but it should be based on an administrative system of scheduled assessment (similar to the UK system for assessing pain and injury, based on a “tariff” approach).

- **Contaminated sites**: The EC’s proposal for dealing with contaminated sites is not justified on subsidiarity grounds since contaminated sites rarely have a cross-border effect. The “serious threat to man and environment” criterion is not sufficient - quantitative, numerical criteria should be developed and these should be differentiated on a substance-by-substance and area-by-area basis.

- **Traditional damage**: The regime should not cover damage caused by the polluter to his own property.

- **Access to justice**: The Commission’s proposal is inconsistent with the
access to justice regime set forth in the 1998 Convention which grants any person “having a sufficient interest” a right to judicial review and which does not give public interest groups any preferential treatment. No money should be paid to public interest groups and they should not be in charge of spending money on society’s behalf. The public should only have the right to force the government to seek compensation.

- Relation with international conventions: The proposals in respect of access to justice are inconsistent with the ?rhus Convention.

- Financial security: Liability in excess of fault liability serves primarily an insurance objective. First party insurance is better suited to control the risks associated with any insurance scheme. The current trend is a move away from liability insurance and towards direct first party insurance. On insurance grounds, proportional liability should have a strong preference, except when polluters have acted in a concerted manner.

- Different options: It would be better for the EC to dictate the restoration of certain damaged natural resources and leave the Member States free to choose the means, which may or may not involve additional liability rules.

- Subsidiarity and proportionality: The proposed regime violates the principle of subsidiarity. Liability is neither sufficient nor necessary for pursuing the objectives of restoring environmental damage and boosting implementation of EC environmental legislation. The EC’s proposal for dealing with contaminated sites is not justified on subsidiarity grounds since contaminated sites rarely have a cross-border effect. National courts can well address any injustice that may result from the plaintiff bearing the burden of proof. Therefore, for reasons of subsidiarity, no EC proposal in respect of the burden of proof is justified.

- Economic impact: As the Directive would be based on Article 175 of the Treaty and, hence, Member States would be authorised to go beyond the Directive’s scope and broaden it, competitiveness considerations cannot justify EC intervention. Any competition distortions that may exist are likely to continue to exist despite the proposed regime.

- Law Groups and Associations

- European Environmental Law Group

- General comments: A number of issues would need further clarification or detail but it may well not be appropriate for all of these to be addressed in the proposed directive itself. The differences in the existing legal systems in the different Member States are such that careful thought will be needed to ensure that the proposed directive achieves the stated objectives in the WP, without being over-prescriptive.

- No retroactivity: The definition of “past pollution” already exists in the legislation of some Member States (e.g. Sweden). Any definition of this concept should make it clear upon whom the burden of proof lies, to prove whether any given pollution is or is not “past pollution”. It should also address the situation where contamination or emissions have been contributed to (whether by the same or different polluters) both before and after the key date. Meaning of “omission” – given that liability is meant to be strict for “dangerous activities”, is it relevant whether, for e.g., the landowner knew that the contamination was there and/or was in some way at fault for having not removed it.
- Activities to be covered: One category of legislation mentioned in the WP is “legislation which contains discharge or emission limits for hazardous substances into water or air”. It is unclear whether this category would include legislation that provides for the imposition of restrictions on emissions of discharges but does not itself contain discharge or emission limits. However, care would need to be taken to make clear which activities are “dangerous activities”. For example, the Groundwater Directive could be said to apply only to an activity which might result in a discharge of the specified substances to groundwater, which could leave operators of many activities unsure as to whether their activity is in fact a “dangerous activity”. Most EC environmental legislation covers only certain aspects of an activity to which it applies. It is unclear whether all aspects of a “dangerous activity” would be subject to the regime, even if only certain aspects are regulated by EC environmental legislation. For example, in the case of a construction site which discharges substances into water, would the environmental or health effects from dust from the site be subject to the environmental liability regime?

- Burden of proof: The WP does not distinguish between the principles applicable to an action by an individual who has suffered loss and those applicable to an enforcement action by a competent authority. Member States currently apply different principles in these different cases. It is important that the proposals in the WP do not apply in unexpected ways to the two different kinds of action. Please refer to the full text of the Group’s comments for examples.

- Liable party/parties: With regard to the question of joint and several liability, would the practical application be left to the Member States in transposition, or to the discretion of the Member State’s competent authorities? Other EC legislation refers to the operator of an “installation” and not of an activity. It might be possible to allow parties to stipulate contractually which of them is to be treated as the operator of the activity in question.

- Contaminated sites: The WP sets out qualitative objectives and adds that these should be combined with quantified numerical standards indicating the soil and water quality to be achieved. The competent authorities should be able to determine these quantified numerical standards in the context of the local situation (climate, risk to groundwater, hydrogeology, geology, etc). If so, the Directive should be very clear on this point.

- Traditional damage: It will be a difficult exercise to harmonise existing national legislation with the environmental liability regime proposed in the WP. Any Directive would need to strike a delicate balance between recognising these difficulties (and allowing the necessary discretion to Member States to deal with the difficulties) and securing the Community-wide harmonisation at which the WP aims.

- Access to justice: There is a potential for real divergence between Member States in implementing the “two tier approach”, both in the mechanism provided for NGOs to exercise rights of access to justice and in the “standard of proof” which they have to satisfy. The trigger for subsidiary action by an NGO would need to be clear, and any Directive might well need more detail than that currently provided in the WP. The harmonising purpose of the WP would be weakened if different Member States were to employ different rules in respect of urgent injunction cases. It must be clear whether the court should, or should be entitled to, require an NGO to provide security for losses suffered by the alleged polluter, if the NGO’s case proves to be unfounded but the alleged polluter has suffered loss as a result of the urgent injunction.
- Miscellaneous: The question of who has access to what information is likely to be crucial. It is unclear if any provisions in this respect are contemplated.

- **National Industrial NGOs;** general

  - Fidiration des Entreprises de Belgique

    - General comments: FEB entertains the great doubts in respect of the proposals set out in the WP. FEB fears that these will lead to the creation of legal and economic uncertainties for businesses because of their lack of clarity and that the vagueness of the regime will make it difficult to implement and will also make it practically uninsurable. FEB considers that the Commission should revise its proposals in relation to scope, access to justice and defences.

    - No retroactivity: FEB supports no retroactivity.

    - Activities to be covered: FEB considers it necessary for dangerous activities to be defined more precisely. It suggests following an effects-based approach rather than a substance-based approach (e.g. concentrated milk might pollute a river). It also considers that biotechnology cannot be classified among dangerous activities without further precision.

    - Defences: FEB supports the inclusion of development risk and state of the art as permitted defences.

    - Burden of proof: FEB is opposed to a reversal of the burden of proof or an alleviation of the burden of proof which would have the same effect as a reversal. FEB insists that, in the context of a strict liability regime, businesses need to be able to defend themselves against unfounded claims.

    - Liable party/parties: FEB points out that the fact that only the person having operational control of the activity can be held liable implies proportionate liability since each operator would be held liable only for the part of the damage which was caused by his activity.

    - Biodiversity damage: FEB is surprised that the Commission is proposing to cover biodiversity damage given the impossibility of evaluating the impact of this proposal and evaluating whether such damage is insurable. FEB therefore asks for a more precise definition of significant biodiversity damage, of the areas to be covered and of the measures to prevent disproportionate and ruinously expensive claims.

    - Contaminated sites: FEB points out that several Member States already have legislation on this subject and that harmonising clean up standards would be contrary to the subsidiarity principle. It therefore considers that contaminated sites should not be covered by the EC regime.

    - Traditional damage: FEB points out that all Member States already have legislation on this subject, without these different laws leading to serious distortions of competition. It therefore considers that traditional damage should not be covered by the EC regime.
- Access to justice: FEB considers that utmost caution is needed in relation to granting access to justice to public interest groups. Should the proposals in the WP be retained, FEB recommends that public interest groups only be authorised to apply for injunctions in order to stop a damaging activity or impose preventive measures where there is a serious threat of breach of environmental legislation - no locus standi should be given to sue businesses for damages. In addition to this, specific criteria enabling the identification of which public interest groups would be given a right of action should be set out in order to prevent frivolous actions being brought.

- Financial security: FEB considers that insurability is a crucial prerequisite to a liability regime. FEB points out that insurability is conditioned by the certainty and transparency of the liability regime concerned, qualities which are currently lacking in the proposed regime. FEB considers therefore that it will be very difficult, if not impossible, to find adequate insurance coverage. This difficulty will be even more acute given the absence in the WP of proposed measures to limit the liability of businesses under the future regime.

- Subsidiarity and proportionality: FEB points out that several Member States already have legislation on this subject and that harmonising clean up standards would be contrary to the subsidiarity principle. It therefore considers that contaminated sites should not be covered by the EC regime.

- Economic impact: FEB stresses that a liability regime which is not well thought out might have a potential adverse economic impact on business.

- Miscellaneous: FEB recommends that the future EC regime contain incentives to induce businesses to voluntarily adopt preventive measures.

- National Industrial NGOs; sectorwise

- Belgian Risk Management Association

- General comments: BELRIM is an association of persons responsible for the management of risk and insurance within most of the larger Belgian companies. Although BELRIM welcomes the statement in the WP that a liability regime should be capable of being insured, in light of the association’s experience with the environmental insurance market, it fears that in practice many companies will find it either difficult or impossible to insure themselves (at reasonable premiums and subject to reasonable conditions) against the type of risks proposed to be covered by the liability regime.

- Financial security: BELRIM has provided a list of the type of elements in current insurance products which make it difficult to obtain cover for activities likely to pollute or damage the environment, amongst which the following:- the limited nature of the types of pollution which is insurable; the requirement to designate specific sites to be covered by the policy; the potential exclusion of high-risk areas within a covered site (e.g. underground storage tanks); the automatic exclusion of certain pollutants (e.g. asbestos); the exclusion of pre-existing pollution, of pollution resulting from operator’s serious fault, of professional negligence and of recurring acts; the exclusion of risks associated with the transportation of pollutants; and the exclusion in some cases of damage to ecosystems. Decisions by insurers on whether to grant insurance cover are made on a case-by-case basis based on very detailed questionnaires which have to be filled out by operators. The detail of these questionnaires is such that many companies simply give up on attempting to obtain insurance. In addition, these questionnaires
allow insurers to exclude those risks which they consider most likely to result in pollution or damage.

- **Fidiration des Industries Chimiques de Belgique**

  - **General comments**: Fedichem is concerned that the Commission’s proposals could result in considerable legal and economic uncertainty for businesses. Due to the numerous uncertainties in the proposals set out in the WP, Fedichem considers that the Commission should reconsider its proposals in respect of the scope of the regime, defences and access to justice.

  - **Damage to be covered**: The scope of the proposed regime should be limited to liability for biodiversity damage. Contaminated sites should not be included in the proposed regime since this would not be the most effective way of dealing with this problem and it would be contrary to the principle of subsidiarity. Seeing as compensation for traditional damage is already adequately covered by national rules and that this does not result in distortion of competition, Fedichem considers that traditional damage should not be included in the proposed regime.

  - **Activities to be covered**: Commission needs to clearly define “dangerous and potentially dangerous activities”. Fedichem stresses that the concept of “dangerous activities” should be based on the effects of such activities on biodiversity instead of being substance-based. Activities which are regulated by legislation on biotechnology should not simply be classified as dangerous.

  - **Type and other features of liability**: The scope of the proposed regime should be limited to liability for biodiversity damage. However, many of the elements of biodiversity damage still need to be developed before this can take place.

  - **Defences**: Compliance with national laws and permits is a defence in certain Member States. It would be unreasonable for this not to be allowed as defence under the proposed regime. State of the art and development risk are also permitted as defences in certain Member States, particularly in the domain of product liability. These defences are essential in order to ensure innovation. It is unrealistic to require an operator to foresee risks which are currently unknown.

  - **Burden of proof**: Fedichem is opposed to a reversal of the burden of proof and points out that in a strict liability regime, proof of causation is essential in order to enable operators to defend themselves against unfounded claims.

  - **Liable party/parties**: Fedichem welcomes the proposition that liability rests with the person in control of an activity. This concept implies that liability is proportionate – so that if damage is caused by several activities or several operators then each operator would be liable only for that part of the damage which he has caused.

  - **Biodiversity damage**: Commission should limit the scope of the proposed regime to liability for biodiversity damage. However, the concept of “biodiversity damage” is still far from clear and Fedichem calls on the Commission to define “significant damage”, to propose measures aimed at preventing disproportionate and ruinous claims from being brought and to clarify the criteria which is to be applied to the identification of protected areas and to the quantification of damages.
- Contaminated sites: Contaminated sites should not be included in the proposed regime since this would not be the most effective way of dealing with this problem and it would be contrary to the principle of subsidiarity. The main objective in terms of contaminated sites is the removal of all serious risk to humans and the environment and the eventual clean up of the site. Fedichem considers that national laws and programmes are better placed to deal with local circumstances (e.g. geology, climate, future use of the site, etc) and to ensure that a case-by-case approach is followed.

- Traditional damage: Since compensation for traditional damage is already adequately covered by national rules and that this does not result in distortion of competition, Fedichem considers that traditional damage should not be included in the proposed regime. Not only would this entail the monumental task of re-writing well-established national rules in this domain but the harmonisation of such rules would probably fall outside of the Community’s competence in respect of environmental matters.

- Access to justice: Fedichem considers that the right to bring an action in respect of environmental damage should rest with the State, which is the guardian of the public interest. Therefore, access to justice for public interest groups should be limited to the right to judicially review public authorities’ decisions where these are contrary to environmental legislation. The grant of the right to bring actions directly against an operator would expose businesses to a stream of vexatious claims and would have a detrimental impact on investment in the EU. The Aarhus Convention does not provide that public interest groups be given a right to bring direct actions against operators.

- Financial security: Although Fedichem welcomes the Commission’s recognition of the importance of insurability of a liability regime, any such insurability is dependant on legal certainty and transparency – elements which are absent from the current proposals. In light of this, it would be very difficult, if not impossible, to obtain adequate insurance.

- Subsidiarity and proportionality: Contaminated sites should not be included in the proposed regime since this would not be the most effective way of dealing with this problem and it would be contrary to the principle of subsidiarity. Since compensation for traditional damage is already adequately covered by national rules and that this does not result in distortion of competition, Fedichem considers that traditional damage should not be included in the proposed regime.

- Economic impact: Fedichem is concerned that the Commission’s proposals could result in considerable legal and economic uncertainty for businesses.

- Verband Deutscher Maschinen- und Anlagenbau

- General comments: VDMA represents approximately 3000 companies in the engineering industry sector. It objects to the creation of an environmental liability regime as planned by the Commission. In particular, liability for damage to biodiversity and access to justice for public interest groups cannot be accepted because of their immense negative effect for undertakings in the machinery industry. The WP represents a political approach that-underestimates the economic effects of such a proposal. VDMA proposes a slimmer version of the regime which would focus on liability for traditional damage caused by environmental pollution as well on contaminated sites. Defences should be expanded and the right of access to
- Activities to be covered: VDMA supports the proposal in the WP to limit the regime to activities bearing an inherent risk of causing damage. Optimal legal certainty will be necessary in this field. Companies must be able to determine exactly whether or not they are affected by the regime. A simple list of the EU legislation on dangerous activities will not provide sufficient clarity. There should be a list of facilities defined as dangerous and therefore covered by the regime. Such a list could be based on the annex to the Environmental Impact Assessment Directive.

- Defences: Compliance with permits and legal provisions, particularly if environmentally friendly technologies are used, should be admitted as a defence. This would represent an incentive for the use of environmentally friendly technologies.

- Biodiversity damage: VDMA expects severe negative effects for the economy, specifically for small and medium-sized enterprises if a liability regime for damage to biodiversity is established. It would constitute a legal novelty which would lead to significant uncertainties and risks. The quantification of the damage is still very uncertain.

- Access to justice: Environmental protection groups will consider and use the right of access to justice as an efficient instrument to achieve their political objectives. They would be on the same level as the official authorities, without being subject to the same legal obligations (they do not have to be neutral nor are bound by constitutional fundamental rights). A company would run the risk of being harassed by unjustified legal actions. The “two-tier” approach is not sufficient to prevent unjustified legal actions being brought. Which judicial body and under which conditions will it be decided whether the responsible authority did not act adequately? Public interest groups will be able to ask for injunctions without being subject to any filter mechanism.

- Financial security: The uncertainty relating to the amount of potential damages to be paid has a major effect on their insurability. The EC’s hope that an insurance market will develop in the future is not based on facts. The insurance industry has already declared that this will not be possible within a reasonable space of time. In Germany, the Environmental Liability Act’s provision on a compulsory insurance remained mere theory and could not be implemented in practice. The additional insurance for environmental liability will lead to considerable higher costs. Many manufacturers must already pay an additional 25% on top of the general liability insurance to cover environmental liabilities. If a further EU regime covering also biodiversity damage were established, these costs would become even heavier.

- Economic impact: Severe negative effects for the economy, specifically for small and medium-sized enterprises are expected if a liability regime for damage to biodiversity is established. A too heavy burden on the SMEs would have negative influences on the international competitiveness of the industry as a whole. In Germany, the machinery industry has already achieved important progress in the field of environmental protection, e.g. reducing the utilisation of dangerous substances. There could be a negative effect on employment.

- National and Regional Environmental NGOs

  - Bond Beter Leefmilieu

  - General comments: BBL is a federation of more than 120 NGOs in the
Flemish-speaking part of Belgium. BBL welcomes the long-awaited WP and hopes that it will lead to legislation as soon as possible. However, BBL is disappointed in the vagueness of this document and considers that the WP remains unclear on several issues, including what the Commission sees as the first stage in its proposed “step-by-step” approach.

- No retroactivity: BBL raises the question of what will happen if damage caused by an on-going process, such as water pollution from a contaminated site or leaking landfill, which may have originated before the entry into force of the EC regime is continuing but only becomes known after the entry into force of the regime.

- Damage to be covered: In respect of “diffuse pollution”, BBL considers that it would be feasible, with monitoring and modelling, to identify the contributions made by routine releases from dominant pollutant sources (such as agricultural practices located near a protected area which cause loss of species). Liability for claims in those type of cases could become a driving force for prevention and the use of cleaner technologies. WP does not make it clear when the introduction of GMOs in the environment is to be considered as damage for the purposes of the liability regime. Since the dispersion of GMOs in the environment is irreversible in cases where this results in ecological or economic damage, this should be considered as damage for the purposes of the liability regime.

- Activities to be covered: BBL does not agree that the scope of the regime should be limited to activities which are regulated by existing EC environmental legislation. BBL is concerned with the risks connected with the numerous unregulated, but potentially hazardous, chemicals which are present on the market but which are not classified or covered by a directive.

- Type and other features of liability: BBL welcomes the introduction of strict liability into environmental liability legislation but regrets that this is restricted to dangerous activities. Environmental damage is not always caused by dangerous activities (e.g. damage caused by agriculture) and fault-based liability discourages pro-active companies which take preventative measures. Therefore, BBL takes the view that strict liability should be applied in all cases. BBL asks for greater clarity concerning the “step-by-step” approach proposed in the WP.

- Defences: Compliance with a permit should not be permitted as a defence under the proposed regime, otherwise this would mean replacing the principle of strict liability with fault-based liability. It is unacceptable, from the point of view of the precautionary principle, to allow state of the art and development risks as defences under the proposed regime.

- Burden of proof: BBL considers that unless there is a clear commitment to alleviation of the burden of proof, there is a serious risk that the regime will not be applied when it is needed due to a plaintiff’s lack of capacities. BBL calls upon the re-introduction of the proposal set out in the Commission’s working paper of April 1998 – that in the first place the plaintiff should be required to prove the damage and its origin and a plausible causal link between the two, and that there then be a rebuttable presumption that the activity in question caused the damage.

- Liable party/parties: BBL calls upon the Commission to be clearer as to the circumstances when a permitting authority might have to bear responsibility, in part or in full, for compensation. The recent dioxin crisis in Belgium has shown the importance of considering the whole chain of actors in order to be able to identify the real cause of environmental damage.
The same is true of damage caused by GMOs. For example, in some cases it may not necessarily be the farmer who is responsible for the introduction of GMOs into the environment, it may be the company which carried out the research and marketed the product. BBL suggests expanding liability to parent companies (as is the case under British legislation) in order to solve the problem of parent companies transferring polluting activities to smaller companies in order to avoid liability. BBL considers it important that the financial sector also take responsibility. Even though lending money does not per se constitute a dangerous activity, there is no reason why banks should not be held liable in cases where they knew – or should have known were it not for their negligence – of the possible negative environmental effects of the loan they granted.

- Biodiversity damage : BBL does not agree that liability for biodiversity damage should be limited to those areas covered by the Wild Birds and the Habitats Directives and points out that to do so would mean that damage such as that caused by the Erika tanker would not be covered under the proposed regime – which BBL considers to be an ironic result bearing in mind the fact that the WP expresses concern for incidents such as that caused by the Erika tanker. Therefore, BBL considers that the proposed liability regime should also apply to “ordinary nature”. BBL considers that liability should be strict where biodiversity damage is caused by non-dangerous activities. BBL is concerned as to how “significant biodiversity damage” will be defined. The concept of significance means something very different depending on whether your look at it from an ecologist’s or an industrialist’s point of view. BBL calls upon the Commission to come up with a concept of significance which allows for a wide application of the liability regime. BBL fears that the application of a “reasonableness test” will result in liability being lower than the damage which is caused and that the regime would not effective in cases of severe damage.

- Contaminated sites : BBL does not agree that a distinction should be drawn between dangerous and non-dangerous activities and is of the opinion that the applicability of the regime should be based on the level of damage itself rather than on the type of activity which caused the damage. BBL is concerned as to how the term “significant” will be defined in respect of contaminated sites.

- Relation with Product Liability Directive : The product liability directive only deals with damage to persons and goods caused by a defective product and does not cover environmental damage. BBL considers that since the product liability regime and the environmental liability regime are two different regimes they should be applicable at the same time.

- Access to justice : Although BBL welcomes the fact that the WP mentions the need for enhanced access of justice, it is disappointed with the two-tier approach which is suggested. BBL considers that a two-tier approach is complicated and risks resulting in more harm being caused by prolonged legal procedures.

- Financial security : BBL considers that since it makes no sense to introduce strict liability without ensuring that the potential polluter can pay, it is regrettable that the Commission is not proposing to make insurance compulsory. BBL considers that it is necessary to introduce mandatory insurance since it is possible for the costs of repairing environmental damage to be so high that they exceed the funds available to the party responsible for the damage. BBL questions why it is not possible to insure against environmental damage caused by human activities when it is possible to insure against unforeseeable natural disasters.
- Other Industrial NGOs

- EU Committee of the American Chamber of Commerce in Belgium

- General comments: The Committee fully supports the polluter pays principle as an economic principle to be used in environmental policy and considers civil liability to be one of the many tools to apply this principle. However, experience in the US has proved that this is a complex issue and that "getting it wrong" can have severe consequences for the economy, the use of land and the environment. If it is accepted that harmonisation in the area of environmental liability is needed, then this should be limited in scope to environmental damage and should not seek to encroach into other areas of traditional civil liability which are already dealt with by the Member States. It is apparent from the WP that more time is needed to carry out further studies on the impact of the regime on the competitiveness of European industry.

- No retroactivity: There is unanimous agreement that the retrospective application of the regime in the US has been one of the main problems with the Superfund system. The Commission has acknowledged this fact and has proposed that the EU regime not apply retrospectively. However, the WP still leaves some uncertainty as to the definition of past pollution and the Committee fears this could jeopardise the non-retrospective nature of the proposed regime.

- Damage to be covered: If it is accepted that harmonisation in the area of environmental liability is needed, then this should be limited in scope to environmental damage and should not seek to encroach into other areas of traditional civil liability which are already dealt with by the Member States.

- Activities to be covered: Further analysis of the "dangerous activities" approach is needed. To divide industry into dangerous and non-dangerous sectors in a somewhat arbitrary manner could set a precedent having serious consequences for future legislation.

- Type and other features of liability: The EU thus far has opted for a system based on stringent environmental legislation laying down detailed parameters and this has proved more efficient than the US system which is based on a litigation-driven regime. The shift to a system based on litigation is alien to the European legal tradition. US experience has shown that the fair share system, as opposed to joint and several liability, is the only reasonable option and is a crucial feature if the system is to be insurable. This is an important factor which has not been covered in the WP. There should be time limits (based on when the plaintiff knew or should have known of the damage and on the date of the incident causing the damage) for commencing an action in order to allow the necessary legal certainty for the business community to operate. The Committee suggests that the Directive set out an obligation to set a time-limit but leave the length of the time-limit to the discretion of the Member States.

- Defences: State of the art and development risk should be allowed as defences since it is unreasonable to assign the risk of unknown future damage to one party and the absence of these defences would damage industry by stifling innovation. In addition, if compliance with a permit is not allowed as a defence then parties who diligently comply with their permits will be treated in the same manner as those who are negligent or ignore their permit conditions. This is neither rational or nor equitable and would render permit compliance futile. When granting a permit the authorities weigh the interest of the environment against the economic benefits of the proposed activity, and the authorities expect and accept that there will
be some impact on the environment. In these circumstances, it is unjust to hold the permit holder liable for such damage since the damage was considered to be tolerable by the permitting authorities.

- Burden of proof: Burden of proof is an issue which should not be harmonised. The burden of proof varies widely across Europe because it is the result of the evolution of different legal systems and, in accordance with the principle of subsidiarity, must be left to the Member States. If this and other procedural aspects were to be harmonised, the selected legal basis of Article 175 could be questioned.

- Liable party/parties: Liability for damage should be limited to the operator in control as set out in the WP. However, the concept of control needs to be refined so as to exclude liability of land-owners and other parties who have not been involved in the cause of the pollution (lenders, parent companies, shareholders or corporate successors). This should be accompanied by a clear regime based on a fair share system, as opposed to joint and several liability.

- Biodiversity damage: The very serious difficulties the US has with its longstanding National Resource Damages program should raise questions for the EU about whether imposing liability for biodiversity damage will help the EU protect habitats and species. If the main issue is the loss of habitat due to development, over utilisation or the introduction of non-native species, then the creation of a liability scheme aimed at attaching liability for industrial activities is not relevant. More appropriate solutions, such as preserving sensitive areas, are already institutionalised in the Habitats and Birds Directives. If the objective is to punish a polluter for a damaging accident or intentional misconduct then other traditional legal means, such as criminal enforcement or administrative sanctions, are more appropriate (although outside the scope of the Community’s competence). If the goal is to provide deterrents for misbehaviour, the EU and Member States already regulate extensively discharges to water and air by legislation (e.g. IPPC Directive) which in turn provides for the imposition of fines and criminal prosecutions. In addition, Member States impose liability for clean-up of pollution incidents. These existing regimes already create a very significant incentive for good behaviour. At any rate, before proposing new legislation there should be an improved focus on implementing the Habitats Directive and international agreements.

- Traditional damage: Traditional damage should be left to national civil liability laws and should not be part of an environmental liability regime. Proposals in the area of environmental liability need to respect the subsidiarity principle and the different legal traditions of the Member States.

- Relation with Product Liability Directive: Please refer to the full text of the Committee’s comments for a comparison between the Product Liability Directive and the proposed environmental liability regime.

- Ensuring effective restoration: The principle of proportionality is fundamental when dealing with the restoration of damaged sites. Restoration measures for contaminated sites and for biodiversity damage will always need to be evaluated against their costs.

- Access to justice: If any harmonisation in this area is to be introduced, mechanisms should be put in place to protect the courts and responsible industries from vexatious or frivolous claims. Reckless litigation should be prevented through the imposition of
penalties and fines. The Committee believes that non-governmental organisations have an important role to play in informing authorities in accordance with national provisions and international conventions.

- Financial security: Financial limitations or "caps" are necessary to make the regime insurable. However, the Committee shares the Commission’s view that the EC regime should not impose an obligation to have financial security. The situation in Germany should serve as a learning experience.

- Different options: The idea of a "framework" Directive suggests that it will be necessary to make further detailed legislation and this is objectionable from a legal point of view.

- Subsidiarity and proportionality: Proposals in the area of environmental liability should respect the subsidiarity principle and the different legal traditions of the Member States. If it is accepted that harmonisation in the area of environmental liability is needed, then this should be limited in scope to environmental damage and should not seek to encroach into other areas of traditional civil liability which are already dealt with by the Member States. The principle of proportionality is fundamental when dealing with the restoration of damaged sites. Restoration measures for contaminated sites and for biodiversity damage will always need to be evaluated against their costs.

- Economic impact: One of the reasons given in the WP to proceed with a Directive is the impact on the Internal Market. The Committee considers that this impact alone is de minimis and could never justify the adoption of legislation. It is apparent from the WP that more time is needed to carry out further studies on the impact of the regime on the competitiveness of European industry.

- Others

- Forum NATURA 2000

- General comments: Forum NATURA 2000 represents users and managers of renewable natural resources throughout the EU. The associations forming part of this Forum experience a clear need for sound environmental legislation in order to best ensure sustainable use and management of renewable natural resources. The Forum acknowledges the WP as a first step in setting out the structure for a future EC environmental liability regime. The Forum supports the application and implementation of the polluter pays principle and agrees that polluters have to face the prospect of having to pay for restoration or compensation of the damage they caused. Since the Commission gives as one of the purposes of the proposed regime the boosting of implementation of EU environmental legislation, the Forum asks whether there has been a previous check to identify the reasons for the failure in the implementation of the already existing regulations.

- No retroactivity: For reasons of legal certainty and legitimate expectations, the Forum supports the Commission’s intention to introduce a non-retroactive regime. To leave measures of retroactivity to the responsibility of the Member States means recognising the importance of the subsidiarity principle. However, more clarification is needed on the criteria for distinguishing between “past” and “new” pollution.

- Damage to be covered: It will be very difficult to trace the source or origin
of pollution in the case of diffuse atmospheric pollution with a wide spatial spreading. However, the effects on renewable natural resources will be significant.

- Defences: Predictability regarding liability to third parties should be a basic principle in order to ensure innovation and investment initiatives are not prevented.

- Burden of proof: The burden of proof should remain on the plaintiff who should be obliged to prove both the damage and the causal link between the damage and the polluter.

- Biodiversity damage: The Forum has already raised in the past the problem of lack of clarity of some definitions in Art. 6 of the Habitats Directive, and since the WP uses the same wording, the Forum considers that this will result in vagueness and uncertainty.

- Access to justice: The Forum fears that the proposals in respect of direct access to courts for NGOs could lead to an inflation of legal cases. This, added to strict liability and to the alleviation of the burden of proof, leads to a very difficult situation for users and managers of renewable natural resources.

- Financial security: Predictability regarding liability to third parties should be a basic principle in order to ensure innovation and investment initiatives are not prevented. The Forum points out that in respect of SMEs in particular, the expected insurance scheme will require a high financial input from SMEs which might not be bearable for some of them.

- Subsidiarity and proportionality: The Forum considers that to leave measures of retroactivity to the responsibility of the Member States means recognising the importance of the subsidiarity principle.

- Fidiration des Associations de Chasseurs de l’UE

- General comments: Although FACE welcomes the WP, it takes the view that the polluter pays principle should not be applied rigorously but rather applied in a proportional and justified way. FACE points out that sustainable and regulated hunting does not cause damage to nature but on the contrary contributes to wildlife and habitat conservation.

- No retroactivity: FACE supports the Commission’s intention not to apply the regime retroactively.

- Type and other features of liability: FACE welcomes the distinction between dangerous/potentially dangerous activities and non-dangerous activities. A list of dangerous and potentially dangerous activities should be established and a clear definition of potentially dangerous activities given (including criteria of evaluation, level of acceptable potentiality, etc). FACE accepts the Commission’s choice to apply fault-based liability to biodiversity damage caused by non-dangerous activities and supports the coverage of significant damage only. However, the concept of significant damage needs to be clarified.

- Burden of proof: FACE does not support the proposal to alleviate the burden of proof concerning fault or causation in favour of the plaintiff and is of the opinion that the burden of proof should remain on the plaintiff who should be required to prove the damage as well as the causal link between the damage and the polluter.
- Liable party/parties: In certain circumstances of biodiversity damage, it is very difficult to consider the operator as the liable party under an EC environmental liability regime because certain damage can result from external conditions which the operator cannot control himself.

- Biodiversity damage: FACE accepts the Commission’s choice to apply fault-based liability to biodiversity damage caused by non-dangerous activities and supports the coverage of significant damage only. However, the concept of significant damage needs to be clarified.

- Access to justice: FACE is not in favour of access to justice for public interest groups to claim restoration of environmental damage to be regulated at the European level because in several Member States public interest groups already have the ability to act in environmental matters and already have access to justice.

- Different options: FACE welcomes the Commission’s suggestion that a framework directive would be more appropriate in particular because this approach is more flexible in that it gives Member States the choice of means to reach the objectives fixed by the directive.

- DENMARK

  - Governments

    - Danish Government

      - General comments: In general the WP provides a sound basis for further reflection on the possibilities and content of EU rules in this domain. However, more detailed analysis is needed on a number of points before a proposal can be drawn up. The starting point should be that EU rules on environmental liability must be consistent with the fundamental principles of the Member States.

      - No retroactivity: For reasons of legal certainty EU regime should not be retroactive. Detailed provisions will be necessary to distinguish clearly between “past pollution” and “new pollution”.

      - Damage to be covered: Danish Government agrees that EU regime should cover both traditional damage and environmental damage. Regulation of damage to biodiversity in Natura 2000 sites is of crucial importance. In addition, damage caused by GMOs should be covered by the regime – although careful consideration will need to be given to any such provisions.

      - Activities to be covered: Danish Government agrees that strict liability should be linked to activities involving a special risk to the environment (e.g. by linking the liability regime to those activities currently regulated by EU environmental legislation).

      - Type and other features of liability: Danish Government agrees that liability should be fault-based where a non-hazardous activity causes damage to biodiversity in a Natura 2000 site.
- Defences : Where strict liability applies, certain defences should be recognised. Detailed consideration should be given to the different types of defences suggested in the WP.

- Burden of proof : Before the Danish Government is able to express a view on the proposal to alleviate the burden of proof, it would wish to see an analysis of the law in Member States that have alleviated the burden of proof in the environmental area.

- Liable party/parties : Strict liability should be imposed on the person (regardless of whether they are a legal or natural person) who has control of the relevant hazardous activity. Liability should not be imposed on lenders. Danish Government disagrees with suggestion in the WP that permitting authorities be made liable where the damage is caused by emissions expressly authorised under an environmental permit. This would be contrary to the polluter pays principle and should be left up to Member States to decide in accordance with their respective national rules.

- Environmental damage : It may be difficult to define what constitutes “significant damage” to biodiversity and “significant pollution” of sites.

- Biodiversity damage : Further consideration is needed on the methods for assessment of this type of damage – with particular attention being given to cases where the damage cannot be restored.

- Contaminated sites : It is questionable whether EU-wide decontamination targets ought to be laid down. The basic underlying principle should be that the environment be restored to the condition it was in prior to the damage occurring.

- Traditional damage : Traditional damage should be included in the regime. Danish Government agrees that it should be left to Member States to define the scope of traditional damage to be covered by the regime.

- Access to justice : There may be difficulties with regard to competence if the EU attempts to introduce rules in this area otherwise than via Article 65 on co-operation under civil law. In addition, the Danish Government considers that there should not be sectoral regulation of the administration of justice. However, the Danish Government does agree that the principles on access to justice enshrined in the Aarhus Convention are of crucial importance. Danish Government is sceptical of a model which would allow public interest groups to take preventative measures and restore damage of their own accord – this would affect responsibilities which normally rest with national environmental authorities.

- Relation with international conventions : Certain international liability regimes already exist – e.g. in the realm of nuclear damage, maritime transport and oil. Any EU liability regime should respect Member States’ obligations under international law.

- Financial security : Any liability provisions which are formulated should be sufficiently clear and transparent to ensure that insurance schemes can be developed – at reasonable premiums. A compulsory insurance scheme may help secure payment of compensation where the party responsible for the damage is unable to pay.

- Different options : Danish Government cannot support possibility of EU acceding to the Lugano Convention and agrees that the best option for an EU regime would be a
framework directive. However, this should not preclude the laying down of specific provisions for a specific sector if there are significant grounds warranting this (e.g. if liability provisions in respect of damage caused by GMOs cannot wait until an environmental liability regime is drawn up).

- Subsidiarity and proportionality: There may be difficulties with regard to competence if the EU attempts to introduce rules in this area otherwise than via Article 65 on co-operation under civil law. In addition, the Danish Government considers that there should not be sectoral regulation of the administration of justice.

- Economic impact: It is necessary to investigate further the general economic consequences of an EU regime.

- National and Regional Environmental NGOs
  
  - Danmarks Naturfredningsforening
  
  - General comments: Although the Danish Society for the Conservation of Nature considers the WP a welcome step towards a real implementation of the polluter pays principle, it takes the view that the WP is deficient in a number of areas and that the proposed liability regime falls short of the effective regime one would expect to find in a directive.

- Damage to be covered: Regime should also take account of the special risks associated with the release of GMOs and should include from the start an appropriate system of liability and insurance to cover the pollution of “ordinary” nature by GMOs. In particular in light of the recent developments in respect of the revision of the GMO Directive, the Society is concerned that until the entry into force of a general directive on liability, industry will be able to disclaim legal and financial responsibility for damage to nature and the environment caused by the release of GMOs. Should the revised GMO Directive not contain an insurance scheme, it is essential for the future directive on general liability to take account of the major risk to nature and the environment posed by GMOs. In addition, bearing in mind the risks posed to nature by the release of GMOs, it would be particularly inadequate to limit liability for biodiversity damage to the Natura 2000 network.

- Activities to be covered: The proposal to limit the scope of the regime to existing environmental legislation and to biodiversity protected under the Natura 2000 network should be considered merely as a starting point and the scope of the regime should be extended as soon as possible to cover all areas. Otherwise damage caused by small industrial plants and many unregulated and potentially harmful chemicals and “ordinary” nature would be left uncovered.

- Type and other features of liability: The Society considers that strict liability should also apply to damage to biodiversity caused by non-dangerous activities. This is necessary in order to encourage people to take even more preventative measures than required under existing legislation. WP contains no justification for application of fault-based liability to this type of damage.

- Burden of proof: It is vital for the burden of proof to be on the defendant if the regime is to be effective. Main reason for this is that plaintiffs (whether they be state authorities or environmental organisations) will often have insufficient capacity, staff or data to prove a link between the damage and its originator. The Society is of the view that the
suggestion in respect of burden of proof set out in earlier drafts of the WP should be incorporated into the regime – that is, the plaintiff would need to establish the existence of damage and its origin and present elements which could show a causal link between the two and it would then be up to the defendant to prove that they did not cause the damage.

- Liable party/parties: It should be possible for the damaged party to sue the head office or parent company of the company which caused the damage. This principle is recognised inter alia in British law.

- Environmental damage: Since the concept of “significant damage” can be interpreted very differently at local, regional and European level and depending on who assesses the damage, the Commission’s definition of this must be clear, unambiguous and ensure the widest possible application of the regime.

- Biodiversity damage: The proposal to limit the scope of the regime to biodiversity protected under the Natura 2000 network should be considered merely as a starting point and the scope of the regime should be extended as soon as possible to cover “ordinary” nature. In addition, bearing in mind the risks posed to nature by the release of GMOs, it would be particularly inadequate to limit liability for biodiversity damage to the Natura 2000 network. The use of cost-benefit analyses for valuing damaged natural resources is inappropriate. The consequence of doing so would be that the mechanism of liability would be least effective in the cases where it is most needed (i.e. those of extreme damage). The Society is of the opinion that cost-benefit analyses should be used only to assess whether restoration of the damaged natural resources or a form of compensation such as the restoration or establishment of other natural areas would be the best solution.

- Access to justice: The Society considers the ability of environmental organisations in the EU to defend nature conservation and environmental interests in court to be a prerequisite for an effective liability regime. It also considers that the future directive should ensure that costs of environmental liability cases do not become so high that environmental organisations are unable to bring the cases. This could be done if Member States are free to refund the organisation’s costs in liability cases or grant free legal process if they so choose.

- Financial security: The regime should include an obligatory system of insurance. The cost of damage to nature and the environment can be so high that the responsible party may have no means of paying for the restoration. Funds for restoring damage to nature and the environment should be established in parallel with an insurance system. These funds would cover those cases not covered by the liability regime - such as, pollution caused before the entry into force of the regime, where the polluter cannot be identified, where cost of restoration exceeds the polluter’s financial means and insurance and where the damage is the result of many unidentifiable sources (i.e. diffuse damage).

- WWF Denmark

- General comments: WWF Denmark strongly support the development of an EC Directive on environmental liability. Clear, strong and uniform rules regarding environmental liability are one of the key preconditions for the proper functioning of the precautionary principle across Europe.

- Damage to be covered: WWF Denmark consider it very important that a EU liability regime include damage to biodiversity – since the rules applicable to biodiversity
should not differ from rules in other environmental areas.

- **Biodiversity damage**: WWF Denmark consider it very important that a EU liability regime include damage to biodiversity – since the rules applicable to biodiversity should not differ from rules in other environmental areas. However, WWF Denmark are puzzled by proposal to limit liability for biodiversity damage to Natura 2000 sites. For example, Habitats Directive also aims at protecting a number of specified species regardless of whether they are within Natura 2000 sites or not.

- **Different options**: WWF Denmark strongly support the development of an EC Directive on environmental liability.

- **Other Public bodies**

  - **Danish Parliament - European Committee and Environmental and Planning Committee**

    - **General comments**: The European Committee and the Environmental and Planning Committee of the Danish Parliament held a public hearing, involving the Environment and Justice Ministers and representatives of various interest groups, to discuss the WP. Danish Parliament is very pleased that the Commission has moved towards laying down common rules implementing the polluter pays principle while at the same time ensuring there is somebody to rectify the harm done.

    - **Damage to be covered**: Although the Danish Parliament recognises the need for a certain form of restriction of the type of damage to be covered (not least for reasons of legal certainty), it considers that a restriction of liability for biodiversity damage to Natura 2000 areas is too narrow. The Danish Parliament therefore seeks a better and broader definition of damage to the environment, including biodiversity.

    - **Activities to be covered**: Danish Parliament is pleased that the release of GMOs is covered by the proposed regime but seeks a clearer statement of intent in this area. Even though GMOs are not of themselves hazardous, they have a potential to cause enormous damage (e.g. by escaping from a high security confinement facility or if there is an unforeseen impact of a release into the environment).

    - **Type and other features of liability**: The proposal for strict liability set out in the WP bears many similarities with Danish environmental liability law. Danish Parliament supports the principle of strict liability for dangerous and potentially dangerous activities – provided that this is accompanied by adequate guarantees of legal certainty. In addition, Danish Parliament believes that there should be strict liability for damage to biodiversity regardless of the nature of the activity.

    - **Burden of proof**: Danish Parliament supports the Commission’s intention to adopt some form of alleviation of the traditional burden of proof but it feels unable to adopt a final view in this respect until it has seen more precise wording.

    - **Biodiversity damage**: Danish Parliament is able to support the regulation of biodiversity damage at Community level and points out that to a certain extent biodiversity damage has already been introduced into Danish liability law. Danish Parliament believes that there should be strict liability for damage to biodiversity regardless of the nature of the activity.
and that the regime should not be limited to Natura 2000 sites. Danish Parliament seeks a better and broader definition of damage to the environment, including biodiversity.

- Ensuring effective restoration: Danish Parliament considers it inappropriate to attempt to define in advance significant as opposed to insignificant damage – such a delimitation would risk blocking the entire process. Danish Parliament also considers it inappropriate the use of cost-benefit analysis to assess damaged natural resources. The proposed “reasonableness” test could result in the liability not being established in those cases where it is most needed – namely, where there is very severe and extensive damage. Danish Parliament recommends that the use of a cost-benefit analysis be restricted to assessing whether restoration or compensation is the better option.

- Financial security: Clear rules are needed in respect of environmental liability if an appropriate insurance scheme is to be developed – something which the Danish Parliament considers to be a step in the right direction.

- Different options: Danish Parliament supports the Commission’s proposal to lay down rules in a framework Directive thus leaving it to Member States to decide by what means the principles are to be implemented. The setting of common minimum standards is a good way of ensuring a general raising of standards, not least if liability for damage to biodiversity is introduced.

- FINLAND

  - Governments

    - Finnish Government

      - General comments: Finland welcomes the WP as a first step towards a framework directive on environmental liability. A Community liability directive would strengthen the implementation of the environmental policies and directives of the EU as well as bring about incentives for further improvements and even more preventative effect. However, it needs to be recognised that harmonisation of environmental liability systems is difficult since the legal systems in the various Member States are different. In general, Finland would wish that any future Community liability regime is sufficiently flexible, taking advantage of the principles and approaches contained in the Lugano Convention and other appropriate international liability conventions. Finland also stresses the importance of achieving a regime which encompasses clarity and legal certainty. Taking into account the complexity of environmental liability, Finland believes it would be useful if the Commission could convene meetings of national experts in order to facilitate the drafting work.

      - Damage to be covered: Finland welcomes the discussion of GMO-related liability issues and considers that in principle GMO-related damage could be contained in the scope of the proposed regime. However, without further elaboration in this respect, it seems premature to take a position on specific questions. The content of the existing Directives 98/81 and 90/220 and the special characteristics related to the issue should be taken into account in further discussions. Finland basically supports the intention to cover both traditional damage and damage to the environment (i.e. restoration costs and damage to biodiversity).

      - Activities to be covered: Finland favours a regime with a broad scope of application along the lines of the Lugano Convention. Fixing the scope of the proposed regime
to existing directives would make the system more predictable and therefore pragmatic. However, this approach would burden certain listed activities while leaving others outside of the scope of application.

- Type and other features of liability: The WP contains different types of question, some of which are civil liability law issues and some of which are public law issues. Civil law is not able to deal with the question of restoration of contaminated land and so this matter is best left to public law and to the Member States to decide on the means to make it concrete. However, the question of compensation of restoration costs can be dealt with by means of civil law.

- Biodiversity damage: A major challenge relates to the definition of ecological damage and the methods for assessing such damage. Further clarification and studies are necessary in elaboration of the future regime. As ecological damage is a new category of damage, a step-by-step approach would be wise. Therefore, Finland favours in principle an approach where ecological damage is covered but is perhaps limited to the costs of measures reasonably undertaken to restore the environment, and if that is not possible, to costs of introducing equivalent components into the environment.

- Contaminated sites: Civil law is not able to deal with the question of restoration of contaminated land and so this matter is best left to public law and to the Member States to decide on the means to make it concrete.

- Traditional damage: Finland basically supports the intention to cover both traditional damage and damage to the environment (i.e. restoration costs and damage to biodiversity).

- Access to justice: Finland supports in principle, along the lines of the ?rhus Convention, the proposal to extend the rights of environmental associations to request effective remedy. However, it should be left up to the Member States to decide whether this should be provided by means of an administrative or a judicial procedure.

- Relation with international conventions: Finland is of the view that the proposed regime should not cover areas already covered by other instruments, for example connected with the transport of goods. A well-established network of international conventions is already in place and is coming into force in this field. If there are deficiencies in the international regimes, the respective conventions should be amended.

- Financial security: A financial security scheme, as provided in Article 12 of the Lugano Convention, is useful in avoiding the risk that the financial burden rest with the State in the end. Such a financial security scheme is already in place in Finland.

- Different options: Harmonisation of environmental liability systems is difficult since the legal systems in the various Member States are different. Given the fact that complete harmonisation would be very difficult, and not even appropriate bearing in mind the aims of the directive, Finland welcomes the Commission’s intention to propose a framework regime which fixes objectives and results while leaving to Member States the ways and means to achieve these. This approach would be in accordance with the principles of subsidiarity and proportionality.

- Subsidiarity and proportionality: Harmonisation of environmental liability
systems is difficult since the legal systems in the various Member States are different. Given the fact that complete harmonisation would be very difficult, and not even appropriate bearing in mind the aims of the directive, Finland welcomes the Commission’s intention to propose a framework regime which fixes objectives and results while leaving to Member States the ways and means to achieve these. This approach would be in accordance with the principles of subsidiarity and proportionality.

**- FRANCE**

- **European Industrial NGOs; sectorwise**

  - **Union Européenne des Indépendants en Lubrifiants**

    - General comments: UEIL is a trade association whose members represent approximately 30% of the Western European lubricants market. UEIL has noted with interest the adoption of the WP - especially the approach based on non-retroactivity, operational control and insurability.

    - Type and other features of liability: To preserve consistency, the liability regime should focus on the effects of an activity instead of being based on a product-based approach. To prevent ambiguity, environmental liability should be based on operational control as proposed by the Commission and should be proportionate.

    - Defences: To promote innovation, defences should include development risk and state of the art.

    - Burden of proof: To maintain the equality of terms, the liability regime should preserve a sound approach to the burden of proof in respect of the causal link.

    - Liable party/parties: UEIL agrees with the Commission’s proposal that environmental liability should be based on operational control.

    - Contaminated sites: Inclusion of contaminated sites in the proposed regime should be linked exclusively to the existence of an identified and actual damage.

    - Traditional damage: UEIL is of the opinion that "traditional damage" is significantly covered by national civil liability regimes and so environmental liability should be limited to damage to biodiversity.

    - Financial security: To promote the viability of the regime, insurability must be guaranteed prior to setting up a liability regime. In UEIL’s view, insurability is an absolute pre-requisite for any form of liability and so liability should be defined in such a way that insurers are able and willing to provide cover on reasonable terms not only to those who have the resources to pay large premiums, but also to SMEs.

    - Subsidiarity and proportionality: UEIL is of the opinion that "traditional damage" is significantly covered by national civil liability regimes and so environmental liability should be limited to damage to biodiversity.

- **Governments**
- French Government

- General comments: Environmental liability is one of the priorities of the current French Presidency and France will be calling for a debate on this topic in the Council. Environmental liability is a complex topic and it is crucial that an EC regime not put into question that which has been achieved by the existing national regimes. It should focus instead on bringing about real progress in the domain of restoration of pure ecological damage. Since certain Member States already have considerably developed legal regimes in respect of remediation for environmental damage, it might be possible to envisage an EC liability regime which is not exclusive and which, like the regime under the Product Liability Directive, allows an affected party to choose whether to invoke the national or the EC regime.

- No retroactivity: For the sake of legal certainty, the proposed regime should not be retroactive.

- Damage to be covered: Although the WP proposes a regime which would cover both traditional and environmental damage, there are some valid justifications for limiting an EC regime solely to environmental damage. However, the French Government considers that it would be premature to express a view one way or the other until the content of the notion of "environmental damage" has been defined. The French Government considers that the term "contaminated site" does not have a precise legal meaning and should not be present in a legal instrument. Contaminated sites can lead either to traditional damage (i.e. personal injury or damage to personal property) or to damage to unowned goods. Damage caused by GMOs should be included in the regime. Further consideration is needed in respect of products containing GMOs and the interaction between liability under the Product Liability Directive and liability under the proposed regime.

- Activities to be covered: It is crucial that the regime be sufficiently wide so as to cover all professional activities which are likely to damage the environment. The French Government does not agree with the proposal in the WP to limit the scope of the activities covered by the proposed regime by reference to a list of activities currently regulated by EC legislation. This would be unworkable, too wide and vague. The scope of the covered activities should be defined by reference to a list of clearly defined activities which should be related to the type of environmental damage caused. The proposed liability regime could also cover the road transport of dangerous goods with a view to supplementing existing rules in this respect.

- Type and other features of liability: The French Government considers that the cohabitation of strict liability and fault-based liability in the same regime is likely to lead to confusion. Damage which is not covered by strict liability should be left to the national laws of each Member State. The introduction of fault-based liability for non-hazardous activities would represent a set back in terms of current rules under French law.

- Defences: The defences which will be allowed will condition the balance of the EC regime and will allow the stringency of strict liability to be softened. Development risk could be allowed as a defence, but, if this were the case, the French Government would require that the EC regime not be exclusive - non-exclusivity being also the case under the Product Liability Directive.

- Burden of proof: The French Government emphasises the importance of maintaining a clear requirement that causation be established in so far as strict liability is concerned.
- **Liable party/parties**: The French Government does not agree with the proposal in the WP to allow public authorities to be made liable for remediation of environmental damage. Such a proposal would be contrary to the polluter pays principle and, in addition, the concept of state liability is one which is based on wider legal principles than just environmental law and which has its origin in well-established national rules. A polluter should only be liable to remediate damage which he has caused and the French Government emphasises the importance of maintaining a clear requirement that causation be established in so far as strict liability is concerned. The notion of "operator" as set out in the WP is too vague. Does this mean in the case of an installation that it would be the operator sensu stricto, the owner of the facility or the parent company which controls one of its daughter companies? And in the case of GMOs, does it mean the producer of the seeds, the person who markets them or the farmer?

- **Environmental damage**: In order for the French Government to be able to express its view in respect of environmental damage, it would first need to see a clear definition of the notion of "environmental damage". The French Government considers that the remediation criteria set out in articles 2(7) and (8) of the Lugano Convention represent the most workable approach. The underlying principle of those criteria is that remediation of environmental damage should be limited to the costs of reasonable reinstatement measures which have actually been taken or will be taken in order to reinstate or restore those elements of the environment which have been damaged or destroyed. This approach allows reinstatement measures to be quantified and guarantees that the monies will be used for making good the environment.

- **Biodiversity damage**: The French Government does not agree that biodiversity damage should be limited to the Natura 2000 network - the regime should cover damage to nature. Limiting the liability regime to the Natura 2000 network can only worsen the current difficulties involved in the designation of such sites.

- **Contaminated sites**: The concept of universal remediation standards for contaminated land can hardly be reconciled with the specificity of soil pollution. Soil remediation should be based on risk assessment criteria, as is the case in France.

- **Relation with Product Liability Directive**: Damage caused by GMOs should be included in the regime. Further consideration is needed in respect of products containing GMOs and the interaction between liability under the Product Liability Directive and liability under the proposed regime. Development risk could be allowed as a defence, but, if this were the case, the French Government would require that the EC regime not be exclusive - non-exclusivity being also the case under the Product Liability Directive.

- **Ensuring effective restoration**: The French Government considers that the remediation criteria set out in articles 2(7) and (8) of the Lugano Convention is the most workable approach. The underlying principle of those criteria is that remediation of environmental damage should be limited to the costs of reasonable reinstatement measures which have actually been taken or will be taken in order to reinstate or restore those elements of the environment which have been damaged or destroyed. This approach allows reinstatement measures to be quantified and guarantees that the monies will be used for making good the environment.

- **Access to justice**: The French Government entirely subscribes to the
objective in the WP to promote access to justice in line with the Aarhus Convention (which France has signed). However, the "two-tier" approach advocated in the WP is not self-evident insofar as it poses the State as "trustee" of the environment. The EC regime will have to distinguish clearly between the three roles which can be performed by public authorities: that of regulator, "trustee" and operator.

- Relation with international conventions: An EC liability regime should exclude those types of damage which are already covered by international conventions.

- Different options: Although no specific comments are made in respect of which option would be preferable, the French response refers to an "EC framework directive" without disputing this as the option to be preferred.

- Miscellaneous: In light of the Brussels Convention, transboundary litigation is not a problem in the EU. ECJ caselaw has established that a claimant can choose whether to bring his case in the location where the damage occurred or where the act which caused the damage took place.

- Individual Companies

- Electricité de France

- General comments: EDF considers that the proposals set out in the WP do not provide operators with sufficient legal certainty and that further detailed thought is needed.

- No retroactivity: EDF welcomes the non-retroactive nature of the proposed regime and considers that there should be a presumption that damage was caused prior to the entry into force of the regime and that it should be up to a claimant to prove otherwise.

- Damage to be covered: Traditional damage should be excluded from the scope of the proposed regime since this is already adequately covered by national legislations. The regime should only apply where the damage caused can be shown to be abnormal and excessive.

- Activities to be covered: In the interests of legal certainty, the notions of dangerous or potentially dangerous activities should be linked to an exhaustive list of activities.

- Type and other features of liability: EDF does not object to the imposition of strict liability since this is already a relatively common practice.

- Defences: In addition to the traditional defences suggested in the WP, other crucial defences should also be permitted - such as development risk and compliance with a permit.

- Burden of proof: In light of the imposition of strict liability, EDF considers that it would be unjustifiable and inappropriate to have a presumption that the damage was caused by the defendant's acts. However, should such a presumption be introduced it should not apply in cases where it can be shown that the installation is operating in accordance with the relevant laws and the conditions set out in its operational permits and where the damage in question is likely to have resulted from a different cause. These exceptions are provided for in
the 1990 German law on civil liability for pollution.

- **Biodiversity damage**: The absence of satisfactory valuation methods for damage to biodiversity is likely to lead to legal uncertainty for operators. Therefore, EDF considers it essential that the Commission define what is meant by significant biodiversity damage and define the valuation methods for such damage.

- **Contaminated sites**: EDF considers the proposal to harmonise clean up standards for contaminated sites to be overly rigid. Clean up standards and values already exist at national level and have been devised so as to take into account differences in local circumstances (climate, geology, etc). Therefore, the Commission should envisage an approach which is better suited for differences in local circumstances (such as a site-by-site approach). In addition, the notion of significant damage in respect of contaminated sites should also be defined.

- **Traditional damage**: Traditional damage should be excluded from the scope of the proposed regime since this is already adequately covered by national legislations.

- **Access to justice**: It is up to public authorities to ensure protection of public interests. However, EDF can envisage access to justice being given to public interest organisations in the event that there were no public authority responsible for protection of a particular public interest. Access should be limited to those organisations which have qualified under specific procedures to bring an action in the public interest. In addition, damages claimed by such organisations should be linked exclusively to the clean up or restoration of a site.

- **Financial security**: Due to the uncertainties surrounding ecological damage, it would not be feasible to make insurance compulsory. EDF warns against proposals for an indemnity fund (funded by potential polluters) since this is open to abuse.

- **Subsidiarity and proportionality**: The Commission had not yet demonstrated that action at the Community level would be more effective than action at the Member State level, as required by the principle of subsidiarity.

**- Insurance Sector**

- **Comité Européen des Assurances**

- **General comments**: The polluter pays principle is generally accepted by the insurance industry as the appropriate basis for environmental regulations.

- **No retroactivity**: The regime should only apply to damage that arises from an action that occurs after the entry into force of the regime. This will assist considerably businesses in obtaining suitable insurance protection.

- **Damage to be covered**: Any injury, damage or loss must be quantifiable in terms of money in line with a priori established and known criteria. The damaged party must be an identifiable legal entity of its own.

- **Activities to be covered**: The regime should not be applied to damage caused during terrestrial or maritime transportation since these activities are covered by other legislation. An event causing environmental damage is only insurable if it is fortuitous (that is,
involuntary and unexpected with respect to the insured party) and not the result of the normal functioning of the insured business activity. In addition, the event must not have existed at the inception of the insurance cover provided.

- Type and other features of liability: A strict liability regime is manageable only if it rests on a requirement of clearly established causality between an alleged damage and an act to which it is attributed. Any compensation due under civil liability rules must be in proportion to the contribution to the damage by each party involved.

- Defences: A liability regime which does not allow for defences is contrary to the precautionary principle – absence of defences means an operator will have no incentive to prevent the occurrence of pollution. At the very least the following defences should be allowed: force majeure, state of the art, development risk and compliance with environmental permits or norms.

- Burden of proof: The causal link must be clearly established by the claiming party. Any alleviation of the burden of proof would result in much legal uncertainty and endanger the development of a viable insurance market. The study conducted by ERM Economics (commissioned by the Commission) concluded that a reversal of the burden of proof could have damaging effects on SMEs since this could result in an increase in their expenditure which is likely to be disproportionate to their financial resources. The absence of the defences described above (that is, force majeure, state of the art, development risk and compliance with environmental permits or norms) combined with an alleviation of the burden of proof would seriously inhibit the development of suitable insurance protection.

- Liable party/parties: Only an identified legal entity should be liable (e.g. an operator or owner). Parent and sister companies of the actual polluter should be held liable only when it is proven that there has been a deliberate attempt to circumvent liability and liability should only be transferred to the specific part of the organisation which made the decision to transfer the activity. A polluter should only be obliged to pay for the damage which he caused by his own activities: proportionate liability should be the guiding system, not joint and several liability.

- Environmental damage: Since this type of damage cannot be assessed or quantified, it fails one of the crucial prerequisites of insurability.

- Biodiversity damage: This highly complex area may be better served by the imposition of other penalties upon the polluter to act as a greater deterrent. This type of damage should be excluded from the regime until such time as all the difficulties in quantifying ecological damage have been resolved. In many cases restoration will not be possible.

- Contaminated sites: Distinguishing between “historic” and “future” pollution on any one site can be extremely difficult. This is likely to be further complicated by such elements as “significant pollution”, minimum remediation standards and remediation standards where a future use of a site is envisaged.

- Traditional damage: Applying the envisaged regime with its unique and exceptional features to all categories of damage would disturb the well-established practices and principles surrounding existing national compensation regimes for traditional damage.

- Ensuring effective restoration: Compensation should be paid only to
persons who have actually suffered loss, damage or injury - and to no other person.

- Access to justice: To extend eligibility for claiming compensation to NGOs presents many difficulties (particularly in the case of damage to biodiversity). A viable insurance market is more likely to develop if eligibility for claiming compensation is limited to those persons who have legal ownership of the affected property and to regulatory authorities carrying out their statutory duties. Compensation should be paid only to persons who have actually suffered loss, damage or injury - and to no other person.

- Financial security: The insurance industry welcomes the practical approach adopted in the WP in not imposing a legal obligation to obtain a financial guarantee and, instead, make it a voluntary decision to seek risk transfer opportunities. It is optimistic to state that the availability of insurance cover for natural resource damage is likely to develop in the near future. Judicial certainty and predictability are essential in order to allow the insurer to calculate the premium by balancing all the transferred risks.

- Economic impact: Reversal of the burden of proof would be disproportionate to SMEs’ financial resources and could have a potentially damaging effect on them.

- Miscellaneous: Limitation periods: the period of 30 years envisaged in the draft versions of the WP is impractical. A shorter period should be introduced – that is, 10 years from the date on which the damage occurred. The longer the limitation period, the harder it becomes to identify the cause of the damage.

- Fidiration Frangaise des Sociités d’Assurances

- General comments: Insurers have, since 1989, regarded environmental damage as a type of risk which should benefit from particular treatment and therefore have isolated this type of risk from other types in order to be able to tailor insurance coverage to the particular characteristics and needs of environmental risks. FFSA take note of the Commission’s intention not to compromise the insurability of an environmental liability regime. The ability of operators to obtain insurance will affect the effectiveness of such a regime.

- No retroactivity: FFSA agree that the regime should not apply retroactively and consider that it should be stated expressly in the provisions of the regime that liability will only apply to an act or omission causing damage which is carried out after the entry into force of the regime.

- Damage to be covered: FFSA agree that it is not appropriate for the proposed regime to cover diffuse pollution since it is not possible to establish a causal link in such cases. There is some overlap between the concepts of traditional damage, contaminated sites and biodiversity damage. For example, contamination of a site can amount to damage to private property and a contaminated site can be the cause of damage to biodiversity. Therefore, it would preferable if each of these three types of damage could be kept distinct from each other since different types of liability will apply depending on the type of damage.

- Activities to be covered: In accordance with the principle of subsidiarity and proportionality, the scope of the proposed regime should be determined by reference to a list of EC legislation. Insurers need to know with certainty which types of activities are covered
by the regime and whether a particular activity is to be classified as dangerous or non-dangerous. However, until an exhaustive list of dangerous activities has been drawn up, it will be difficult to distinguish between what is intended by dangerous and non-dangerous activities. FFSA suggest as a possible solution using the list of dangerous activities set out in the Seveso Directive.

- Defences: Development risk is accepted as a defence in most Member States in cases where the damage in question results from the defective nature of a product. Not only is development risk uninsurable but its effects on industry (such as a deterrent to innovation, incentive for relocation, etc) are well known. With regard to chronic pollution, operators have on several occasions asked that it be accepted as a defence the fact that the releases in question were carried out in compliance with a permit which was itself issued in accordance with EC legislation. FFSA also point out that it is not possible to insure against chronic pollution because of its non-aleatory nature but that financial security for these type of risks might be available under alternative financial security arrangements.

- Burden of proof: FFSA point out that proof of a causal link by the victim is one of the fundamental principles of liability and that under French law, such proof can be adduced in any manner, in particular by means of presumptions as to facts. Reversal of the burden of proof would no doubt result in a large number of legal claims being brought, some of which would be unjustified or abusive. At any rate, in accordance with the principle of subsidiarity, the question of burden of proof should be left to the discretion of each Member State.

- Environmental damage: Objective criteria have to be established in order to define the concept of significant damage.

- Biodiversity damage: Clear and precise criteria are needed in respect of the valuation and restoration of biodiversity damage. The establishment of such criteria would improve the insurability of the relevant risks. The Natura 2000 network is for the time being incomplete. In addition, since such areas will not be evenly distributed across the Member States, industries would face unequal exposure to liability for biodiversity damage across the different Member States. This could lead to those industries which are faced with high exposure relocating to areas not covered by the Natura 2000 network or even relocating to outside the EU.

- Ensuring effective restoration: The WP says that if restoration is not or is only partially possible for technical or economic reasons, compensation amounting to the value of the unrestored damage should be spent on comparable projects of restoring or improving protected natural resources. From an economic point of view, damage which is non-restorable is not insurable.

- Access to justice: Even though French law grants access to justice under certain conditions to certain certified public interest organisations, the State remains the defender of the public interest and in matters pertaining to environmental protection it retains general policing powers which cannot be delegated. In addition, extension of the right of access to justice could lead to a multiplicity of claims being brought. Therefore, actions by public interest organisations should be on a subsidiary basis and only in cases where the State has failed in the exercise of its duties.

- Financial security: FFSA agree with the Commission that financial security should not be compulsory under the proposed regime. Please refer to the full text of this
summary for other comments relevant to insurability of the proposed regime.

- Subsidiarity and proportionality: In accordance with the principle of subsidiarity and proportionality, the scope of the proposed regime should be determined by reference to a list of EC legislation. At any rate, in accordance with the principle of subsidiarity, the question of burden of proof should be left to the discretion of each Member State.

- Economic impact: Please refer to the full text of this summary for comments relevant to the potential economic impact of the proposed regime.

- Miscellaneous: The WP does not mention the question of limitation periods. A strict liability regime requires limitation periods setting out the delay within which actions should be brought and the periods after which no action may be brought. The former should be no longer than three years from the first manifestation of the damage and the latter should be no longer than that foreseen by the Product Liability Directive. FFSA point out that limitation periods improve insurability of the relevant risks.

  - *International Industrial NGOs: general*

  - *International Chamber of Commerce*

    - General comments: The very general tone of the WP does not allow for an in-depth analysis of the effects of the proposals that are set out therein.

    - No retroactivity: ICC agrees with the proposals in this respect.

    - Activities to be covered: It should be clearly explained which activities are considered hazardous, potentially hazardous and non-hazardous. This is very important not only for the insurance industry but also in order to provide the necessary legal certainty. There should be an exhaustive list of relevant activities that infringe the applicable EC environmental legislation.

    - Defences: State of the art and development risk should be allowed as defences.

    - Burden of proof: There are insufficient grounds for changing the ordinary burden of proof principle. The proposed change, combined with a strict liability regime, would significantly challenge a fair balance between the parties.

    - Biodiversity damage: Very little experience exists in this area. This type of damage should not be included in the proposed regime. The following will be problematic: defining the threshold for significant biodiversity damage, introducing a mechanism to avoid disproportionate and ruinous claims and providing transparency as regards criteria for designating protected areas as well as criteria for quantifying damage.

    - Contaminated sites: The Directive should provide for a flexible site-by-site and case-by-case approach, building from the US Superfund experience. The proposal that soil be made fit not only for actual use but also for plausible future use contradicts the polluter pays principle and should be reviewed.

    - Access to justice: An insurance market is only likely to develop if
eligibility for claims is limited to those who have a legal ownership of the property affected and to the competent regulatory authorities.

- Financial security: The EC should always bear in mind that practical insurability needs to be possible for any company and that the insurance industry should be able to provide suitable protection for businesses. The EC should be aware of the prerequisites of insurability, which are quantifiability, adequate defences and existence of a reasonable prescription period (10 years).

- International Industrial NGOs: sectorwise

  - Suez Lyonnaise des Eaux

    - General comments: Suez Lyonnaise des Eaux is an industrial group consisting of numerous service providers in the domain of energy, water and cleanliness located in 120 countries. Although the Suez Lyonnaise des Eaux group understands the Commission’s desire to implement the polluter pays principle by means of the proposed environmental liability regime, it considers that under no circumstances should a liability regime discourage those undertakings which have adopted measures to reduce the risk of environmental damage.

    - Defences: An undertaking should be exempt from liability for biodiversity damage if it has acted in accordance with an authorisation issued by a public authority. Development risk should also be allowed as a defence.

    - Burden of proof: The Suez Lyonnaise des Eaux group has strong concerns in respect of the proposal to alleviate the burden of proof.

    - Environmental damage: The Suez Lyonnaise des Eaux group has strong concerns in respect of the evaluation criteria for damage and the cost of restoration of biodiversity damage.

    - Biodiversity damage: The Suez Lyonnaise des Eaux group has strong concerns in respect of the evaluation criteria for damage and the cost of restoration of biodiversity damage.

    - Financial security: The Suez Lyonnaise des Eaux group considers insurability to be a key condition for the application of the proposed regime. And in light of the expanding insurance market, the group considers that the Commission will need to accelerate the setting of alternative financial risk mechanisms in a clear legislative and fiscal context at the European level. Once this significant hurdle has been surmounted, the Suez Lyonnaise des Eaux group would not be opposed to a framework directive - provided that studies and further work is carried out in respect of biodiversity damage, restoration and remediation and in respect of the impacts on the economy and on insurance.

- National Industrial NGOs: general

  - Association Française des Entreprises Privées - test

    - General comments: AFEP is pleased to note that the Commission has taken into account some of the suggestions proposed by AFEP following consultation on the Green Paper. AFEP supports the polluter pays principle, provided that this is based on a requirement to
establish a causal link between damage and the person responsible for that damage. The ultimate objective of an environmental liability regime is to ensure the remediation of damage, rather than to require the payment of a monetary sum for the remediation of damage. Monetary compensation should be seen as a last resort where there is a failure to carry out remediation. The regime should focus on liability for biodiversity damage seeing as this is the only aspect which is not yet covered by the different national legislation. Since traditional damage and contaminated sites are already covered by national legislation, in accordance with the principle of subsidiarity these existing regimes should be applied without any need for any additional text at the Community level.

- No retroactivity: Non-retroactivity is an essential element for the effectiveness of the proposed regime. The notion of non-retroactivity should be linked to the damaging act. AFEP agrees that responsibility for the remediation of damage caused before the entry into force of the regime should lie with the State.

- Damage to be covered: The regime should focus on liability for biodiversity damage since this is the only aspect which is not yet covered by the different national legislation. Since traditional damage and contaminated sites are already covered by national legislation, in accordance with the principle of subsidiarity these existing regimes should be applied without any need for any additional text at the Community level. Biotechnology and GMOs should be excluded from the proposed regime. In light of the particular difficulties associated with this field, this should be dealt with within the framework of the current revisions to the GMO Directives.

- Activities to be covered: It is crucial that dangerous and non-dangerous activities be defined in an exhaustive manner, based on the IPPC Directive. AFEP agrees with fault-based liability for biodiversity damage caused by non-dangerous activities. AFEP welcomes the exclusion of diffuse pollution and considers this to be a realistic choice.

- Type and other features of liability: The ultimate objective of an environmental liability regime is to ensure the remediation of damage, rather than to require the payment of a monetary sum for the remediation of damage. Monetary compensation should be seen as a last resort where there is a failure to carry out remediation.

- Defences: The 4 classic defences should be available: force majeure, state of the art, development risk and, above all, compliance with permits.

- Burden of proof: AFEP is strongly against any alleviation of the burden of proof in respect of the establishment of the causal link between the damage and the person responsible for that damage. Any such alleviation would be contrary to the polluter pays principle.

- Liable party/parties: AFEP welcomes the proposal that liability rest with the operator and suggests that the liable party be defined as the person (or persons) who exercise operational control of the activity which causes the damage. AFEP also welcomes the exclusion of liability in respect of lenders.

- Biodiversity damage: The regime should focus on liability for biodiversity damage since this is the only aspect which is not yet covered by the different national legislation. Since traditional damage and contaminated sites are already covered by national legislation, in accordance with the principle of subsidiarity these existing regimes should be
applied without any need for any additional text at the Community level. The concept of biodiversity will need to be defined in greater detail than is currently the case under the Habitats and Birds Directives. And criteria will need to be developed in respect of valuation of biodiversity damage. AFEP point out that the term biodiversity should not be interchanged with the term natural resources since these are not equivalents.

- Contaminated sites: Since traditional damage and contaminated sites are already covered by national legislation, in accordance with the principle of subsidiarity these existing regimes should be applied without any need for any additional text at the Community level. As a result, the liability regime should focus on liability for biodiversity damage seeing as this is the only aspect which is not yet covered by the different national legislation.

- Traditional damage: Since traditional damage and contaminated sites are already covered by national legislation, in accordance with the principle of subsidiarity these existing regimes should be applied without any need for any additional text at the Community level. As a result, the liability regime should focus on liability for biodiversity damage seeing as this is the only aspect which is not yet covered by the different national legislation.

- Ensuring effective restoration: Without prejudice to AFEP’s view that contaminated sites should not be included in the proposed regime, AFEP considers that concepts such as significant damage and thresholds will need to be defined. The proposal to have EU-wide thresholds is both unrealistic and impracticable. An acceptable solution would be a definition of the relevant thresholds at a national level which would be decided on a case-by-case basis following the carrying out of on-site risk analysis by certified bodies.

- Access to justice: Access to justice by public interest groups is only conceivable if those groups are certified by the State and if their intervention is strictly limited to their social objectives.

- Relation with international conventions: It is crucial that proposals in respect of environmental liability be coherent with existing international conventions.

- Financial security: An insurance system requires at the very least that damage be capable of being quantified in monetary terms. As the WP acknowledges, it is incredibly difficult to attribute a value to biodiversity. Due to the unpredictable nature of biodiversity damage, insurers will only be able to offer very low levels of indemnity and the remainder of the cost would have to be borne by businesses. AFEP has strong reservations in respect of the feasibility of introducing an insurance regime for biodiversity damage.

- Subsidiarity and proportionality: The regime should focus on liability for biodiversity damage since this is the only aspect which is not yet covered by the different national legislation. Since traditional damage and contaminated sites are already covered by national legislation, in accordance with the principle of subsidiarity these existing regimes should be applied without any need for any additional text at the Community level.

- Miscellaneous: WP does not mention limitation periods but these have an important role to play in a liability regime. However, AFEP point out that if the period is too long (such as the period of 30 years which appeared in earlier drafts of the WP) then it becomes impossible to trace the cause of the damage and gather the necessary evidence and it would hinder the availability of insurance coverage. AFEP would like to be involved in consultations in respect of the studies which are being prepared by the Commission on competitiveness,
valuation of biodiversity and insurance.

- Association des Chambres Françaises de Commerce & d’Industrie

- General comments: ACFCI consider that the environmental liability regime proposed in the WP combined with the very wide scope being proposed constitutes a risk to the development and viability of European enterprises. ACFCI consider that there is no justification for coverage of traditional damage or contamination of sites in an EU regime and that the coverage of biodiversity damage is preconditioned by the development of detailed valuation criteria.

- No retroactivity: ACFCI consider it inappropriate to include contaminated sites in an EU liability regime since those sites are not defined or covered at the Community level. This absence of a definition puts into question the principle of non-retroactivity proposed in the WP in respect of this type of damage.

- Damage to be covered: ACFCI consider that there is no justification for coverage of traditional damage or contamination of sites in an EU regime and that the coverage of biodiversity damage is preconditioned by the development of detailed valuation criteria.

- Activities to be covered: The distinction made in the WP between dangerous (to which strict liability is to apply) and non-dangerous activities (to which fault-based liability is to apply) is very questionable. The underlying presumption here is that industry adversely affects the environment. In addition, non-dangerous activities are not defined in the WP.

- Type and other features of liability: ACFCI consider that the scope of the proposed regime is too large not only would it cover a great many activities (in particular industrial activities) but it would also cover traditional damage, damage in the form of contaminated sites and biodiversity damage.

- Defences: Development risk and acting in accordance with the instructions of a regulatory authority should also be allowed as defences.

- Biodiversity damage: Although the coverage of biodiversity damage in an EU liability regime would appear to be justified, it is nonetheless crucial to define from the outset precise valuation criteria.

- Contaminated sites: ACFCI consider it inappropriate to include contaminated sites in an EU liability regime since those sites are not defined or covered at the Community level. This absence of a definition puts into question the principle of non-retroactivity proposed in the WP in respect of this type of damage.

- Traditional damage: There is no need for a Community liability regime in respect of traditional damage. Any such regime would have to be superimposed on the liability regimes already in existence in the different Member States. Coverage of this type of damage is not justifiable under the subsidiarity principle.

- Access to justice: ACFCI urge caution in respect of reinforcing access to justice for public interest groups since there is a risk that this would result in a multiplication of claims and a weakening in the position of companies carrying out dangerous or potentially
dangerous activities.

- Financial security: Although the WP considers the question of insurability to be important, ACFCI question whether the regime being proposed in the WP is in actual fact insurable. In order not to damage the competitiveness of industry, and of SMEs in particular, it is important that the costs of insurance remain acceptable for those enterprises.

- Subsidiarity and proportionality: Coverage of traditional damage in an EU liability regime is not justifiable under the principle of subsidiarity. There is no need for a Community liability regime in respect of this type of damage and any such regime would have to be superimposed on the liability regimes already in existence in the different Member States.

- Economic impact: ACFCI consider that the environmental liability regime proposed in the WP combined with the very wide scope being proposed constitutes a risk to the development and viability of European enterprises.

- Chambre de Commerce et d'Industrie de Paris

- General comments: In order to comply with existing environmental obligations, most operators have put in place considerable preventative measures, particularly in terms of environmental management practices. CCIP notes that the WP focuses solely on the polluter pays principle and considers that the attention of directors and managers should be drawn to the importance of preventative measures and environmental management. CCIP considers that the proposals set out in the WP are likely to add to the already heavy environmental burden on industry and therefore it expresses strong reservations in respect of the WP.

- No retroactivity: In cases where it is not possible to identify when the action which caused the damage took place, CCIP recommends that there should be a presumption that the damage was caused prior to the entry into force of the regime.

- Activities to be covered: CCIP agrees with the proposal to limit liability to those hazardous activities which are regulated under existing EC environmental law.

- Type and other features of liability: Limitation periods for the bringing of actions need to be considered. CCIP suggest that the wording of the Lugano Convention might serve as inspiration in this respect.

- Defences: In the interests of fairness, operators should be able to rely on the defence of compliance with permits issued by the relevant regulatory authorities.

- Burden of proof: CCIP is strongly opposed to the introduction of a presumption that the damage suffered by the claimant was caused by the plaintiff’s actions. This would be contrary to the fundamental principles underlying civil liability and inequitable in light of the proposed application of strict liability.

- Liable party/parties: In order to prevent unnecessary litigation, environmental audits should be encouraged in cases where one operator takes over from a previous operator.

- Biodiversity damage: The difficulty with restoration of biodiversity
damage is that no evaluation method can be applied in a systematic manner. A civil liability regime requires that damage be real and quantifiable.

- Contaminated sites: CCIP points out that the scope of the proposed liability regime is intended to be limited to activities which are already regulated under existing EC environmental law and that this is not the case in respect of contaminated sites. Since contaminated sites is an area in respect of which Member States retain competence, this should not be regulated under the proposed liability regime.

- Traditional damage: Since the definition of traditional damage would be left up to the Member States, CCIP considers that it would be opportune to harmonise at EC level the liability rules applying to this type of damage.

- Ensuring effective restoration: What should be done with damages paid by polluters in cases where full restoration is not possible? Since the damages will have been calculated on the basis of alternative solutions (restoration not being possible), the monies which have been paid should be set aside until such alternative measures are implemented.

- Access to justice: Interest groups should only be entitled to take subsidiary actions if they comply with certain qualitative criteria. Only those groups whose objective is the promotion of environmental protection should be entitled to take subsidiary action. Even if the right of action for interest groups is conferred at the EC level, it should be left up to Member States to decide at the national level under what conditions this right can be exercised by such groups.

- Relation with international conventions: The proposed liability directive could complement existing international conventions in respect of matters which are not dealt with by those conventions.

- Financial security: CCIP suggests that the system whereby insurers assess and advise insureds on prevention of risks and liabilities prior to the granting of insurance coverage could be systematised and co-ordinated at the EC level. Damage resulting from the day-to-day operation of an activity is not covered by insurance coverage. Companies would be well advised to set up reserve funds in order to cover the cost of restoration or clean up measures in cases of such type of damage.

- Different options: A framework directive would seem to be the better option since it gives Member States flexibility in the way the directive’s objectives are implemented, allows Member States to introduce or maintain more stringent requirements if necessary and allows a step-by-step/progressive approach to implementation.

- Subsidiarity and proportionality: CCIP points out that the scope of the proposed liability regime is intended to be limited to activities which are already regulated under existing EC environmental law and that this is not the case in respect of contaminated sites. Since contaminated sites is an area in respect of which Member States retain competence, this should not be regulated under the proposed liability regime.

- Comiti National Francais de la Chambre de Commerce Internationale

- General comments: Any forthcoming Community measure should consist of specific proposals and should be capable of practical application throughout the entirety of
the EU, rather than merely setting out principles which could then be subject to different interpretations and applications.

- Defences: EC legislation provides that environmental permits may only be granted by the relevant national authorities if those permits are based on best available techniques, which by definition takes into account state of the art. Therefore, the Commission should allow development risk as a defence under the proposed liability regime.

- Burden of proof: ICC France have serious reservations in respect of the proposal to alleviate the burden of proof and they consider that the consequences of such a proposal would be all the more significant since the regime would be based on strict liability. The only justification given in the WP for reversal of the burden of proof is that it may be more difficult for a plaintiff to establish facts concerning the causal link between an activity carried out by the defendant and the damage. Reversal of the burden of proof would be contrary not only to the polluter pays principle but also to the principle of subsidiarity. The forthcoming Directive should take into account the numerous means available under existing environmental legislation for establishing the cause of a particular damage. For example, IPPC Directive 96/61 requires operators to inform the relevant authority of any incident or accident which may significantly affect the environment and enables samples to be taken. In addition, the Recommendation of the European Parliament and the Council on minimum criteria for inspections also contributes to improving access to the relevant information. There already exist rules in most national regimes which allow a court to modify the usual rules pertaining to the burden of proof where this is necessary in a particular case and ICC France consider that the Commission should bear in mind all such existing national rules before proposing regulation of this aspect at EC-level.

- Liable party/parties: Application of the polluter pays principle requires that liability be borne solely by those parties which have caused the damage. ICC France are vigorously opposed to any extension of liability to shareholders or directors.

- Environmental damage: It cannot be seriously envisaged that a Directive would merely set out guiding principles in respect of restoration of biodiversity damage and contaminated sites. Since what is being proposed is a civil liability regime, the regime has to be capable of being applied by non-specialist national courts. Such courts would not be in a position to set parameters such as the minimum threshold for restoration of biodiversity damage or the natural resource evaluation criteria which should be weighted against the cost of restoration so as to ensure that such costs are not disproportionate. Non-specialist national courts would encounter similar problems with regard to the clean up of contaminated land. In France, contaminated land raises such technical questions that it is dealt with by a specialist administrative body. Therefore, ICC France call again for adequate scientific and technical studies to be carried out so as to enable the Commission to propose specific provisions in respect of restoration which would be capable of being applied by non-specialist national jurisdictions. Such studies should be subject to consultation with the relevant interested parties. Failing this, ICC France consider that biodiversity damage and contaminated sites should be excluded from the proposed liability regime and should be regulated separately in such as manner as to require Member States to order their relevant national authorities to prescribe restoration measures.

- Contaminated sites: There will be serious practical difficulties in including contaminated sites in an EC-wide liability regime seeing as there is currently no Community measure in existence relating to this, due to the local nature of contamination.
- Financial security: A liability regime will only be effective in practice if operators are able to insure against potential liabilities. This would not be possible in the absence of specific parameters enabling the relevant risks to be assessed. ICC France point out that it would be contrary to the principle of proportionality to seek to invoke the liability of mother companies or directors in cases where the company responsible for the damage is insolvent.

- Subsidiarity and proportionality: A liability regime will only be effective in practice if operators are able to insure against potential liabilities. This would not be possible in the absence of specific parameters enabling the relevant risks to be assessed. ICC France point out that it would be contrary to the principle of proportionality to seek to invoke the liability of mother companies or directors in cases where the company responsible for the damage is insolvent.

- Mouvement des Entreprises de France

- General comments: Although MEDEF considers that the final version of the WP is better structured than its previous versions, it believes nonetheless that the WP leaves a large number of questions answered and that this is prejudicial to the legal certainty needed by the relevant operators.

- No retroactivity: MEDEF welcomes the non-retroactive nature of the proposed regime. However, it considers that questions still remain in respect of the cut-off point between historic contamination and contamination covered by the regime, in particular in cases of gradual and on-going contamination.

- Activities to be covered: MEDEF does not think it is necessary to link liability to those activities which are already regulated under EC law – instead, liability should be linked to the damage which is caused.

- Type and other features of liability: MEDEF emphasises the need to define clearly the various elements of the proposed regime so as to avoid legal uncertainty and litigation.

- Defences: MEDEF considers that companies should be entitled to invoke the following as defences: compliance with permits, the fact that the damage results from pollution which is acceptable in light of local conditions, development risk and state of the art.

- Burden of proof: The requirement that a causal link be established is an essential element in a strict liability regime. MEDEF is concerned that the requirement to establish a clear and direct causal link might be eroded through proposals for an “alleviation” of the burden of proof.

- Liable party/parties: MEDEF agrees that liability should rest with the person who exercises control of the relevant activity and it welcomes the intention to make legal persons, rather than managers and employees, liable. MEDEF is also glad to note that the previous references to making mother companies liable for the acts of their subsidiaries has been removed from the final version of the WP.

- Biodiversity damage: MEDEF considers that the inclusion of liability for
biodiversity damage in the proposed regime appears to be justified since this is an area which is not yet covered by national French law. MEDEF welcomes the intention to limit liability for biodiversity damage to the Natura 2000 network but considers that “significant biodiversity damage” and the valuation and restoration methods for such damage need to be defined before any legislative measure can be proposed.

- Contaminated sites: The proposed harmonisation of objectives and standards for the clean up of contaminated sites is contrary to the principle of subsidiarity. MEDEF does not believe that Community action in respect of contaminated sites would have an added-value. In fact, any EC intervention in this area will inevitably lead to a great deal of confusion in terms of current French policy on the clean up of contaminated sites. French law applies both to historical and recent contamination and is based on a case-by-case assessment following specific methodologies (which take into account local conditions, risks to health and to the environment and the future use of a site).

- Traditional damage: MEDEF is firmly opposed to the inclusion of traditional damage in the proposed regime and considers that the approach being proposed by the Commission carries serious risks of upsetting national civil liability regimes. Inclusion of traditional damage would be contrary to the principle of subsidiarity since this area is already well covered under French national law and it would lead to a great deal of legal uncertainty. In addition, the proposed approach raises difficult questions of interaction between civil law and administrative law.

- Access to justice: French law currently grants environmental protection organisations wide powers which enable them to bring legal and administrative actions, such as public interest civil actions. Therefore, MEDEF considers that existing French law already provides sufficient access to justice for public interest groups. Environmental protection organisations should not take over the role of public authorities and the question of abusive actions should be borne in mind in order to prevent the economic interests of businesses being prejudiced. MEDEF does not consider that the proposals in respect of preventative action have a role to play in a civil liability regime since in such cases damage has not yet occurred. MEDEF points out that in the US, environmental protection organisations are not entitled to bring legal actions in cases of damage to biodiversity.

- Financial security: MEDEF considers that insurability is a prerequisite to the introduction of a liability regime and that legal certainty is crucial to the question of insurability. Consideration should be given to the cost of obtaining insurance, in particular the cost to SMEs. Consideration should also be given to the absence of ceilings on the amount of liability an operator may incur.

- Subsidiarity and proportionality: The proposed harmonisation of objectives and standards for the clean up of contaminated sites is contrary to the principle of subsidiarity. MEDEF does not believe that Community action in respect of contaminated sites would have an added-value. In fact, any EC intervention in this area will inevitably lead to a great deal of confusion in terms of current French policy on the clean up of contaminated sites. MEDEF is firmly opposed to the inclusion of traditional damage in the proposed regime and considers that the approach being proposed by the Commission carries serious risks of upsetting national civil liability regimes. Inclusion of traditional damage would be contrary to the principle of subsidiarity since this area is already well covered under French national law and it would lead to a great deal of legal uncertainty. The only area MEDEF considers Community action is justifiable is that of liability for damage caused to biodiversity damage.
- Economic impact: Proposals for a liability regime should take into account the costs which might be involved for businesses, in particular for SMEs.

- Miscellaneous: MEDEF considers that the Commission’s proposals do not take into account sufficiently the preventative measures which some companies may have put into place.

- National Industrial NGOs; sectorwise

- Fidiration Française de la Ricupiration pour la Gestion Industrielle de l'Environnement et du Recyclage

- General comments: The polluter pays principle and the concept of making the operator liable already exist under French law and are now being taken up at the Community level. However, the proposed liability regime is intended to apply only to future damage without anything being said about past pollution. The fact that damage will only be covered by the regime if it is caused by dangerous activities which are regulated and that biodiversity damage will only be covered if it occurs within the Natura 2000 network means that two very large blanks would be left in terms of environmental protection.

- Activities to be covered: The fact that the proposed regime is intended to cover only dangerous activities which are regulated leaves a very large blank in terms of environmental protection.

- Type and other features of liability: The concepts of fault-based and strict liability are new to French law. More detailed explanations are needed in this respect since the distinction between the two types of liability will affect the scope of application of the regime depending on whether the damage occurs within the Natura 2000 network or not and on whether the activity which causes the damage is dangerous or not.

- Liable party/parties: The WP proposes to cover damage caused by the recycling sector. However, FEDEREC consider this to be a very dangerous position and point out that the recycling sector, which is subject to stringent regulation, will cause the least amount of pollution, while users of polluting products will be entitled to pollute without being held liable. The proposal to make a permitting authority liable instead of the polluter in certain cases would be a very important innovation under French law. Although the proposal might seem interesting to operators, FEDEREC doubt whether the French administration would agree with this proposal.

- Biodiversity damage: The fact that the proposed regime is intended to cover biodiversity damage only within the Natura 2000 network leaves a very large blank in terms of environmental protection. FEDEREC consider that it would be desirable to have a description of biodiversity damage caused within the Natura 2000 network. The regime is intended to apply only where the damage which is caused exceeds a minimum threshold. This threshold should be defined with a great deal of precision.

- Contaminated sites: FEDEREC consider that harmonisation of clean-up standards appears to be indispensable, particularly in the case of France which up until now has based itself on Dutch, German and French legislation. It is necessary to fix limits and criteria when defining significant damage.
- Ensuring effective restoration: The concept of spending compensation on comparable projects in cases where restoration of the actual damage is not possible either for technical or economic reasons is unknown in France.

- Access to justice: In the case of biodiversity damage, it is the State (rather than the polluter) who will be responsible for carrying out remediation and restoration but using money paid by the polluter. However, if the State fails to act or does not act adequately, interest groups will be entitled to take over the role of the State. This means that if the State is slow to act the Greens will step in automatically. Giving public interest groups the right to take preventative measures in urgent cases and then allowing them to recover the costs of so doing from the polluter means that such groups would be willing to take any sort of action since it would not cost them anything. No definition has been given of the objective qualitative criteria for deciding which public interest groups would be entitled to take action.

- Financial security: It is very difficult to obtain insurance cover for pollution in France. French legislation provides that if the polluter fails to pay, the owner may be held liable for clean-up.

- Union des Industries Chimiques

- Damage to be covered: The WP does not give sufficient elements to justify the necessity of such a wide Community directive on environmental liability. A directive that deals with traditional damage, damage to biodiversity and contaminated sites will cause a great deal of confusion in the liability regimes already in force in the Member States. Only a Community initiative dealing with liability for damage to biodiversity would be legally justified.

- Activities to be covered: The distinction between (potentially) dangerous activities and non-dangerous activities can be interpreted in different ways and might lead to a difficult application of the regime. Such a distinction will not help the restoration of environmental damage.

- Type and other features of liability: Limitation periods should be foreseen from the date when the plaintiff knew of the existence of the damage and from the date when the harmful event occurred.

- Defences: Risk of development, state of the art and compliance with permits should be allowed as defences. In addition, account should be taken of specific local circumstances and of the margin of discretion given to the permitting authority in the procedure for delivering licences.

- Burden of proof: An alleviation of the burden of proof will mean at the end a reversal of it. The plaintiff should be in charge of proving the causal link.

- Biodiversity damage: UIC consider that limitation of the scope to the Natura 2000 network is reasonable. Any future extension of the scope of liability for damage to biodiversity will have to be carefully discussed with all interested parties.

- Contaminated sites: This matter is only relevant on a national level. Contaminated sites do not need to subject to individual treatment since contamination of a site always involves damage to property or to biodiversity. The introduction of this kind of damage
into the regime is questionable as long as there is no previous harmonisation on a Community level on this issue.

- Traditional damage: The WP does not explain well why liability for traditional damage should be included in the environmental liability regime. There would be an overlap with the existing national regimes, which are working very well. This would result in a great deal of confusion and therefore a great deal of legal and economic uncertainty.

- Access to justice: A strict legislative framework will be necessary in order to prevent the multiplication of abusive initiatives which, in the framework of a strict liability system, would unduly compromise the value of the permits delivered by public authorities.

- Financial security: The development of an appropriate insurance mechanism is most welcome. It will be necessary to first develop a valuation system in order to be able to attribute a monetary value to environmental damage. A maximum threshold for the compensation should be fixed (such as in Product Liability Directive).

- Subsidiarity and proportionality: The EC should not intervene unless it can deal with a problem better than the Member States at the national level. The extension of an environmental liability regime to traditional damage would infringe the subsidiarity principle. The influence of such a regime should have been evaluated before the adoption of the WP. On the contrary, a Community action in the field of damage to biodiversity would not infringe the principle of subsidiarity.

- National and Regional Environmental NGOs

- Fidiration FRANCE NATURE ENVIRONNEMENT et Federation SEPANSO

- General comments: The Federation FRANCE NATURE ENVIRONNEMENT (Federation Francaise des Societes de Protection de la Nature et de l’Environnement) and the Federation SEPANSO (Societe pour l’Etude, la Protection et l’Amenagement de la Nature dans le Sud-Ouest) have both stated that they are very interested in the WP and in environmental liability itself and that due to the volunteer-nature of their organisations they rely on the European Environmental Bureau (EEB) to voice their views. Both Federations hope that they will not be disappointed in the next initiative taken by the Commission in respect of environmental liability.

- Other Public bodies

- Association Nationale des Communes pour la Mantrise des Risques Technologiques Majeurs

- General comments: Application of the principles of prevention and precaution resulting in the polluter paying for the damage he may cause to the environment may have a dissuasive effect but this effect is not solely dependent on liability and therefore dependent on insurance.

- Damage to be covered: Generally, the concept of "risk" is assessed on the basis of its human, material and environmental consequences.

- Type and other features of liability: Although the impact and nuisances
resulting from dangerous or potentially dangerous activities are already regulated, the degradation of an environment which has been rendered fragile by environmental accidents needs to be taken into account in research, investment and know-how. The relevant question is whether the environment should be considered as being in the service of economic development or whether it should be considered as an ethic. Given the close links between industrial activities and the national economy, the Association considers that the concept of industrial risk in the environment may be an issue of national solidarity. Therefore, the Association suggests the setting up of a compensation fund made up of contributions from polluting activities, which in turn would be included in the sale price to consumers. This compensation fund could dispense with the long and hazardous process of establishing liability and would guarantee rapid restoration. There could be a sliding scale of contributions to the compensation fund based on the levels of protection, prevention and safety a particular company has introduced. This would allow companies wishing to pursue voluntary environmental management to control and limit the impact of their activities on the natural environment.

- Financial security: It should be possible for insurance to cover the costs of restoration. An appropriate mechanism will be required - operating under the control of a supervisory body, an expert third party appointed by the courts or a private supervisory body - with a view to achieving optimum restoration without unwanted interventions. Steps should be taken to ensure that the costs of any obligatory measures are economically acceptable. Measures will need to specify the deadline by which implementation or restoration is required and this requirement should be imposed on the polluter and his insurer.

- GERMANY

- Academics

- Mr Pawel Przybysz

- General comments: Implementation of the principal EC environmental law objectives requires the strengthening of the present European environmental regime. The harmonisation of rules governing liability for damage seems to bring about better equalisation of competitiveness. There is a need for liable parties to internalise the costs of restoration of damage.

- Damage to be covered: The coverage of damage to biodiversity is very welcome. However, Mr Przybysz queries whether restricting liability for this type of damage to species in the Natura 2000 network is justifiable.

- Type and other features of liability: Although the insertion of no-fault liability as a rule should be viewed very positively, the application of no-fault liability to biodiversity damage caused by non-dangerous activities does not seem to be justifiable. The possibility of escaping liability might create unwelcome incentives leading to the shifting of partially dangerous activities to entities which are primarily of a non-dangerous character.

- Burden of proof: Proposals in respect of alleviation of the burden of proof should take into account the German experience (i.e. art.6-1 of the German Environmental Liability Act 1990).

- Liable party/parties: Both physical persons and corporate entities running the dangerous activities are embraced in the proposals.
- Biodiversity damage: The coverage of damage to biodiversity is very welcome. However, Mr Przybysz queries whether restricting liability for this type of damage to species in the Natura 2000 network is justifiable.

- Traditional damage: Mr Przybysz agrees that the proposed regime should cover traditional damage otherwise there would be strict liability for environmental damage and fault-based liability for traditional damage and this would amount to an unjustifiable differentiation.

- Access to justice: The fulfilment of the objectives of open civic society demands the disclosure of certain types of information. The better knowledge is in respect of those who have caused damage, the stronger is the incentive for those persons to take preventative measures.

- Financial security: The State should be liable in cases where the polluter’s means are exhausted but where damage is still uncovered.

- Different options: A directive is the best tool for implementation of the proposed civil liability regime. However, the directive should limit the areas which should be left to Member States’ discretion otherwise this could lead to differences across the different Member States which could jeopardise the objectives of the regime.

- Professor Dr. Eckard Rehbinder

- General comments: Professor Rehbinder is a professor of economic law, environmental law and comparative law at the Johann Wolfgang Goethe University in Frankfurt. Professor Rehbinder considers that insofar as polluters are made to restore or pay for restoration of natural resources impaired by them, this is bound to have a positive effect on the environment. However, the Professor considers that the prevention rationale of environmental liability is less obvious and that the empirical evidence needed to back this up is weak. The proposal in the WP is inconsistent with the more recent development of Community law on air and water pollution. Professor Rehbinder considers that the WP is too timid for a successful beginning and that it does not represent a “great leap forward”. The Professor’s overall impression is that the WP has discarded major important issues.

- No retroactivity: Professor Rehbinder considers that the arguments put forward in support of a non-retroactive regime – legal certainty and protection of legitimate expectations – are well founded. A rule of apportionment of liability over time (for example, following the rules in Article 5(1) of the Lugano Convention) should be established for cases where damage was caused partly before and partly after the entry into force of the regime.

- Damage to be covered: The very core of the proposals for a liability regime, that of liability for ecological damage, is weak in that it limits the scope of the regime to natural resources protected under the Wild Birds and the Habitats Directives and to contaminated sites. Since most Member States already have special laws for the clean-up of contaminated sites, the introduction of the proposed regime would only be innovative in respect of bird protection areas and habitats. Ecological damage associated with damage to property and with pollution of environmental media other than contaminated sites is not covered. Pure economic damage resulting from natural resources damage is not encompassed either.
Activities to be covered: The activity-based approach in the WP should be applauded since there are a number of well-founded objections against the facility-based approach of the German and Danish legislation. Nevertheless, the preference for linking the regime to environmental regulation under existing Community legislation is not very convincing. Positive aspects are the limited Community engagement under the perspective of subsidiarity and the expectation of boosting compliance with national law implementing Community directives. The negative aspect is that such a link will leave gaps in coverage as regards the natural resource damage because the scope of Wild Birds and Habitats Directives is relatively narrow. In the field of biodiversity damage, the WP proposes an effect-oriented liability regime which applies regardless of the dangerousness of the activity that caused it. An extension of this kind of liability should be discussed.

Type and other features of liability: The WP does not provide for upper limits to liability. Professor Rehbinder considers that a cap on liability would undoubtedly facilitate the development of the insurance market.

Defences: Adding the defences of compliance with administrative regulations and permits, state of the art and risk of development would bring strict liability close to traditional fault-based liability.

Burden of proof: The WP is too vague on this topic and thus fails to fulfil the normal task of a WP - namely, to give guidance for future discussion. The WP does not address the question of burden of proof for co-causation.

Liable party/parties: Liability is channelled to plant operators. This is a sensible principle as regards activity-based liability, but is less convincing as regards effect-based liability for natural resource damage. Member States may be free to extend liability to other persons such as property owners or waste generators. The WP does not address the question of liability where there are multiple identifiable sources.

Biodiversity damage: In the field of biodiversity damage, the WP proposes an effect-oriented liability regime. An extension of this kind of liability should be discussed. Fault-based liability for damage caused by non-dangerous activities appears sensible.

Contaminated sites: Most Member States already have special laws for the clean-up of contaminated sites. Therefore, the introduction of the proposed regime would only be innovative in respect of bird protection areas and habitats. Under the WP, damage in the form of “contaminated sites” includes soil, surface and ground water contamination but excludes recultivation. The WP may underestimate the difficulty of setting quantitative standards and objectives. National experiences seem to demonstrate the superiority of a case-by-case determination.

Ensuring effective restoration: The WP has a pragmatic approach that would be more convincing if the rich discussion in the US on economic valuation of natural resources had been more fully introduced into the debate and if it had been shown that the use of more complex evaluation methods is not feasible. In the case non-restorable damage, the liable person should bear the costs of establishing an alternative natural resource equivalent to the destroyed one. However, the WP does not give a definition of equivalent natural resource.

Access to justice: The two-tier system proposed by the WP constitutes a necessary complement of any attempt of effectively tackling the problem of pure ecological
damage. It could be tempered by limiting standing to “responsible” interest groups and qualifying it by the requirement of subsidiarity. Moreover, co-operation with the competent public authorities and use of available expertise as to the manner of restoration are required.

- Financial security: The WP shows itself to be realistic when it renounces to the requirement of a financial security. A cap on liability would undoubtedly facilitate the development of the insurance market.

- Different options: A Community directive really seems to be the best way to introduce a harmonised regime for environmental liability.

- Professor Ginter Hager (Rechtsanwälte)

- General comments: Although the proposed regime takes into account the polluter pays principle, it does not take into sufficient account the precaution principle. Since some damage can never be restored, the regime should be shaped in such a way as to induce those who might cause environmental damage to avoid from the outset the risk by setting up all possible precautionary measures.

- Damage to be covered: Damage caused by diffuse pollution and by pollution whose source is not identifiable should be restored by means of a special fund (see "Rechte des Burgers zur Verhutung und zum Ersatz von Umweltschaden" by Lummert, Thiem, UBA Berichte 3/80).

- Liable party/parties: In case of very extensive damage and of consequent insolvency of the polluter, the direct liability of controlling shareholders (piercing the corporate veil) should be foreseen. For the same reason, it should also be possible to claim damages from the insurer when the polluter no longer does not exist any more or is no longer to be found.

- Contaminated sites: In case of a contaminated site, the identification of the polluter and proof of the causal link is often problematic - above all when a public prosecution is no longer possible because of the expiration of the prescription time-limits. Special attention should therefore be paid to clarification of the state of facts.

- Access to justice: The proposal to allow public interest groups to have rights of direct action against the polluter is a very positive one.

- European Industrial NGOs; sectorwise

- Union Petroliére Européenne Indépendante

- General comments: UPEI is the European Representation of Independent Oil Traders. UPEI has provided comments both on the WP on Environmental Liability and the Commission’s Communication to the European Parliament and the Council on the Safety of the Sea-Borne Oil Trade. With regard to the WP, UPEI accepts the concept of "polluter pays" but considers that the concept of "polluter" needs to be defined strictly. With regard to the Communication, UPEI advises against extending liability under the Civil Liability and Fund Conventions beyond ship-owners to charterers and other players. It is only the ship-owners who have real control over the operation of their ships - charterers have only a limited ability to inspect vessels. A regime of shared responsibility between ship-owners and other players would lead to a disincentive for underwriters to take a proactive interest in the condition of ships. UPEI
suggests that instead of requiring charterers to share liability, it would be preferable to require these parties to contribute into the International Oil Pollution Compensation (IOPC) Fund.

- **Liable party/parties**: UPEI accepts the concept of "polluter pays" but considers that the concept of "polluter" needs to be defined strictly. UPEI explains that in the context of liability under the Civil Liability and Fund Conventions, liability for damage caused by oil spills should not be extended beyond ship-owners since they are the ones with real control over the operation of the vessels.

- **Access to justice**: Although UPEI does not doubt NGOs's good intentions, it strongly advises the Commission to define the instances in which NGOs are to be granted the right to sue potential polluters. Industry needs to be protected against harassment and non-democratically legitimised institutions.

- **Financial security**: UPEI considers that since bank guarantees are not obtainable from a practicable point of view, insurance is the only workable solution.

- **Subsidiarity and proportionality**: UPEI supports the idea of internal untaxed reserves and considers that in order to avoid distortions in intra-trade, the handling of this matter must not be left to subsidiarity.

- **Governments**

- **German Government**

- **General comments**: The German Government welcomes the WP as an important, informative and trend-setting basis for further discussions on this topic. However, the WP itself makes it clear that some important aspects are still in need of more detailed consideration and the German Government welcomes the fact that the Commission openly points out such gaps and puts them up for discussion without anticipating any particular solutions. Concrete proposals should be tabled only when the necessary specialist and legal examinations have been completed. The German Government very much supports the Commission's concept of gradual implementation of the WP.

- **No retroactivity**: The German Government welcomes the fact that the proposed regime will not apply retroactively and therefore agrees with the Commission's view that the decision of what to do in respect of retroactive liability should be left to the discretion of the Member States. A clear and precise definition of what is meant by "pollution from the past" will be needed.

- **Damage to be covered**: The German Government agrees that it is not possible for cover diffuse damage in the proposed liability regime and so it will be necessary to define what is meant by diffuse damage in order to ensure that it clearly excluded. Although the German Government accepts that there is a good case for introducing liability rules at the EC level for biodiversity damage, it does not consider that a valid case has been made out by the Commission for including traditional damage in the proposed regime.

- **Activities to be covered**: The German Government welcomes in principle the idea of linking the liability regime with existing EC environmental protection provisions and so a list of activities will need to be clearly defined. It agrees that the scope can usefully be limited by restricting the regime to infringement of EC environmental protection provisions.
- **Type and other features of liability**: The WP states that the primary aim of environmental liability lies in the monetary compensation of environmental damage caused. It does not comment on whether the person responsible for the damage should also be responsible for the physical restoration of the damage or whether it should be exclusively a matter for the injured party or the competent authorities. Under German public law, the person responsible for the damage is not only required to provide compensation for the costs but is predominantly called upon to actually physically restore the damage. Therefore, remedy of the damage by the injured party or the relevant authorities only comes into play if the responsible party fails or is unable to comply with his obligation to remedy the damage. The German Government is of the opinion that such a distribution of responsibility under a liability regime would satisfy the polluter pays principle better than a liability regime where the person responsible for the damage is merely the bearer of the costs. The German Government agrees that strict liability should apply to those activities which present a substantial inherent risk to the environment. However, the German Government considers that a necessary corollary of strict liability is the imposition of appropriate ceilings on the level of liability which can be incurred. In the case of fault-based liability for damage to biodiversity, the Commission has assumed that if it is not possible to establish where the fault lies, the State should be responsible for restoring the damage. The German Government is assuming that in cases where a polluter cannot be made liable the decision on whether restoration work will be carried out by the State will be made in accordance with the law of the Member States.

- **Defences**: The German Government agrees that there should be no liability in cases of Act of God/force majeure but is less sure whether it agrees that acting in accordance with a compulsory order issued by a public authority should be allowed as a defence. Allowing compliance with a permit or development risk as defences do not appear to the German Government to achieve a balanced distribution of the liability risk between the person responsible for the damage, the injured party and the general public. On the whole, the German Government believes that the acceptance and formulation of possible defences should be given further detailed consideration.

- **Burden of proof**: The way in which the burden of proof is arranged will be of central importance to the practicability, effectiveness and economic impact of a Community liability regime. A balance needs to be struck between the interests of the injured party and operators. It should be borne in mind that in a strict liability regime an operator often only has the defence of non-causality as a protection against an unjustified claim. It is possible to envisage that the balance of equity between the plaintiff and the defendant might be addressed by entitling the injured party to advance information from the operator. Under the German Environmental Liability Law, if the facts justify the assumption that a particular installation caused the damage, the injured party is entitled to demand information from the owner of the installation insofar as this is necessary to determine whether there is any entitlement to compensation. The same Law also gives the injured party the benefit of the doubt if in the particular circumstances the installation in question is capable of causing that particular type of damage. The operator can then rebut such a presumption by proving that the installation was operated properly.

- **Liable party/parties**: In principle, the German Government does not object to the proposal that the liable party be the person who exercises control of an activity. However, it is not clear from the WP whether the regime would be confined solely to economic players or whether private persons should be included as well. In the German Government's opinion private persons should not be included, at least not in the initial phase of introduction and testing.
of the regime. Secondary liability of the licensing authority in cases where the damage is caused by emissions which were permitted under a licence could in principle be considered but only if in granting the licence the authority has been at fault and infringed its official duties and the issuing of the licence was therefore illegal.

- Biodiversity damage: In Germany, in the event of damage to protected areas the nature conservation laws of a number of the Federal Lander provide for restoration of the damage at the polluter's expense and if restoration is not possible, compensatory or substitute measures or compensatory payments may be ordered. However, Germany accepts that provisions of this nature do not seem to exist in most other Member States and so it accepts that in respect of biodiversity damage there is a good case for harmonising liability rules at the Community level. The German Government does not object to liability for biodiversity damage being restricted to the Natura 2000 network, at least while the concept of liability for biodiversity damage remains a novel one. However, the German Government points out that the Commission should not underestimate the time and effort that it will take to develop an effective and practicable liability regime for biodiversity damage and it considers that we are still a considerable way away from being able to lay down regulations setting up such a regime.

- Contaminated sites: The German Government agrees with the Commission that liability for contaminated sites needs to be based on appropriate clean-up standards and refers to the German Soil Protection Law and Soil Protection Order as an example. The German Government points out that the consultation effort needed to develop liability rules in this respect could be considerable.

- Traditional damage: The German Government considers that the Commission has not justified in an adequate manner why an EC environmental liability regime is needed in respect of traditional damage. All the Member States have relevant provisions in their national civil law or in special environmental liability instruments which deal with personal injury and damage to property, and, according to the WP most of those national instruments provide for strict liability. The German Government considers that inclusion of traditional damage in an EC liability regime would amount to considerable interference in national legal systems and that, in accordance with the principle of subsidiarity, such drastic interference with national regimes would only be justified if EC-wide regulation were to ensure better protection against traditional damage than national laws can.

- Relation with Product Liability Directive: The German Government has no objections to the delimitation proposed in the WP in this respect.

- Ensuring effective restoration: A framework directive which left the issue of valuation aspects to the Member States would be bound to lead to a mixture of liability provisions resulting in considerable distortions of competition in the Community. In the preparation of valuation principles, particular importance must be attached to questions of efficiency and practicability. From this point of view, the reference to cost-benefit or reasonableness tests give cause for concern. The need for separate tests might mean that expensive and time-consuming expert opinions would need to be obtained in order to come to a decision.

- Access to justice: The German Government considers that "access to justice" is a subject which is very much in need of further discussion. Clearly, it makes sense for private individuals and interested groups to support the relevant public authorities in their work and to bring any shortcomings to their attention. However, any decision to take action should, as
a rule, be left to the national authorities. It would become an intolerable situation if virtually everyone declared themselves the guardians of the environment and could legally claim or actually take whatever action they deemed necessary over the heads of the competent authorities. Therefore, the German Government welcomes the Commission's approach which leaves the prime responsibility in this area to the State. Under restricted conditions and subsidiary to any action taken by the public authorities and purely in cases of environmental damage, consideration could be given to allowing competent interest groups to have independent recourse to administrative tribunals or provide them with other powers for asserting public environmental concerns. However, in so far as the proposals refer to access to justice in respect of environmental damage which has not yet occurred but which is threatened, the German Government considers that those proposals go far beyond the actual subject of the WP and beyond the requirements of the Aarhus Convention.

- Relation with international conventions: The German Government agrees with the Commission that this still needs to be clarified. In view of the existing liability conventions and continuing international efforts to create additional sector-specific liability regimes, the German Government raises the question of whether it would not be preferable to leave out of the proposed environmental liability regime certain areas of liability (e.g. for nuclear activities). In so far as it appears advantageous to supplement international liability provisions by EC liability law, in order to avoid overlap and legal uncertainties it should be made quite clear in each case how the different provisions are to stand in relation to each other.

- Financial security: Key elements of liability, such as the evaluation criteria and the quantification of pure environmental damage, have to be sorted out before a liability regime can enter into force. The German Government takes the view that the introduction of liability ceilings should be considered in this connection. Not only would this be a simple and effective way of limiting environmental liability in accordance with the principle of proportionality but it would also make it easier to calculate likely damage and thus improve insurability.

- Different options: Although in principle the German Government approves of the idea of a framework directive, it considers that at the present state of discussions it would be premature to make a definitive decision in respect of the introduction of an EC environmental liability regime and on its form and content.

- Subsidiarity and proportionality: In the German Government's view, there is a good case for EC action in areas where so far there are no national provisions or where differing legislation in the Member States makes it necessary to harmonise the law. The German Government does not accept that is the case with regard to liability for personal injury and damage to property. All the Member States have relevant provisions in their national civil law or in special environmental liability instruments which deal with this type of damage and according to the WP most of those national instruments provide for strict liability. The German Government considers that inclusion of traditional damage in an EC liability regime would amount to considerable interference in national legal systems and that, in accordance with the principle of subsidiarity, such drastic interference in national regimes would only be justified if EC-wide regulation were ensure better protection against traditional damage than national laws can. Therefore, the German Government considers that the Commission needs to justify why an EC environmental liability regime is needed in respect of traditional damage. On the other hand, the German Government accepts that there is a good case for harmonising liability rules at the Community level in respect of biodiversity damage since this is an area where there are no, or only partial, liability rules at the national level.
- Individual Companies

  - BLG Consult

  - General comments: BLG Consult strongly believe that the anticipated integration between a framework liability regime and the relevant EU legislation on the protection of the environment provides a significant stimulus for the responsible parties to implement existing and new regulations.

  - Damage to be covered: It is not easy to differentiate between "gradual pollution" and "pollution of a widespread, diffuse character" and these terms would probably need to be defined. It is conceivable that in some cases damage will have been caused partly by identifiable polluters and partly by diffuse sources. In such cases, a certain percentage could be assigned to specific polluters and the remaining percentage could perhaps be compensated by the State.

  - Liable party/parties: Identifying who should be liable in the case of multi-staged activities involving more than one operator (e.g. waste management) will be difficult.

  - Environmental damage: Further studies are needed to give examples of how damage to the environment can be quantified. It is not necessary to distinguish between serious threat and significant damage. A significant contamination is a serious threat to man and the environment. Very likely it would be necessary to define different thresholds for different environments or use the most sensitive ecosystem for guidance.

  - Biodiversity damage: It is a rather restrictive approach to cover only those natural resources which are already protected by EC law - especially since the Natura 2000 network is still far from being complete. It would make more sense to cover all natural resources, including at least the natural areas which are already protected under national regimes. It should be clarified whether the expression "damage to nature" is meant to be synonymous with the expression "damage to biodiversity".

  - Contaminated sites: Clean-up objectives should be mentioned first and they might be qualitative and clean-up standards should be mentioned second and they should be quantitative. Any clean-up standards which are developed should integrate concern for man and the natural environment and aim at characterising and quantifying the risks to human and ecosystem health.

  - Traditional damage: It is not clear why the concept of "significant damage" will not be introduced in respect of traditional damage since both environmental and traditional damage are meant to be treated under the same regime.

  - Ensuring effective restoration: Since the objective of liability regimes is restitutio in integrum of the status quo ante (i.e. to re-establish the situation existing prior to the damage occurring), BLG Consult would like to propose a different methodology to that of an "environmental valuation resource inventory". BLG Consult believe that the costs of restoring damage to nature could be calculated as follows: in addition to the costs of assessing the damage, costs of growing or raising lost flora or fauna under lab conditions and the costs of integrating them back into the natural environment. BLG Consult offer to develop scenarios in order to present this idea in a concrete context. The term "restoration" needs to be defined, and
this should include replanting and eventually the re-introduction of the lost fauna. The following terms also need to be defined: "to bring back the damaged resources to comparable condition", "presumed future use of the damaged resources" and "value of the un-restored damage". These terms are more often used in the context of natural resources used for fishery and forestry and are not easily applicable to a protected habitat or to rare species. Why should a "cost-benefit or reasonableness test" be undertaken? This rather conservative economic tool will be very hard to apply to biodiversity damage since this type of damage and the necessary restoration measures are not easily amenable to monetary evaluation. Since the aim of the regime is to prevent damage from occurring by making the polluter aware of the consequences of his action, BLG Consult believe this approach is not appropriate.

- Relation with international conventions: The scope of the proposed Directive should extend to maritime transport, irrespective of the application of other internationally agreed and implemented conventions. International conventions on oil spills either do not cover nature or do not cover it adequately (e.g. definition of "impairment of the environment" under the 1992 Civil Liability and Funds Conventions) and so need either to be amended or need to be complemented by EU measures. A European liability regime covering all relevant hazardous and potentially hazardous activities would set a positive precedent which the maritime sector would not be able to ignore. In addition, it is neither logical nor consistent to use the Erika spill as an example in the introduction and the summary of the WP and then leave damage caused by the maritime transport of oil out of the scope of the proposed Directive.

- Financial security: Insurance cover should be mandatory. This would solve the problem of under-capitalised companies becoming insolvent in the event of significant damage since they would either not be able to obtain insurance or would find an arrangement with the "richer companies" for sharing the risks.

- Miscellaneous: Out of court solutions should be supported as much as possible in order to speed up the process, save funds for restoration measures and to allow clean-up to commence as soon as possible so as to prevent the spread of contamination and the loss of habitats, biodiversity and natural functions.

- Individual Lawyers

  - Mr Michael G\nter

   - General comments: Mr G\nter is a lawyer advising on environmental matters. As regards the objective of environmental liability, it should be borne in mind that liability is not only about compensation but is also about the polluter pays principle and the precaution principle. Therefore, a liability scheme should be designed so that it will ensure a sufficient incentive in terms of preventing damage.

   - Damage to be covered: Damage resulting from diffuse pollution should be covered.

   - Liable party/parties: A direct action against the financial guarantor (insurer) should be foreseen. When a legal person does not have sufficient financial means to compensate for the whole damage, the managers should be held liable as natural persons.

   - Contaminated sites: Too often contamination is discovered a long time after it occurred; it is therefore important to pay sufficient attention to the factual discovery of
contaminated sites.

- Ensuring effective restoration: A fund should be established to compensate for damage resulting from diffuse pollution as well as from cases where the polluter cannot be identified.

- Access to justice: Mr Günther welcomes the WP’s proposal concerning access to justice for public interest groups.

- Financial security: A direct action against the financial guarantor (insurer) should be foreseen.

- Individuals

  - Ms Nina Weipert

  - General comments: The English version of the relevant section of paragraph 3.1 of the WP reads as follows: “If polluters have to pay for damage caused, they will cut back pollution up to the point where the marginal cost of abatement exceeds the compensation avoided. Thus, environmental liability results in prevention of damage and in internalisation of environmental costs. Liability may also lead to the application of more precaution, resulting in avoidance of risk and damage, and may encourage investment in R & D for improving knowledge and technologies.”. Ms Weipert considers that the German version of this text is incorrect. She believes that the word “bis” should be replaced by the word “da?” otherwise the sentence states that the producer makes his decision at a point where the marginal cost already exceeds the cost of the compensation avoided, which would be contrary to the marginal cost theory which presupposes that a producer will always decide in favour of the cheaper alternative and in favour of his own interests.

- Insurance Sector

  - Gesamtverband der Deutschen Versicherungswirtschaft

  - General comments: The Treaty of Amsterdam does not require such a wide environmental liability system. Other less strict systems can well contribute to the amelioration of the environment and to the health of the European population (e.g., in Germany, the provisions contained in the UHG, WHG and the BGB). The regime described in the WP represents only one of the possible ways to implement the fundamental principles. It is too extreme to be realistically and harmoniously implemented in all Member States, bearing in mind that sensitivity in respect of environmental issues is not homogeneous. Furthermore, the above has to be extended to the accessing countries where the introduction of such a severe regulation would cause even greater problems.

  - No retroactivity: The regime correctly does not deal with past pollution. Nevertheless, a clear definition of the borderline between “old” and “new” pollution is needed.

  - Damage to be covered: A harmonised environmental liability regime which includes personal injury and damage to property is welcome. However, its further definition should be left to the Member States. Having said this, pure economic loss should not be included in the regime. Diffuse pollution and pollution caused by multiple unidentified sources has been correctly excluded by the regime.
- **Type and other features of liability**: Strict liability is acceptable, but it should be related to “installations” and not in general to (dangerous or potentially dangerous) activities. Linking liability to an activity carried out in a specific installation allows a clear link to be established with all provisions that regulate it and provides the necessary legal certainty and transparency. The precautionary principle will be better implemented through application of this type of liability because the person who is responsible for the management of the installation – and not a person who must be identified case-by-case – will be identified in advance as the liable one in case of environmental damage.

- **Defences**: “Development risk” should be allowed as defence.

- **Burden of proof**: An alleviation of the burden of proof in the sense of a prima-facie proof or of the need for the plaintiff to demonstrate only the plausibility of the causal link (see ‘6 and ‘7 of the UHG) can be accepted. There should not be any reversal of the burden of proof in favour of the plaintiff unless there is fault.

- **Liable party/parties**: In case of multiple liable parties, liability should be apportioned according to the part of damage caused by each party.

- **Biodiversity damage**: Biodiversity will only be effectively protected when all of society feels responsible and actively contributes to the conservation of nature. Public and criminal law can help this process but not the establishment of an individual liability for damage to biodiversity. The introduction of liability for this kind of damage is incompatible with the environmental legislation already in force in the Member States. It goes beyond the classical concept of damage (detriment to individually protected goods) and it is not based on sufficiently safe parameters. The concept of damage to biodiversity is too vague and imprecise. The concept of “significance” and the scope of the Natura 2000 network are also unclear. There is no concrete criterion for the restoration of damage or for its economic valuation. The systems established in Hessen and in Andalusia do not provide reliable data. National administrations and courts would not have the means to make the system work. It is wholly unclear who should get the compensation for biodiversity damage. Exhaustive and binding criteria should be established. Nowadays this type of liability is not acceptable.

- **Contaminated sites**: The concept of “significant damage” is unclear. Apart from that, a liability regime for this kind of damage can be supported. Soil and water should not be considered separately from the other natural resources - there should be some connection between them and an individual’s right, as the UHG already does.

- **Relation with Product Liability Directive**: The two liability regimes should work separately. A product that causes damage to persons and goods is generally a defective one. In this case the Product Liability Directive will be applicable and the consumer will not need the supplementary protection provided by an environmental liability regime. Consumer protection does not require the inclusion of the producer’s liability into the environmental liability regime.

- **Access to justice**: Neither public authorities nor public interest groups should be allowed to have direct access to justice. The regime can only be applied in case of damage to individually owned goods and it is only the persons who have suffered damage directly who should be entitled to take action in a civil court.
- Financial security: Financial security should not be compulsory. Bearing in mind the extreme severity of the regime, it will be difficult to establish an efficient insurance system. Enterprises will be forced to face further costs. The wide scope of the regime and the wide concept of damage do not allow for the easy establishment of an efficient insurance market for the environmental liability. Furthermore, there is a lack of exhaustive and binding criteria for the valuation of damage – which are necessary for the insurability of the relevant risks. Capping liability will not solve the problem. An insurance market will develop with many difficulties, and is not likely to be homogeneous in all the Member States.

- Different options: The regime described in the WP represents only one of the possible ways to implement the fundamental principles.

- Economic impact: The proposed liability regime is wider that any other in the rest of the world. This will damage the competitiveness of the European economy.

- National Agricultural NGOs
  - Verband der Landwirtschaftskammern

  - General comments: VLK welcomes the WP’s proposals since this will lead to a harmonisation of the legislation on environmental liability in the Member States and therefore to the end of any possible disparity in the field of competitiveness. Provided that agriculture is classified as a non-dangerous activity, the regime described in the WP can be supported. In the later stage of the implementation at national level, attention will have to be paid in order to harmonise the European legislation and avoid discriminations against the competitiveness of German agriculture.

  - Activities to be covered: Provided agriculture is classified as a non-dangerous activity, the regime described in the WP can be supported.

  - Type and other features of liability: The German environmental liability law applies only to very big stock-rearing farms listed in annex 1. Under the regime proposed by the WP, it would seem that strict liability would also apply to medium and small stock-rearing farms. This would represent a high risk for the smaller companies.

  - Biodiversity damage: The definition of the concept and the valuation of damage to biodiversity will encounter many difficulties and consequently the regime itself might be hard to implement. There is no generally accepted method yet for the valuation of environmental damage. The concept of biodiversity damage as set out in the WP can threaten the existence of farmers. Therefore, their situation should be taken into account carefully while drafting the future Directive. In particular, it will be difficult to attribute to a particular dangerous activity the decline of a certain species. Several factories might contribute to this (even the creation of a new humid zone in the surrounding). Farmers should not be held liable if environmental damage occurred during an activity carried out in compliance with legislative provisions and administrative permits.

  - Contaminated sites: The proposed regime does not introduce any significant element which might worsen farmers’ condition. Liability should be excluded if contamination is caused by the utilisation of plant protection products, provided that “good agricultural practices” have been followed.
Traditional damage: The regime should be applicable only to the very big agricultural enterprises listed in annex 1 of the German environmental liability law. The future Directive should contain a rule similar to that provided in annex 1 (n. 64) to '1 of the UmweltHG.

Zentralverbandes Gartenbau

General comments: An EU-wide environmental liability regime should not only set some targets, but should also contain as precise as possible provisions in order to avoid Member States interpreting it in different ways. As regards in particular horticulture and agriculture, the regime should not imply – for example – the risk for an enterprise of being held liable for damage to the environment in case it uses production equipment and facilities. The WP is often unclear and so it is not yet possible to estimate its influence on horticultural enterprises. There is a lack of criteria and measurement systems and it is difficult to assess its practical implementation. The Association points out that the regime which is proposed would not be more stringent than German environmental legislation.

Activities to be covered: It is not clear what “(potentially) dangerous activity” means. Since there no criteria for establishing which activities should bear strict liability, the regime should be only applied to installations formally classified as dangerous. If the regime refers in general to “activities” its scope will never be definitive. The regime should be restricted and related to “installations”. In case of correct utilisation of authorised GMOs there should not be any liability for the horticulturists. The risk would be too high for them – they might not be aware of the possible dangerous implications of the use of such products.

Burden of proof: The rule of presumption should be well clarified. The burden of proof should in any case rest wholly on the plaintiff. In case of biodiversity damage, the causal link might be particularly difficult to demonstrate. The causal link should not be based on probability presumptions.

Liable party/parties: The WP is not clear on who should be liable in case of consequential damage caused by a defective product.

Biodiversity damage: Clear criteria is needed on the valuation and restoration of biodiversity damage and on the possible ways of taking action in case of such damage. The lack of precise criteria could lead to contradictory interpretations in the Member States. The establishment of minimum thresholds (that of significant damage) seems to be reasonable. Such thresholds should be unequivocally determinable, measurable and verifiable. No threshold should be based upon probability.

Traditional damage: There can be an overlap with different liability regimes.

Financial security: No specific indication has been given in the WP in respect of financial security. This needs to be considered urgently.

National Industrial NGOs; general

Bundesverband der Deutschen Industrie

General comments: Several important points are still unclear. It is not yet
time to draft a Directive.

- Damage to be covered: BDI is against the extension of liability to environmental damage as such.

- Activities to be covered: A list of relevant Directives might lead to great legal uncertainty. There should be a better delimitation of dangerous and non-dangerous activities.

- Burden of proof: BDI fears the effects a wide alleviation of the burden of proof in favour of the plaintiff might have.

- Biodiversity damage: It is not clear how biodiversity damage can be evaluated in cases where it is impossible to restore a natural resource to its previous condition. The concept of "significant damage" has not yet been defined. The Natura 2000 network is not yet complete.

- Traditional damage: Health protection seems to have become less important than protection of nature.

- Access to justice: The State should be exclusively responsible for caring for the public interest.

- Financial security: Not only must insurance be available, but SMEs must be able to afford it. Insurance conditions may not influence the features of the liability regime, but the latter must realistically take into account the position of private companies.

- National and Regional Environmental NGOs

- Deutsche Naturschutzring

- General comments: DNR is the umbrella organisation of German nature protection and environmental organisations, as well as for a number of user groups.

- Activities to be covered: Mine exploitation is a (potentially) dangerous activity not covered by the EU legislation. The proposed regime should apply to an accident as serious as that which occurred in Romania, where a goldmine caused an environmental disaster.

- Defences: Compliance to permits and development risk should not be admitted as defences.

- Burden of proof: The defendant should demonstrate that he did not cause the damage. In earlier drafts of the WP a "probability higher than 50%" could be held as a proof. This detail no longer appears in the WP.

- Liable party/parties: A bank should also be considered a potentially liable party if it financed a dangerous activity.

- Biodiversity damage: The link of the proposed regime to EU environmental legislation and its consequent limitation can be justified for reasons of legal certainty but this must be seen only as the first step in a gradual approach. Basing liability on fault in the case of
non-dangerous activities means leaving out agricultural activities from the scope of application of the regime. The proposed regime will apply only in case of “significant damage”. This concept can be interpreted in many different ways. Its definition should not lead to a restriction of the regime.

- Ensuring effective restoration: A cost-benefit or a reasonableness test would result in liability being limited just to the most serious cases – that is, when a very significant environmental damage has been caused.

- Access to justice: The “two-tier approach” is not convincing and seems unnecessarily complicated. Public interest groups should be allowed to have direct access to justice. Such intervention might be necessary in case of inefficient authorities.

- Financial security: If insurance is not compulsory, risky activities might be shifted to smaller enterprises that would become insolvent as soon as a damage occurred. Special funds should be established in order to cover damage which occurred before the entry into force of the regime and/or caused by an unidentifiable polluter, or by diffuse pollution.

- Other Public bodies

  - Bundesrat

  - General comments: The Bundesrat welcomes the WP’s objective to establish a structured Community environmental liability regime ensuring that the persons causing environmental damage would be held liable.

  - No retroactivity: The Bundesrat supports no retroactivity and considers that a reversal of the burden of proof would not be admissible since it would oblige potentially responsible persons to establish that the cause of the damage took place before the entry into force of the regime. The Bundesrat considers that it should be left to Member States to decide on a possible alleviation of the burden of proof in this respect. It is not clear from the WP what should happen in cases where the cause of the damage spans both the period before and after the entry into force of the regime. The Bundesrat considers that it would not be practicable in most cases to distinguish between damage which occurred before and damage which occurred after the entry into force of the regime. Also, it is not clear what should happen in respect of damage caused over a long period of time. The Bundesrat considers that liability for the part of the damage that occurred before the entry into force of the regime should be excluded.

  - Damage to be covered: The Bundesrat is of the opinion that damage caused by diffuse pollution should be excluded.

  - Activities to be covered: The notion of dangerous or potentially dangerous activities should be clearly defined. The Bundesrat considers that activities which are located outside Natura 2000 sites but which cause damage to such sites should not be covered. There is a need to define which activities or acts would be covered in relation to contaminated sites.

  - Type and other features of liability: The Bundesrat supports strict liability in relation to well-defined dangerous activities. Liability should be limited through ceilings and there should be limitation periods.

  - Defences: The Bundesrat considers that operating under a permit and
development risk should not constitute defences. It does, however, advocate the use of ceilings.

- **Burden of proof**: The Bundesrat considers that the WP is insufficiently developed in this respect given the importance of the question. It refers to an example of "6 and '7 of the German Environmental Liability Act 1990. A reversal of the burden of proof would oblige potentially responsible persons to establish that the cause of the damage took place before the entry into force of the regime. The Bundesrat considers that it should be left to Member States to decide on a possible alleviation of the burden of proof in this respect.

- **Liable party/parties**: The Bundesrat agrees that the operator should be held liable. The Community should not intervene in the relationship between the operator and his employees, a matter which should be left to Member States. The Bundesrat strongly opposes the introduction of State liability when damage is caused by an installation operating in accordance with its permit. The Bundesrat also opposes the introduction of an obligation for the State to step in should the polluter remain unidentified.

- **Biodiversity damage**: The Bundesrat notes that linking liability for biodiversity damage to Natura 2000 sites would introduce a territorial limitation that is normally unknown to liability law. Moreover, it has doubts as to the practicability of the scheme. The Bundesrat wonders whether provision of a liability regime for non-dangerous activities is justified in light of the subsidiarity principle. It should be left to the Member States to decide whether they will ensure the conservation of Natura 2000 sites through a liability regime or independently thereof. The Bundesrat doubts the justification for covering biodiversity damage to Natura 2000 sites only. On the other hand, the mere fact that national provisions covering biodiversity damage would be lacking is not as such a justification for the adoption of Community legislation. The Bundesrat considers that activities which are located outside Natura 2000 sites but which cause damage to such sites should not be covered. The Bundesrat notes that strict liability for biodiversity damage would only apply in respect of specific activities. Since these activities are unlikely to be carried out within Natura 2000 sites, the Bundesrat questions the utility of the scheme. Hence, the need to consider liability for biodiversity damage outside the Natura 2000 network (see '16 Environmental Liability Act 1990 as a model). The notion of "biodiversity" should be defined. Although the Bundesrat considers that only "significant damage" should be covered, it underlines the difficulty in defining thresholds beyond which damage would be significant. The Bundesrat also stresses the need to have clearly defined criteria concerning the evaluation of the damage itself, as well as the evaluation of the level of restoration needed.

- **Contaminated sites**: The Bundesrat considers that the notion of "contaminated sites" is not clearly defined in the WP so that the concept of "Altlast" should either be set aside or defined along the lines of '2(3) of the German Federal Soil Protection Act. In addition, it is necessary to define which activities or acts would be covered in relation to contaminated sites.

- **Ensuring effective restoration**: The Bundesrat points out that the liability system contemplated by the WP differs from existing German liability law, including the German Environmental Liability Act 1990. It underlines that it is not self evident that public authorities should step in as guarantor of the environment. Such an option would in any case go beyond civil liability and should be dealt with through public law mechanisms, the choice of which should be left to the Member States. It should also be ensured that the damaged party would be fully compensated, which does not seem to be the case in the WP. The Bundesrat also considers that public authorities should be allowed to act against polluters when there are no
private persons directly affected or when such persons fail to take action.

- Access to justice: The Bundesrat disagrees with the WP’s proposals on access to justice. It considers that biodiversity damage affects the public interest, the trustee of which is the State. It has difficulties with the proposal to give public interest groups locus standi to require interim and preventive measures should the State fail to act. In general, the Bundesrat considers that this issue, as well as that concerning the reimbursement of costs, should be left to the Member States. The Bundesrat fears an adverse impact on businesses if numerous legal actions are brought by public interest groups. The Bundesrat opposes the introduction of a compulsory out-of-court procedure.

- Relation with international conventions: The Bundesrat notes that nuclear energy is already covered by several international conventions which take into account the specific character of this sector. An overlap between these conventions and the proposed liability regime would entail significant complications.

- Financial security: The Bundesrat considers that financial security should be compulsory. The opinion that financial security cannot be made compulsory because of the unpredictability of the damage could be used as an objection against the establishment of the liability regime itself. Specifying further the scope of application of the regime and the damage evaluation methods which are to be applied is a prerequisite for ensuring insurability.

- Different options: The Bundesrat is of the opinion that, in light of the subsidiarity principle, a framework directive is the most appropriate instrument. It also considers that Member States should be able to choose freely the means and legal ways to ensure the transposition of a future Directive.

- Subsidiarity and proportionality: The Bundesrat wonders whether provision of a liability regime for non-dangerous activities is justified in light of the subsidiarity principle. It should be left to the Member States to decide whether they will ensure the conservation of Natura 2000 sites through a liability regime or independently thereof. The Bundesrat is of the opinion that, in light of the subsidiarity principle, a framework directive is the most appropriate instrument.

- Economic impact: The Bundesrat is concerned about the potential economic impact on SMEs and agriculture and fears an adverse impact on businesses if numerous legal actions are brought by public interest groups.

- Miscellaneous: The Bundesrat is of the opinion that liability resulting from activities subject to permitting procedures by public authorities should be limited.

- IRELAND

- Academics

- Ms Dawn Slevin

- General comments: Ms Slevin is an environmental scientist whose work is mainly in the area of oil spills and contamination caused by industrial activities. In addition, Ms Slevin also has experience of investigating sites in the US under the CERCLA and Superfund legislation on behalf of the insurance industry.
- No retroactivity: Ms Slevin believes that, although non-retroactivity may be a practical necessity, the process of establishing whether pollution occurred before or after the entry into force of the regime presents an enormous loophole in the proposed regime. It is very possible that the objectives of the regime could be severely jeopardised by this loophole since polluters will undoubtedly attempt to demonstrate, using all the means at their disposal, that the contamination which they caused occurred prior to the entry into force of the regime. The WP states that "some transaction costs associated with litigation concerning the cut-off point...are to be expected". However, the WP does not offer any solution to this problem nor does it sufficiently recognise the significance of the cut-off point.

- Activities to be covered: What are the definitive guidelines for "dangerous and potentially dangerous activities"? For example, does this imply that only licensed or regulated activities will be considered "dangerous" and therefore strictly liable or will all activities that are dangerous to the environment regardless of whether they are licensed be deemed "dangerous" for the purposes of the regime? Why does the WP not address the question of liability for traditional damage and site contamination caused by non-dangerous activities? It is possible to envisage that a negligent act carried out in the context of a non-dangerous activity could result in significant environmental damage (e.g. a water supply well drilling company that encounters fuel oil contamination at the subsurface level and continues to drill, thereby permitting contamination to spread to the deeper aquifer).

- Ensuring effective restoration: In cases where damage to biodiversity can only be partly restored, what are the criteria for deciding when active restoration should stop and who will make this decision? What are the exact provisions regarding alternative payments to be made by the polluter in the event that remediation of the damaged environment is not feasible? It is important to be aware of certain limitations associated with remediating contamination. Often, the only financially practical measures which can be taken in response to environmental damage are emergency actions and/or the establishment of the nature and the extent of the contamination. Natural attenuation may be the only solution to certain kinds of contamination. Therefore, it is imperative that an independent and reliable system of decision-making and appraisal of activities be set up within each country in order to ensure that activities are closely monitored.

- Financial security: The WP states that insurability is important in order to ensure that the goals of an environmental liability regime are reached but how have the provisions outlined in the WP been tailored to suit the requirements of the insurance industry? And what has been the overall response by the European insurance industry to those provisions?

- National Industrial NGOs; general

- Irish Business and Employers Confederation

- General comments: IBEC welcomes the exclusion of retroactivity and the limitation of the scope of the regime regarding dangerous activities to existing EC legislation and believes that it is vital that the Commission retain these provisions. However, IBEC also has many concerns about the impact of the proposals for an EC liability regime on both Irish and European industry. IBEC fully supports UNICE’s response to the WP.

- No retroactivity: IBEC supports the exclusion of retroactivity but foresees problems with distinguishing between "old" and "new" pollution and dealing with gradual
pollution.

- Damage to be covered: Environmental and traditional damage as defined in the WP should not be dealt with under a single regime. The inclusion of traditional damage would include the harmonisation of different national tort laws and go against the principle of subsidiarity for traditional damage. Apart from the question of the Commission’s jurisdiction in this area, tort law should be dealt with as a different issue and not through the “backdoor” of environmental liability. Therefore, the Commission’s proposals should be limited to the environment.

- Activities to be covered: IBEC welcomes the limitation of the scope of the regime regarding dangerous activities to existing EC legislation and believes that it is vital that the Commission retain this provision. Since different types of liability are to apply depending on whether the activity is "hazardous" or "potentially hazardous" on the one hand or "non-hazardous" on the other, there should be a clear definition of these terms.

- Type and other features of liability: Since civil law allows individuals to claim compensation for damage to persons and property and the restoration of the environment is a public interest in which no single party had ownership rights, IBEC considers civil liability to be unsuitable. It is the State which is responsible for the protection of this public interest.

- Defences: IBEC believes that businesses that have operated within permits and regulations and applied best available technology (BAT) should not be liable for damage that was not foreseeable at the time of issue of their licences/permits. Equally, permitting/licensing authorities should also have a BAT defence available to them otherwise they would be inclined to excessive caution when setting operating conditions. Pollution which results despite compliance with BAT should be remedied using public funds. In addition to the defences proposed in the WP, the proposed regime should also include as a defence compliance with legislation and permits. Existing national environmental liability regimes, including Irish law, allow for compliance with a permit as a defence and other Member States take compliance with a permit into account when assessing the extremity of a case. State of the art and development should also be allowed as defences in the interests of innovation, because these are allowed under most European insurance markets and because it is not reasonable to assign liability for unforeseen damage.

- Burden of proof: Commission needs to clarify what it means by an "alleviation" of the traditional burden of proof. If by this the Commission means a reversal of the burden of proof, then IBEC considers this to be excessive when combined with strict liability and the limited number of defences which are proposed.

- Liable party/parties: IBEC strongly recommends the removal of liability from licensing authorities - otherwise they would be inclined to excessive caution when setting operating conditions. Commission needs to ensure that where there are several liable parties, responsibility will be apportioned equally and/or accordingly in such cases.

- Biodiversity damage: Clarification on what constitutes significant biodiversity damage is needed. In addition, a standard measurement technique is needed in order to quantify environmental damage and different degrees of liability are needed in order to ensure that claims are proportionate to the damage.

- Contaminated sites: Contaminated sites should be considered on a site-by-
site basis, taking into account local circumstances (geology, climate and envisaged use) rather than on the basis of a general EU standard as proposed by the Commission.

- Traditional damage: The inclusion of traditional damage would include the harmonisation of different national tort laws and go against the principle of subsidiarity for traditional damage. Apart from the question of the Commission’s jurisdiction in this area, tort law should be dealt with as a different issue and not through the "backdoor" of environmental liability. Therefore, the Commission’s proposals should be limited to the environment.

- Access to justice: IBEC believes that environmental interest groups should be allowed to challenge the decision of the public authority but should not be given powers of direct action. The right to bring direct action where a public authority has failed to act which is proposed to be accorded to public interest groups goes beyond the Aarhus Convention.

- Financial security: Insurability is a pre-requisite for any liability regime since this implies a quantifiable aspect to the regime. However, complications will arise in the calculation of premiums, especially in the case of biodiversity damage where damage is difficult to define and unquantifiable. Therefore, IBEC recommends that a financial cap be placed on liability to facilitate insurability and avoid excessive financial costs to industry.

- Subsidiarity and proportionality: Environmental and traditional damage as defined in the WP should not be dealt with under a single regime. The inclusion of traditional damage would include the harmonisation of different national tort laws and go against the principle of subsidiarity for traditional damage. Apart from the question of the Commission’s jurisdiction in this area, tort law should be dealt with as a different issue and not through the "backdoor" of environmental liability. Therefore, the Commission’s proposals should be limited to the environment.

- Economic impact: IBEC also has many concerns about the impact of the proposals for an EC liability regime on both Irish and European industry.

- National and Regional Environmental NGOs

- Earthwatch - Friends of the Earth Ireland

- Activities to be covered: Liability should apply to all activities. With regard to widespread and diffuse pollution in the agricultural sector, some of the environmental damage caused by agriculture, such water and groundwater pollution caused by industrially produced fertilisers, may not come from a dangerous activity.

- Type and other features of liability: Strict liability for biodiversity damage should create incentives to be more careful beyond existing protection standards and become an effective instrument for environmental policy integration.

- Liable party/parties: It is a positive proposal that public bodies may be held liable for environmental damage if they are “operators in control of the activity that caused the damage”. This responsibility should be extended to the EU institutions in cases where national projects are approved and part-funded by the EU (e.g. EU Forest Premiums in Ireland which favour the introduction of a ratio of 20% - 80% non-native conifers to native broadleaves and of intensive monocultures and which could have a very harmful impact on biodiversity). Lenders not exercising operational control should still be liable in cases where they knew – or ought to
have known were it not for their negligence – of the possible negative environmental effects at the time the loans were granted.

- Environmental damage: The EC should develop urgently criteria to define the concept of “significant damage”. It should include a variety of perspectives – including European, local neighbourhoods and ecological perspectives.

- Biodiversity damage: Confining liability for biodiversity damage to the Natura 2000 network could result in serious environmental limitations to the liability regime for a number of Member States, including Ireland. Without a good national network of ecological site protection and management, protection will be fragmented and ineffective. An environmental liability regime would also need to observe agreements made under the Convention on Biological Diversity. A regime that covers areas outside the Natura 2000 network would encourage Ireland to create an ecological infrastructure. Strict liability for biodiversity damage should create incentives to be more careful beyond existing protection standards and become an effective instrument for environmental policy integration.

- Relation with international conventions: An environmental liability regime would need to observe agreements made under the Convention on Biological Diversity.

- Financial security: The EC should implement the structures necessary for obligatory insurance. A guarantee to that effect should be incorporated in the liability legislation. A time-frame should be included.

- Irish Wildlife Trust

- General comments: The Trust welcomes the publication of the WP and supports the European Environmental Bureau’s response to the WP. The Trust is particularly supportive of the need for a product liability system and an environmental liability system and of the need to pierce the corporate veil.

- Damage to be covered: The scope of the regime should be extended to include ordinary nature outside of areas protected under the Habitats Directive. Since the Irish Government has opted for a minimalist approach with regard to the designation of Special Areas of Conversation (SAC), restricting an EU liability regime to Natura 2000 would not be particularly helpful.

- Type and other features of liability: WP proposes fault-based liability for biodiversity damage. The Trust would welcome a stricter approach and considers that introduction of strict liability for biodiversity damage would encourage a holistic approach in many Member States and would act as an incentive for continuous improvements in environmental legislation.

- Biodiversity damage: WP proposes fault-based liability for biodiversity damage. The Trust would welcome a stricter approach and considers that introduction of strict liability for biodiversity damage would encourage a holistic approach in many Member States and would act as an incentive for continuous improvements in environmental legislation. The scope of the regime should be extended to include ordinary nature outside of areas protected under the Habitats Directive. Since the Irish Government has opted for a minimalist approach with regard to the designation of Special Areas of Conservation (SAC), restricting an EU liability regime to Natura 2000 would not be particularly helpful. “Significant damage” needs to
be clearly defined while allowing for as wide a scope as possible.

- Ensuring effective restoration: The Trust considers that the cost/benefit approach suggested in the WP is out-dated and focuses on the financial costs rather than on the possible benefits of site restoration and that such an approach risks undermining the internalisation of costs.

- ITALY

  - Governments

    - Italian Government

      - General comments: Italy supports both a Community framework Directive on environmental liability and the ratification of the Lugano Convention by the Member States. Italy considers that, for competitiveness reasons, legislation needs to be harmonised in all the Member States but that the proposed liability regime should be implemented gradually in order to avoid too strong an impact on the economy.

      - Type and other features of liability: Italy is in favour of a strict liability regime for both traditional and environmental damage (i.e., contaminated sites and damage to biodiversity). Nevertheless, enterprises say that such a regime would limit economic development. Italy is also in favour of a fault-based regime in the case of non-dangerous activities. However, it considers that only a limited number of defences should be allowed, otherwise the positive effects of the regime could be jeopardised. The proposed liability regime should be implemented gradually in order to avoid too strong an impact on the economy.

      - Defences: Italy considers that only a limited number of defences should be allowed, otherwise the positive effects of the regime could be jeopardised.

      - Financial security: An effective environmental liability regime requires the availability of a financial security system. Some tax relief could be established in order to stimulate enterprises to take out insurance. Common funds could also be established in order to deal with urgent cases.

      - Economic impact: Italy considers that, for competitiveness reasons, legislation needs to be harmonised in all the Member States but that the proposed liability regime should be implemented gradually in order to avoid too strong an impact on the economy. Account should also be taken of the States which are expected to become members of the EU soon. Such countries need special technical assistance.

      - Miscellaneous: Enterprises should be obliged to: (1) periodically carry out a risk analysis; (2) organise training courses for their staff; and (3) designate one or more persons to be in charge of environmental safety.

- National and Regional Environmental NGOs

  - Legambiente

    - General comments: Legambiente strongly supports the EEB’s position on the WP. The EC must go ahead with a legislative proposal as soon as possible. Unfortunately
the EC seems to have weakened in the WP most of the elements for an effective liability system. The WP indirectly calls for an EU soil quality policy in order to identify the standards for cleaning up contaminated sites. Legambiente welcomes this initiative. Important new directives on GMOs and Oil Pollution are in the pipeline and they need to be covered by a comprehensive liability regime for environmental damage without any delay which could further endanger our environment.

- Damage to be covered: Strict liability should be applied to all biodiversity damage. The scope of the regime should be gradually extended to “ordinary nature”. A restrictive definition of “diffuse sources and diffuse pollution” should be developed. Diffuse sources only exist when polluters are no longer identifiable.

- Activities to be covered: Installations and substances which are not yet covered by EU legislation should also be included in later stages in order to make the system comprehensive.

- Type and other features of liability: Strict liability should be applied not only to dangerous activities which are covered by EU legislation but also to all biodiversity damage. There should be joint and several liability in multiple party cases. There should not be an absolute time bar for bringing legal claims but there should be a time limitation running from the manifestation of the damage (which should not less than five years).

- Burden of proof: The Commission should re-introduce the concept of “plausible causation”, “rebuttable presumption” and “prevailing probability” to alleviate the burden of proof for the plaintiff.

- Liable party/parties: The principle of “piercing the corporate veil” should be introduced. In multiple party liability cases there should be joint and several liability. Apportionment should be allowed only in case of negligible contribution to the damage. Banks should be held responsible if a loan were granted knowing the possible negative effects of the activity.

- Biodiversity damage: The scope of the regime should be gradually extended to “ordinary nature”. Strict liability should be applied to all biodiversity damage. The Commission should develop a concept of “significance” that allows a wide application of the system.

- Contaminated sites: Restoration up to clean-up standards should not mean a restriction of liability.

- Traditional damage: The inclusion of traditional damage in the system is one of the positive elements of the WP.

- Relation with Product Liability Directive: Liability for defective products and environmental liability are different systems and should be applied at the same time.

- Ensuring effective restoration: A cost-benefit test to assess the level of damage is not acceptable. A reasonability test should not become an upper threshold to the damage covered - it should only be applied in order to decide if restoration is the best option.

- Access to justice: Legambiente is against a two-stage model in the field of
access to justice for public interest groups. There is no need to involve public authorities in a lawsuit of a basically civil nature. This is irrelevant in a strict liability regime which is widely independent from the eventual existence of permits. It should be optional for public interest groups to instruct state authorities to deal with the problem before suing the polluter himself. There should be reimbursement or exemption from all judicial costs for actions brought by public interest groups.

- Financial security: There should be a mandatory insurance. Lack of insurance could imply a “moral hazard”. In addition, complementary liability funds have to be set up for contamination of sites which occurred before the entry into force of the regime, for unidentifiable polluters and for diffuse damage. If unforeseeable natural disasters can be insured, why not environmental damage caused by human activities?

- Economic impact: By internalising the potential social costs of risk, economic operators will determine themselves the level of precaution based upon their calculation on the probability of harm. The trial and error approach inherent to markets will simply be extended to risk management.

- Miscellaneous: The polluter pays principle could also be implemented by establishing a tax on harmful materials which should converge in a liability fund.

- WWF Italia

- General comments: An environmental liability regime needs to be established urgently because environmental disasters are becoming more and more frequent, many of which are transboundary. WWF Italia thanks the EC for this initiative and hopes that a directive will adopted and implemented rapidly.

- Damage to be covered: The regime which is being proposed would exclude liability for biodiversity damage caused by any incidences of marine pollution. Whilst agreeing with the idea of a framework directive, WWF Italia also asks for the Commission to look into the need for a valid instrument to guarantee compensation for environmental damage and restoration, even in cases outside the jurisdiction of the EC. WWF Italia agrees with the European Parliament that damage caused by GMOs should be treated horizontally (rather than sectorally) and should therefore be included in the regime. WWF Italia calls upon the EC to extend the scope of the regime to cover liability for damage to natural resources regardless of whether the resource in question is located in a protected area.

- Environmental damage: The concept of “environmental damage” as set out in the WP with its subdivision into “damage to biodiversity” and “site contamination” is not consistent with the concept of “liability for environmental damage” and cannot make for an efficient system of prevention and repair. The “environment” should be considered as a legal asset belonging to everyone, including all natural and cultural resources. It is a fundamental right of everyone and an absolute primary interest in respect of other public and economic interests. It is an economic asset and as such capable of being evaluated monetarily.

- Biodiversity damage: Limitation of the scope of the regime to areas belonging to the Natura 2000 network is excessively restrictive. Only 10% of the European territory would be covered by the regime and therefore all the important areas not belonging to the Natura 2000 network would be excluded. The regime which is being proposed would exclude liability for biodiversity damage caused by any incidences of marine pollution. The
protection of biodiversity inside Natura 2000 is strictly connected with its protection outside those areas. WWF Italia understands that the approach to an environmental liability regime should be gradual, but it deems it necessary for liability under the proposed regime to be extended to damage to natural resources/biodiversity without any distinction being made between areas which are protected or not.

- Different options: WWF Italia agrees with the choice of a framework directive.

- NETHERLANDS

  - European Industrial NGOs; sectorwise

  - Network for Industrially Contaminated Land in Europe

  - General comments: NICOLE (formerly funded by the Commission’s DG XII and now self-funding) represent a body of significant experience in contaminated land and its members are drawn from industry, academia and consultancy. NICOLE wish to comment only on the proposal for “quantified numerical standards indicating the soil and water quality to be achieved”. NICOLE fully support UNICE’s response to the WP in so far as it relates to comments in respect of contaminated land and also fully support CLARINET’s response to the WP. NICOLE feel that harmonised, quantified, numerical standards for soil quality are inconsistent with a rational, scientific, risk-based approach to dealing with contaminated soils and they strongly advocate the removal of this proposal from the scope of the proposed regime. NICOLE suggest that if the Commission wish to bring forward proposals in the area of contaminated land then pan-European groups such as CLARINET and NICOLE are well placed to assist the Commission.

  - Contaminated sites: NICOLE fully support UNICE’s response to the WP in so far as it relates to comments in respect of contaminated land and also fully support CLARINET’s response to the WP. NICOLE feel that harmonised, quantified, numerical standards for soil quality are inconsistent with a rational, scientific, risk-based approach to dealing with contaminated soils and they strongly advocate the removal of this proposal from the scope of the proposed regime.

  - Governments

  - Dutch Government

  - General comments: The Netherlands endorse the Commission’s objective of introducing a Community liability regime to improve the implementation of existing environmental legislation and of important principles such as the polluter pays principle and agree that an important consequence of such a regime will be the preventative effect it exerts. However, the Netherlands wish to emphasise that is important that an EC initiative in this field not override pre-existing and more comprehensive protection which may exist under national law. The proposed regime should, wherever possible, be linked to or build on the Lugano Convention. Both the WP and the Lugano Convention leave a number of matters unresolved and so a future directive could deal with these matters or address further issues (such as biodiversity damage).

  - Type and other features of liability: Please refer to the full text of the
Netherlands comments for a description of current Dutch legislation on environmental liability.

- **Defences**: Compliance with a permit should not be allowed as a defence.

- **Biodiversity damage**: It would be preferable if a future directive could give Member States the express possibility of broadening the scope of biodiversity damage to areas beyond those covered by the Natura 2000 network. The Netherlands doubt whether biodiversity damage should be limited to "significant damage" and point out that this concept does not exist in Dutch civil law. Member States should be given the freedom in the directive to adopt a wider definition of damage.

- **Contaminated sites**: The decisive criterion for deciding whether land is significantly contaminated is not the contamination present in the soil or water but rather whether there is or is likely to be a threat of significant emissions or exposure of the environment and this is determined on the basis of what is seen as the action or event causing the damage. Lists of substances could be drawn up for this purpose (as was done under Dutch law). The WP is not entirely clear about the clean up objectives. In principle, the goal should be to restore matters to the situation they were in before the emissions. There does not need to be an existing threat to humans or to the environment nor do any minimum thresholds need to be set. The policy in the Netherlands for soil which was contaminated before 1987 is to make the site fit for the desired land use. However, in respect of more recent soil contamination, the policy is that all new contamination must be removed and the status quo ante restored irrespective of the planned land use. The Netherlands consider that this should also be the point of departure for the framework directive.

- **Ensuring effective restoration**: With regard to biodiversity damage, it is still unclear what kind of cost-benefit or reasonableness test should be applied to compensation and when restoration costs should be regarded as disproportionate. These points, along with the whole question of valuation of biodiversity damage, should be addressed in consultation with the Member States, taking into account the work done in the context of the Biodiversity Convention and the associated Cartagena Protocol on biosafety.

- **Access to justice**: The Netherlands wish to emphasise that it is happy to see public interest groups acquiring easier access to justice in the EC in matters related to the environment but, compared with the current situation under Dutch law, the proposed "two-tier" approach would represent a backwards step. Under Dutch civil law, public interest groups can apply directly to a court for an order to protect the interests they promote (e.g. stop a particular industrial activity because of threatened damage to the environment) and in certain cases they may also be able to obtain reimbursement for clean up costs. Therefore, the Netherlands consider that it would be preferable to give public interest groups direct access to justice.

- **Relation with international conventions**: The Netherlands consider it important that there should be no conflict between the future regime and international conventions to which the Netherlands are a signatory (e.g. the Lugano Convention, the CRTD Convention and the HNS Convention). An EC directive must not be allowed to constitute an obstacle to the ratification of these Conventions by Member States.

- **Financial security**: The Netherlands share the Commission's view that it is better to acquire experience with the new liability regime before including in the directive an obligation to provide financial security. The Netherlands endorse the step-by-step approach advocated in the WP but consider that the regime should not exclude the possibility of collective
instruments in respect of financial security. Please refer to the full text of the Netherlands comments for a description of recent Dutch experience in relation to environmental insurance.

- Different options: Although the Netherlands initially indicated a preference for accession to the Lugano Convention, given that the Commission has expressed an intention to develop a draft directive, the Netherlands now wish to indicate that they favour a framework directive which lays down minimum requirements but which will allow Member States to introduce more stringent measures.

- National Industrial NGOs; general

  - VNO - NCW, Bureau Milieukazen BMRO

    - General comments: VNO – NCW point out that since the principle of strict liability for dangerous substances and certain dangerous activities is already applied in the Netherlands, the proposals set out in the WP would not appear to involve major changes in practice.

    - No retroactivity: For reasons of legal certainty and legitimate expectations it is appropriate that an EC regime should only work prospectively. The definition of “past pollution” should not dilute these principles.

    - Activities to be covered: The definition of “non-dangerous activities” remains unclear.

    - Type and other features of liability: VNO – NCW point out that since the principle of strict liability for dangerous substances and certain dangerous activities is already applied in the Netherlands, the proposals set out in the WP would not appear to involve major changes in practice. VNO – NCW consider that strict liability is acceptable only if reasonable defences are allowed.

    - Defences: Strict liability is acceptable only if reasonable defences are allowed. Development risk and state of the art should be allowed. This is already the case under Dutch legislation (e.g. with regard to liability for dangerous substances and product liability). VNO – NCW consider that it would be appropriate to allow these defences where the Commission justifies the introduction of strict liability on grounds of prevention and cost internalisation, among other things. Acting in accordance with a permit should be allowed as defence in cases of damage to the environment or to biodiversity. The interests of an operator and the environment are weighed when the permit is granted and the proposed liability regime should not upset this balance. For example, where an operator bordering a Natura 2000 site carries out an assessment of the impact on the birdlife on that site and the relevant authority grants a permit on the basis of that assessment because it considers that the consequences are acceptable to the birdlife, it would be unreasonable if the operator were subsequently held liable for the consequences which had been anticipated in the assessment and deemed acceptable for the purposes of the relevant permit.

    - Liable party/parties: The proposal that a permitting authority bear part of the cost of compensation in cases where the damage is caused by emissions authorised under a permit will in all likelihood lead to excessive caution on the part of the authority.

    - Environmental damage: It is still very unclear precisely what the concepts
of “environmental damage” and “biodiversity damage” would cover and how such damage should be quantified.

- Biodiversity damage: It is still very unclear precisely what the concept of “biodiversity damage” would cover and how such damage should be quantified. Since biodiversity damage is a novel concept due caution should be exercised.

- Access to justice: VNO – NCW consider that restoration of the environment and/or biodiversity is the responsibility of the relevant authorities in the first place since a public interest is involved. If the authorities fail in their duty then interested parties (including environmental organisations) should have the right to challenge them. However, VNO – NCW consider that to give environmental organisations the right to carry out restoration measures and recover the costs from the polluter is going to far, especially as there is no system to determine when an organisation can intervene and which costs are reasonable. VNO – NCW do not object to environmental organisations being given the right to seek a court injunction requiring a company to act or to abstain from unlawful action.

- Financial security: The possibility of obtaining insurance for environmental damage at reasonable cost is very important to industry. VNO – NCW would like the Dutch Government to confirm that it regards insurability at reasonable cost as a conditio sine qua non for the introduction of a liability regime.

- National Industrial NGOs; sectorwise

- EG-Beraad voor de Bouw

- General comments: EGBB considers the subject an important one for the construction industry since this usually entails physical modification of the environment. EGBB also supports the application of the polluter pays principle but regrets that, on several important issues, the White Paper is not precise enough.

- No retroactivity: EGBB considers that the Community regime should not be retroactive and that the “cut-off” point should be the date of causation of the damage and not the date on which the damage manifests itself.

- Activities to be covered: EGBB considers that the notion of “dangerous activities” should be defined clearly and precisely. It considers that, in principle, construction activities should normally be classified as non-dangerous. EGBB also suggests that care should be taken to avoid that a too stringent liability regime discourage the use of “secondary raw materials” (deriving from waste) which has the positive environmental effect of avoiding the use of non-renewable natural raw materials (e.g. sand).

- Type and other features of liability: EGBB acknowledges the advantage of imposing strict liability in cases of environmental damage. It considers important, however, to find the right balance between strict liability and defences.

- Defences: EGBB acknowledges that if too many defences are permitted, this will undermine the achievement of the environmental objectives pursued. However, EGBB considers it important to find the right balance between the different interests concerned and it supports in this respect the inclusion of “state of the art” as a defence.
- Burden of proof: EGBB acknowledges that placing a burden of proof on the plaintiff which is impossible to discharge in practice undermines the achievement of the environmental objectives pursued. However, EGBB considers it important to find the right balance between the different interests concerned. In this respect, the type of causal link to be established should be precisely defined.

- Liable party/parties: The polluter should be the liable party. EGBB underlines in this respect the importance of identifying precisely who is the person controlling the dangerous activity in the context of the building industry where one might find a great number of persons intervening in the process. It also favours proportionate liability instead of joint and several liability.

- Biodiversity damage: EGBB doubts that the time is right for covering damage to biodiversity under a strict liability regime given that damage in such case is difficult to quantify and it is therefore difficult to obtain insurance.

- Relation with Product Liability Directive: EGBB would seem to agree with the suggestion in the WP that the Product Liability Directive should take precedence.

- Ensuring effective restoration: EGBB supports the principle that environmental liability should aim at effective restoration of the environment. It would seem that EGBB considers that insurability is a prerequisite for ensuring effective restoration in case of biodiversity damage.

- Access to justice: EGBB underlines the importance of ensuring that access to justice for public interest groups is made subject to such groups fulfilling objective criteria so that possible proceedings are not “emotionally” driven.

- Financial security: EGBB considers it to be of utmost importance that damage be insurable. It underlines in this respect that at present only traditional damage can adequately insured. The insurability of contaminated sites is a relatively recent phenomenon and damage to biodiversity is very difficult, if not impossible, to insure given the lack of appropriate valuation methods. Therefore, EGBB supports a step-by-step approach.

- Different options: EGBB agrees with the WP’s option for legislation.

- Economic impact: EGBB underlines the potential impact of the proposed regime on the building industry where many businesses are SMEs.

- National and Regional Environmental NGOs

- Stichting Natuur en Milieu

- General comments: Stichting Natuur en Milieu fully support the comments on the WP sent by the European Environmental Bureau (EEB) and do not wish to add anything further at this stage to the EEB’s input.

- Other Public bodies

- IPO - Kerngroep Europees Milieubeleid
- No retroactivity: IPO raises the question of how the proposal for no retroactivity can be squared with Dutch legislation on liability for soil pollution.

- Liable party/parties: The proposal that permitting authorities bear part of the cost of compensation in cases where the damage resulted from emissions authorised under a permit would mean that Dutch authorities would incur non-insurable risks since no insurance company would be prepared to cover a permitting authority’s risks. Dutch provinces and municipalities would strongly resist the incorporation of such a proposal in the regime.

- Biodiversity damage: How should the amount of damage be determined in the event of damage to natural sites, bird populations, etc. If the Commission wants to have a uniform system for damage in the territory of the EU, common guidelines should be drawn up to facilitate damage assessment.

- Ensuring effective restoration: The Commission should indicate the procedure to be applied in the case of one-off damage. For example, damage of this type could be covered through a fund established in each Member State (such as the Dutch Air Pollution Fund).

- Relation with international conventions: The WP is unclear on the issue of the extent to which agreements on compensation for damage in the framework of multilateral conventions, such as the Rhine Convention on pollution by salt and chemicals, would be undermined by the proposed EC-wide liability regime.

- NORWAY

- International Industrial NGOs; sectorwise

- International Association of Independent Tanker Owners

- General comments: The two International Maritime Organisation (IMO) instruments ratified by all the EU Member States - the Civil Liability Convention and the Fund Convention establishing the International Oil Pollution Compensation Fund - already provide a regime for compensation, on a strict liability basis, for damages occurring as a result of oil spills from ships. These two Conventions have served the interests of claimants well since they entered into force more than 20 years ago and have served as the model for new regimes in the maritime field (i.e. the convention covering pollution of chemicals from ships and the draft bunker spill convention). INTERTANKO consider it vital that any regional EU initiative not adversely affect this international regime and would like to associate themselves with the comments on the WP submitted by the International Tanker Owners Pollution Federation (ITOPF).

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supplementary compensation in addition to that provided by the tanker owner. These two Conventions are currently being reviewed in the IMO with a view to increasing liability limits. INTERTANKO point out that these two Conventions have served the interests of claimants well since they entered into force more than 20 years ago and have served as the model for new regimes in the maritime field (i.e. the convention covering pollution of chemicals from ships and the draft bunker spill convention). INTERTANKO consider it vital that any regional EU initiative not adversely affect this international regime and would like to associate themselves with the comments on the WP submitted by the International Tanker Owners Pollution Federation (ITOPF).

- SPAIN

- Academics

- Cuatrecasas Abogados & Universitat Pompeu Fabra

- General comments: The introduction of a liability regime on top of existing regulation of potentially polluting activities can have the effect of “overdeterrence” - for example, a polluter might have to pay damages under the liability regime and pay fines if administrative or criminal proceedings are brought. The authors consider that it is necessary to undertake a detailed analysis of the administrative and criminal regulations in force in the Member States before adding an EC liability regime. Although the authors consider that the level of deterrence which can be achieved by means of a liability regime is significant, they warn against excessive optimism in this respect since the deterrent effect of environmental liability is difficult to measure and is virtually impossible in the short-term. Excessive optimism can generate a frustrating reaction if expectations are not confirmed shortly after by a noticeable improvement in the behaviour of the relevant operators.

- No retroactivity: In addition to legal certainty and legitimate expectation, another justification for having a non-retroactive liability regime is that past behaviour can no longer be deterred and the only thing to do in such cases is to try and repair the damage which has been caused. The authors agree that determining the cut-off point for future liability can be very difficult in environmental cases.

- Damage to be covered: The authors consider the proposed classification of damage into traditional damage, contaminated sites and biodiversity damage idiosyncratic. The two classical distinctions in civil liability law are: (1) personal injuries and property damage; and (2) pecuniary and non-pecuniary damage. The authors consider that the new regime should include an explicit rule on the question of non-pecuniary damage.

- Activities to be covered: A list of activities to be covered by the regime (such as in the IPPC Directive or the German Umwelthaftungsgesetz) would improve the foreseeability of potential liabilities and therefore improve their insurability. However, there is the risk that such a list would not cover all activities that are really dangerous to the environment. In respect of biodiversity damage, the authors consider that the deterrent effect of liability would be higher if liability were limited to a reduced group of potential polluters - i.e. if the type of activities to be covered by the regime were to be limited.

- Type and other features of liability: The authors agree that strict liability has some advantages over fault-based liability for activities which are inherently dangerous to the environment but they do so for different reasons to those mentioned in the WP. In addition,
they query what would constitute “fault” under the Habitats and Wild Birds Directives for the purposes of liability for biodiversity damage. In respect of the requirement that money paid be used to restore the damage caused, the authors point out that the final destination of money paid is irrelevant for the purposes of the deterrent effect on the polluter – as long as a polluter anticipates having to pay for the harm caused, he will refrain from polluting, regardless of how the money is actually spent later.

- Defences: The authors query the relevance of the defence of “consent by the plaintiff” in cases of damage to the environment. With regard to the defence of development risk, the authors consider that the environmental and product liability regimes should be considered jointly, with the aim of unifying, or at least increasing the degree of harmonisation of the different national laws in both matters.

- Burden of proof: The WP refers both to positive and negative proof – the authors consider that the WP should have been precise as to whether the defendant will only have to prove the existence of an alternative source of damage or that his behaviour did not exceed the quantitative limits set by administrative regulation.

- Liable party/parties: Insolvency, or limited solvency of potential polluters, is a serious obstacle to the implementation of the polluter pays principle. One possible solution is to hold all companies that have some degree of control over the hazardous activity joint and severally liable (including financial institutions). Another possible solution is to impose mandatory insurance. A third possible solution, and one which is usually more expensive than the previous two solutions, is to require a minimum solvency level above the highest possible environmental risk created. All of these solutions can serve to reduce the feasibility of circumventing liability by transferring hazardous activities to thinly capitalised companies.

- Environmental damage: The authors consider it undeniable that there is currently a lack of protection through liability rules in respect of pure environmental damage, such as damage affecting biodiversity. The authors query whether the minimum threshold of damage is the same for biodiversity damage and for the clean up of contaminated sites.

- Contaminated sites: Strictly speaking, damage consisting of contamination of sites is property damage (i.e. “traditional” damage) and so there would be no need to create an ad hoc category.

- Traditional damage: Inclusion of traditional damage in the proposed regime results in the unfair situation of the same damage being compensated differently depending on where it originated or how it happened. For example, damage to health arising from an environmental accident would be dealt with in a different way than if it had been caused by a workplace, medical or traffic accident.

- Relation with Product Liability Directive: With regard to the defence of development risk, the authors consider that the environmental and product liability regimes should be considered jointly, with the aim of unifying, or at least increasing the degree of harmonisation of the different national laws in both matters.

- Ensuring effective restoration: The WP foresees the alternative assignment of monetary awards only when restoration of biodiversity damage is impossible or extremely costly. The authors query whether it might not be economically more sound to invest the money into which ever option is socially more desirable at the time. For example, if restoring damage
caused to a 1,000 hectare would cost 10,000 monetary units, then might it not be better to use the money to restore a neighbouring 2,000 hectare wood? Historical experience seems to show that environmental damage is underestimated rather than overestimated. The WP assumes that the value of the damaged natural resource is almost always equal to the cost of restoring it but the authors point out that restoration costs depend essentially on the level of quality of the resource we want to reach, which will not necessarily correlate with the initial value of the damaged resource.

- Access to justice: Another reason for allowing interest groups to sue polluters directly is that it is not unusual for damage to the environment to originate from a public entity or for the regulatory agency which authorised a potentially polluting activity to lack any incentive to sue. However, the authors also acknowledge that a disadvantage of direct access to justice for such groups is that they sometimes can act in their own interest, rather than in the interest of the general public. The WP does not give any indication of the criteria for distinguishing between ordinary and urgent cases or which behaviour of the public authorities would be sufficient to trigger the right of public interest groups to sue. In addition, the WP is not precise enough about the level of damages which interest groups could claim and the authors point out that there are problems related to controlling the destination of awards of damages to interest groups.

- Financial security: Obtaining insurance does not necessarily lead to operators investing less in precaution since insurance companies can link premiums to the insured’s level of care or can use deductibles which leave part of the damage with the insured. The authors believe that, under certain circumstances, mandatory insurance can solve the problem that firms lacking the necessary resources to face their expected liability have less incentives to prevent pollution. Therefore, the authors consider that activities which are particularly dangerous for the environment should be subject to mandatory insurance. In addition, in order to improve the operation of the insurance market, at least in the short term, the introduction of damage schedules or caps could be considered.

- Different options: The authors agree that an EC Directive on environmental liability is the most desirable option.

- Miscellaneous: More account should be taken of the option of compensation funds, paid for by taxes levied on those industries most likely to affect the environment.

- Governments

- Spanish Government

- General comments: Spain welcomes the Commission’s WP and considers that the establishment of a Community regime which is based on strict liability and ensures the restoration of environmental damage is a very important measure for the implementation of the prevention principle.

- Damage to be covered: The concept of environmental damage should include damage to other important aspects of the environment, such as landscape and historical-cultural heritage.

- Environmental damage: The concept of environmental damage should
include damage to other important aspects of the environment, such as landscape and historical-cultural heritage.

- Traditional damage: The regime should only cover traditional damage if this is caused through one of the environmental mediums (i.e. water, air, soil, flora, fauna, etc) - for example, a person who suffers personal injury as a result of drinking water which has been contaminated following a spillage caused by an activity which falls within the proposed list of "dangerous activities".

- Access to justice: Spain emphasises the importance of referring to "public authorities" and "local authorities" and not just to the "State" since in many Member States, as is the case in Spain, certain competences in respect of environmental matters are held by the regional authorities. In addition, in some cases the public interest is represented by the Public Prosecutor/Attorney General which has a different status from that of public or local authorities.

- Financial security: Spain does not agree with the statement in the WP that at present insurance policies covering environmental risks are not available. The fact is that there are several insurance companies which currently offer these type of policies. In addition, experience has demonstrated that in order for a strict liability regime to function effectively, it needs to be accompanied by compulsory insurance. Spain points to the road traffic regime as an example of a strict liability regime which functions well due to the existence of compulsory insurance and points to the product liability regime as an example of a regime which does not function effectively due to the absence of compulsory insurance. However, in order for a regime of compulsory insurance to function properly, liability under the regime would need to be capped and the technical characteristics for these type of environmental policies would need to be set out in a legislative/binding instrument.

- National Industrial NGOs; sectorwise

  - Spanish Chemical Industry Federation

    - General comments: FEIQUE welcomes and attaches considerable importance to the Commission’s plan to put forward legislation for an EU environmental liability regime. Although the WP describes the polluter pays principle as the basis for an EU liability regime, FEIQUE are of the opinion that any such regime should be based first and foremost on prevention.

    - No retroactivity: It is important that the proposed regime not be retroactive. In order to make it clear in what cases the EU regime is to apply, the notions of gradual pollution and “pollution from the past” will need to be clearly defined.

    - Damage to be covered: FEIQUE take the view that it is justifiable to apply an EU liability regime to traditional damage and contaminated sites only and that coverage of biodiversity damage should be relegated to a second stage given the novel nature of the subject and that the WP proposes to cover biodiversity damage caused by non-hazardous activities.

    - Activities to be covered: It is extremely important for the chemical sector for the directive to define clearly which activities are likely to cause damage. Only activities which pose a real threat to the environment should be considered – not activities which have an environmental impact of a generic nature. For this purpose it will be very useful to explain the relationship between environmental damage and the risks of each activity, indicating
quantitative criteria or an order of magnitude and the likelihood of the damage occurring so as to obtain a sliding scale of likely environmental impacts.

- Type and other features of liability: WP does not mention whether liability should be proportionate or joint and several in cases where there is more than one polluter. It would be better to have proportionate liability in order to prevent adverse effects, such as liability always being imposed on the economically stronger polluter.

- Defences: FEIQUE are of the opinion that in addition to the traditional defences (i.e. force majeur, consent of the plaintiff, etc) acting in accordance with a compulsory order issued by a competent authority and damage caused by discharges authorised under EC rules should also be allowed as defences under the regime. In addition, the regime should also allow as a defence the fact that the damage was caused by an activity duly authorised by a competent authority – in which case some of the costs should be borne by that authority.

- Burden of proof: Reduction of the burden of proof has a certain logic to it but this should not be taken to an extreme. Elimination of the burden of proof altogether would make it impossible for a defendant to defend himself. It is crucial that the following 3 elements be established in all cases – there must be one or more clearly identifiable causes, the damage must be concrete and quantifiable and there must be a causal link between the damage and the identified polluters.

- Liable party/parties: FEIQUE agree that liability should rest with the person who controls the activity which caused the damage and in the case of legal persons liability will rest with the legal person and not on the company’s managers or administrators. The regime should allow as a defence the fact that the damage was caused by an activity duly authorised by a competent authority – in which case some of the costs should be borne by that authority. WP does not mention whether liability should be proportionate or joint and several in cases where there is more than one polluter. It would be better to have proportionate liability in order to prevent adverse effects, such as liability always being imposed on the economically stronger polluter.

- Biodiversity damage: In respect of biodiversity damage, the regime should include a few clearly applicable criteria – rather than the various criteria suggested in the WP. A minimum threshold for triggering the regime (i.e. significant damage) is a good starting point which should be further developed.

- Contaminated sites: In respect of contaminated sites, only damage which is significant and relevant should be taken into account. Therefore, it is essential to have a clear definition, including an illustration, of what is meant by “significant damage”. In addition, the criterion for what constitutes a serious threat to man and the environment should always reflect the present or future use of the site.

- Ensuring effective restoration: The polluter should be given the possibility of repairing the damage himself – so as to ensure that the damages or compensation are used for that purpose.

- Access to justice: FEIQUE agrees with the proposal in the WP that public interest groups be entitled to act on a subsidiary basis – that is, only if the State does not act at all or does not act properly. With regard to the mechanism for the recognition of which groups should be entitled to act, as the WP suggests these groups should comply with objective quality
criteria – which should take into account whether the group has the necessary assets to pay for damages they might incur as a result of bringing an unfounded legal action. Some public interest groups could use the pretext of defending environmental interests to further a political agenda or gain publicity. Strict requirements should be laid down to ensure that only those groups with a genuine interest are given access to justice. Any injunction which is granted should be dependent on specific guarantees being given by the applicant. The proposal to give public interest groups the right to carry out remediation and then recover the costs of so doing from the responsible party is unacceptable.

- Financial security: Fact that WP does not propose that insurance be compulsory is a problem. Either the liability regime should be introduced gradually or an intermediate solution should be found until a financial security regime or some other transparent, reliable and efficient financial mechanism can be defined.

- Different options: Of the various options put forward in the WP, FEIQUE believe that a directive is the most suitable means of introducing an environmental liability scheme uniformly throughout the EU in accordance with the principles of proportionality and subsidiarity.

- Subsidiarity and proportionality: Of the various options put forward in the WP, FEIQUE believe that a directive is the most suitable means of introducing an environmental liability scheme uniformly throughout the EU in accordance with the principles of proportionality and subsidiarity.

- Economic impact: Introduction of a uniform EU liability regime will obviously help create a level playing field across the internal market.

- Miscellaneous: FEIQUE is of the view that Member States and the EU should provide aids and grants for the purpose of prevention of environmental damage.

- National and Regional Environmental NGOs

- Itaca - Amigos de la Tierra

- General comments: Since Amigos de la Tierra are in full agreement with the comments submitted by the European Environmental Bureau (EEB), they have not duplicated those comments. Therefore, what is set out below is a summary of the EEB’s comments to the WP. EC must go ahead with a legislative proposal as soon as possible. Unfortunately EC seems to have weakened in the WP most of the elements for an effective liability regime.

- Activities to be covered: The proposed regime should include a clause which allows the regime to be extended at a later stage to include activities which have not yet been regulated by EU environmental legislation.

- Type and other features of liability: Strict liability should be applied, not only to dangerous activities which are covered by EU legislation, but also to all biodiversity damage. There should not be any apportionment of liability in multiple-party liability cases. Although the EEB is essentially opposed to a cut-off date for bringing claims, if a prescription period were to be included that period should be no less than 5 years running from the date of manifestation of the damage.
- Burden of proof: EC should re-introduce the concept of "plausible causation", "rebuttable presumption" and "prevailing probability" to alleviate the burden of proof for the plaintiff.

- Liable party/parties: The principle of "piercing the corporate veil" should be introduced. There should not be any apportionment in multiple-party liability cases. Apportionment should be allowed only in case of negligible contribution to the damage. Banks should be held responsible if a loan was granted knowing the possible negative effects of the activity. Without an immediate right of access to justice for public interest groups, imposition of liability on permitting authorities does not make sense.

- Environmental damage: The scope of the regime should gradually be extended beyond Natura 2000 sites to "ordinary nature".

- Biodiversity damage: EC should develop a concept of "significant damage" which allows for a wide application of the system. A cost-benefit test to assess the level of damage is not acceptable. A reasonability test should not become an upper threshold for the damage covered and should only be applicable in decisions of whether restoration is the best option. A distinction should be drawn between damage caused by several identifiable sources and damage caused by a diffuse source.

- Contaminated sites: Requiring remediation which is based on clean-up standards for contaminated sites (rather than requiring full restoration) is a form of restriction of liability. WP appears to contain a tacit commitment to the development of a European soil policy; an initiative which the EEB would welcome. See also the comments above on biodiversity damage.

- Traditional damage: The inclusion of traditional damage in the proposed regime is one of the positive elements of the WP.

- Relation with Product Liability Directive: Since liability for defective products and environmental liability are two different regimes, they should be applied at the same time.

- Access to justice: EEB is against a two-stage model in the field of access to justice for public interest groups. There is no need to involve public authorities in a lawsuit of an essentially civil nature. The involvement of public authorities is not relevant in a regime of strict liability that is widely independent from the eventual existence of environmental permits. It should be optional for public interest groups to instruct public authorities to deal with the problem before suing the polluter directly. There should be reimbursement or exemption from all judicial costs for public interest groups.

- Financial security: There should be compulsory insurance. If unforeseeable natural disasters can be insured, why not environmental damage caused by human activities? Lack of insurance may result in a person taking more of a risk than he would if he had to cover all of the damage caused. In addition, complementary liability funds should be set up for those types of damage not covered by the liability regime (i.e. contamination of sites which occurred before the entry into force of the regime, unidentifiable polluters and diffuse damage). These funds could be financed by a tax on harmful materials.
- Economic impact: By internalising the potential social costs of risk, economic operators will determine themselves the level of precaution based upon their calculation of the probability of harm. The trial and error approach inherent to markets simply will be extended to risk management.

- WWF / Adena

- General comments: WWF / Adena’s comments focus on biodiversity damage. It believes that in order to ensure consistency with the Habitats Directive biodiversity damage should not be limited to the Natura 2000 network. It also believes that insurance should be compulsory, that only force majeure should be allowed as a defence, that there should be joint and several liability and that access to justice for public interest groups should not be limited to cases when the State has failed to act or in the event of an emergency.

- No retroactivity: Non retroactivity is acceptable provided further details are given. For example, if the regime were to exclude the period between adoption of the directive and its implementation in Member States then this would exclude most damage done to sites and species covered by the Habitats Directive.

- Damage to be covered: WWF / Adena believes the liability regime must also cover significant damage caused by listed activities to protected habitats and species even if these are not included in the Natura 2000 network. The Habitats Directive covers habitats and species not included in the Natura 2000 network and to leave these out would be inconsistent with that Directive.

- Type and other features of liability: WWF / Adena believes that strict liability should apply to all cases. Also believes that there should be joint and several liability.

- Defences: The only defence which should be permitted is that of force majeure. This defence should apply only where the damage could not be foreseen or if it was foreseen could not have been avoided. To allow a state of the art defence would mean that the plaintiff would have to demonstrate the operator’s guilt in order to make him liable. WWF / Adena does not accept that liability should be excluded or attenuated just because the activity was authorised by the permitting authorities.

- Burden of proof: In earlier drafts of the WP, the suggestion was to alleviate the burden of proof on the plaintiff by means of joint and several liability (so that the plaintiff need not identify and pursue all the parties responsible for the damage). WWF / Adena believes this concept should be re-introduced in the WP.

- Liable party/parties: WWF / Adena believes there should be joint and several liability.

- Environmental damage: A credible liability system needs to be based on reliable damage assessment criteria. It is crucial that such criteria be defined. WWF / Adena proposes the various methodologies approved in the USA. WWF / Adena cannot accept that environmental damage should not be put right just because restoration would be difficult or costly.

- Biodiversity damage: WWF / Adena welcomes proposal for regime to include biodiversity damage but consider that unless this is made more specific, it will not prove
very effective. WWF / Adena agrees that some sort of limitation is useful but consider that concept of “significant damage” needs to be defined – they also refer to article 6 of Habitats Directive.

- Access to justice : WWF / Adena does not accept that conservation groups may only intervene if the State fails to act or in the event of an emergency. For example, where the State has itself caused the damage, it cannot act as both plaintiff and defendant.

- Financial security : Insurance should be compulsory as this is the only way to ensure that damage which is caused to the natural environment is made good.

- Different options : WWF / Adena welcomes the choice of a directive as this would be binding on Member States.

- Miscellaneous : WP no longer mentions a cut-off period for bringing actions. Earlier drafts mentioned a period of 30 years from the time in which the damage appears and three years in which to bring a claim starting from the date of its discovery or potential discovery. WWF / Adena believes time limits should be laid down in the directive.

- SWEDEN

  - Governments

    - Swedish Government

      - General comments : Sweden welcomes the Commission's WP on environmental liability and considers that the WP deals well with the issues and provides a sound basis for further work in this area. However, seeing as the proposed regime contains certain limitations which may not exist under national rules, Sweden considers it important that the Community scheme not encroach on national rules in order to avoid releasing from liability a person who would otherwise be liable under national law.

      - No retroactivity : Given that a liability directive will constitute a minimum standard, there is no obstacle to individual Member States retaining or introducing provisions on retroactive applicability. Sweden considers it vital that a directive with non-retroactive provisions should not strike down existing national rules.

      - Damage to be covered : Seeing as the concepts of "environmental damage" and "traditional damage" are not established terms, in the interests of clarity these concepts should be dropped and the directive should distinguish instead between personal injury, damage to property, damage to the environment in general and other types of purely financial loss. Sweden considers it important to allow the same possibility of claiming compensation for biodiversity damage in relation to GMOs as for traditional damage.

      - Activities to be covered : Sweden agrees that it is necessary to compile a list of activities for which there is to be strict liability but has reservations as to whether such a list should be linked exclusively to EC legislation seeing as this may lead to an unnecessary restriction of liability. Although Sweden agrees that imposing strict liability on activities that involve greater risk is the correct approach, it considers that the concepts of "dangerous" and "non-dangerous" activities are imprecise and may give rise to interpretation problems. This distinction may also be incompatible with the provisions of the Habitats Directive.
- **Type and other features of liability**: Sweden seeks clarification on the proposal that different types of damage should be treated differently and queries whether the same liability conditions should not apply irrespective of the type of damage. In Sweden, as in other Member States, operators have an after-care obligation. It is worth considering whether the proposed regime can be limited to containing a general obligation to carry out after-treatment, and if that is not possible to enhance the environment to an equivalent degree in some other way. Member States would then decide the details of such a regime - including whether such an after-care obligation should be regulated through civil law or administrative provisions. There should be scope for adjustment of liability in cases where it appears unreasonable to require the polluter to pay compensation.

- **Defences**: Although Sweden shares the Commission's assessment that commonly accepted defences should be allowed, it considers it important to restrict the scope for defence. Under Swedish law, a plaintiff's contribution to the damage is a mitigating factor not a defence. Under Swedish law and the law of various other countries, conducting an activity in accordance with a compulsory order given by a public authority is not a defence.

- **Burden of proof**: Sweden welcomes the fact that the issue of alleviation of the burden of proof is to be given further consideration.

- **Liable party/parties**: It is desirable to discuss criteria for the meaning of control and to consider how it relates to the definitions of "operator" already contained in Community legislation (e.g. IPPC, Seveso II and waste incineration Directives). The proposal to allow courts to decide that the permitting authority should pay part of the compensation instead of the polluter is not acceptable - that is, unless the authority has been rightly sued.

- **Biodiversity damage**: Sweden supports the idea that biodiversity protection should cover damage within the Natura 2000 network. However, it is of the view that it is worth considering extending the scope of biodiversity protection since there are many valuable natural environments outside of the this network. There might be justification for extending liability to include damage to certain natural assets that are not part of the Natura 2000 network but which are nevertheless environmentally significant. Sweden considers that the proposed Community regime should allow scope for national rules in this area. Sweden considers it reasonable that the proposed regime should only cover "significant damage". However, the whole issue of valuation methods is so complex and controversial that it would be better to refrain from detailed regulation. Having said this, Sweden considers that certain valuation principles should be developed at Community level. Sweden is against the principle of setting a ceiling for compensation for damage, including biodiversity damage. The question of how the Habitats Directive's rules on compensation in kind (Article 6(4)) will relate to the liability regime needs to be considered. Biodiversity damage may coincide with a landowner's claim for compensation for damage to property. The proposed liability regime must be designed to exclude to the greatest extent possible conflicts between restoration of biodiversity damage and an injured party's private economic interests. Sweden also raises the question of what to do in cases where biodiversity damage cannot be restored. Sweden considers it important to allow the same possibility of claiming compensation for biodiversity damage in relation to GMOs as for traditional damage.

- **Contaminated sites**: Buildings and premises should also be included in the concept of "contaminated sites".
- Ensuring effective restoration: Sweden considers it reasonable that the proposed regime should only cover "significant damage". However, the whole issue of valuation methods is so complex and controversial that it would be better to refrain from detailed regulation. Having said this, Sweden considers that certain valuation principles should be developed at Community level. Sweden considers questionable the proposition that the injured party be required to use in a certain manner compensation which is paid. Biodiversity damage may coincide with a landowner's claim for compensation for damage to property. The proposed liability regime must be designed to exclude to the greatest extent possible conflicts between restoration of biodiversity damage and an injured party’s private economic interests.

- Access to justice: The possibility of giving environmental organisations access to justice should be considered but the future regime must spell out clearly who has the right to sue for the different types of damage. One of the drawbacks of giving public interest groups a secondary right of appeal only is that such groups are obliged to wait and see if the State will take action. In order to avoid unnecessary delays, such groups could be given the right to require a decision with regard to the State's intentions or otherwise to take direct action against the polluter. However, Sweden has reservations about giving environmental organisations the right to apply to the courts for an injunction since it considers this should be the primary responsibility of the public authorities.

- Financial security: Sweden shares the Commission's view that it is still too early to make insurance cover obligatory.

- Different options: Sweden agrees that the best solution would be a framework directive at Community level.

- Economic impact: Sweden considers it extremely important that the Commission act on its commitment to examine the economic and environmental impact of environmental liability in greater detail, as a basis for a stance on designing a liability scheme. The position of small businesses and those with limited resources should be taken into account in the detailed design of the scheme.

- Miscellaneous: WP does not discuss the crucial questions of limitation periods and provisions on joint and several liability.

- National Agricultural NGOs

- Federation of Swedish Farmers

- General comments: Although the Federation supports the Commission's intention to introduce an EU environmental liability regime, it takes the view that the WP is ambiguous on several points which need to be clarified before a final position can be taken on the proposed regime. There is a danger that incongruities existing in definitions in both the concept of damage and liable party will be reinforced rather than clarified and so the Federation considers that a sensible first step would be to seek to reach agreement on concepts and definitions before entering into substantive rules in the sphere of environmental damage. Federation also considers that the effects of a liability regime on SMEs must be looked at more closely.

- Activities to be covered: Federation calls for a more precise formulation of what activities will be included in the proposed regime. Agriculture and forestry will affect the
biodiversity of both wooded country and arable land. Federation cannot under any circumstances accept that farmers will be held liable for the effects of practices used in accordance with conditions set up by society as a whole.

- Type and other features of liability: Fault-based liability in respect of biodiversity damage caused by non-dangerous activities should mean that an operator complying with the current laws and regulations would not be affected by liability. Federation wonders how the Commission’s proposals might affect activities in areas around protected regions. Swedish legislation requires landowners to act with due care and in certain cases in the forestry business the regulatory authority may decide to impose conditions.

- Defences: There should be no question of liability for damages as long as an operator remains within the authorised bounds.

- Burden of proof: No distinction seems to be made between the burden of proof for the causal link between the damage and a particular activity and the burden of proof for the causation - these are separate issues and should be kept separate. Federation considers that the full burden of proof ought to rest with the party asserting that liability exists. It is not reasonable that a fundamental principle dependent on the rule of law should be abandoned simply because the question of environmental damage arises.

- Liable party/parties: The concept of "operator" is ambiguous. It is especially unacceptable to apply this concept in connection with GMO products. The authorisation to release a GMO product on the market is made on the basis of a detailed investigation. It is not reasonable under these circumstances to hold farmers liable for damage to the environment when they use these products within authorised limits. Responsibility must be shared by society as a whole and by the biotechnology companies that bring those products onto the market.

- Biodiversity damage: A necessary condition in a discussion of liability for damage to biodiversity is the criteria for evaluation of resources. As long as the establishment of protected areas remains incomplete and criteria to determine and quantify damage do not exist, it is impossible to foresee to what extent the proposed regime will affect existing activities. The suitability and economic effects of liability for biodiversity damage on individual players require careful analysis before there can be talk of introducing Community legislation in respect of liability. In addition, the setting of limits to penalties should be considered.

- Relation with Product Liability Directive: Where damage caused by a product arises in an environmental area, reference should be made to established principles for such damage.

- Access to justice: Federation is of the opinion that it is excessive to give environmental organisations the right to represent the public interest in questions relating to compensation for damages. Federation does not agree that the Aarhus Convention contains any commitment to give environmental organisations the opportunity to sue possible polluters for damages - article 9 of the Convention refers to the legitimate interest of EU citizens in the right of judicial review in the general sense. The usual rules governing legal costs - that is, losing party pays the winner’s costs - should apply to environmental organisations which bring an action against a legal person. This should be combined with the plaintiff’s obligation to lodge security.
- Financial security: It is crucial for the activities of SMEs, which include agriculture and forestry, that they should be able to calculate risks and take out insurance under reasonable conditions.

- Economic impact: Federation considers that the effects of a liability regime on SMEs must be looked at more closely. It is crucial for the activities of SMEs, which include agriculture and forestry, that they should be able to calculate risks and take out insurance under reasonable conditions.

- National Industrial NGOs; general

- Federation of Swedish Industries

- General comments: The Federation considers that it is essentially correct to include legal instruments (such as civil liability rules) in the market economy which are aimed at reducing the risk of damage to the environment. However, in light of the subsidiarity principle and insufficient need, the Federation believes that legislation in the field of environmental liability is not a task for the Community and considers that this is best dealt with at the national level. Sweden has for many years had a system for dealing with compensation for environmental damage. That system provides injured parties with perfectly adequate protection. Under the Swedish Environmental Code, compensation must be paid for all personal injury, pecuniary loss and material damage caused to its surroundings by an activity operating on a Swedish site. These rules are based on strict liability. Where a polluter cannot pay or cannot be found or where claim is statute-barred, compensation is paid from obligatory environmental damage insurance. The Swedish Code also contains public law rules for the clean up of contaminated sites, and, where there is no one to pay, clean up is paid from obligatory clean up insurance. Before the Federation can consider all the proposals set out in the WP, clarity is needed on a number of issues – such as, the potential effect on the EU’s competitiveness, which activities will actually be covered by the regime, the link between the regime and Natura 2000 sites and the extent to which environmental organisations will have a right to take action.

- No retroactivity: The Federation agrees with the Commission’s decision that the proposed regime should not apply retroactively and considers that there are strong grounds for such a view – namely, that of legal certainty.

- Type and other features of liability: It is not appropriate for all types of environmental damage to be covered by civil liability rules. With regard to a polluter’s obligation to clean up his own contaminated land, the only reasonable option is to frame regulations in this respect under public law. Diffuse damage is another example of a category of environmental damage for which civil liability is not a suitable mechanism.

- Defences: It is important when drawing up liability rules relating to biodiversity that regard be had to the fact that under Swedish law there is a procedure for obtaining an operating licence. The procedure for the grant of such licences involves environmental impact assessments of the hazardous activity in question. These assessments are an effective instrument for society to assess whether, and to what extent, an activity can be allowed to impact on the environment. These assessments also imply legal security for the operator. A licence granted under public law to operate an activity must imply that liability cannot be imposed on an individual operator for damage to biodiversity which results from emissions falling within the limits laid down in the licence.
- **Burden of proof**: From the point of view of legal security, any departure from the general principles of law, such as a high standard of proof, can only be accepted in exceptional cases and then only where the limits are well defined.

- **Biodiversity damage**: As regards biodiversity damage, it is in many cases impossible to identify a person as the injured party. In order to be able to speak at all of an “injured party”, the public interest in the abstract must be identified as the injured party. Since the public interest is not a natural or legal person, someone must be selected to represent this interest. The Commission proposes that the State, firstly, and environmental organisations, secondly, should represent the public interest. In many cases it may be possible to accept the State as representing the public interest but that would not be appropriate in a civil liability dispute against individual natural and legal persons. Therefore, biodiversity damage should be dealt with by means of instruments of public law. The Federation also points out that the costs of implementing civil vs. public law instruments should be considered and those costs balanced against their benefit. The Federation believes that extension of civil liability/tort law to biodiversity damage would involve higher administrative costs than if other instruments were applied in order to achieve the same objective. Damage to biodiversity is very difficult to quantify and assess. The Commission offers no proposals for concrete solutions that can live up to the requirements of general legal security, such as predictability and the requirement that compensation match the value of the damage caused. In addition, the Commission’s objective that it should be possible to insure against environmental liability makes further demands on how the methods of evaluating damage are designed.

- **Contaminated sites**: Information obtained by the Federation indicates that liability under civil law covering damage to persons and property is satisfactorily regulated in all Member States.

- **Traditional damage**: Information obtained by the Federation indicates that liability under public law for the clean up of contaminated sites is satisfactorily regulated in all Member States.

- **Access to justice**: The Federation does not consider it acceptable to give environmental organisations the right, as representatives of the public interest, to take legal action directly against operators. The various tasks of the State and environmental organisations should not be confused. The State can in many instances represent the public interest in various environmental issues. Where the State plays such a role, it must take into account with the framework of the law both the beneficial and the cost-related aspects of such action. The special interests represented by the environmental organisations will never have this general perspective. In many cases it may not be clear whether the organisations are acting in order to achieve their publicly declared aims or to attain other objectives. The Commission’s proposal also implies that the State may find an excuse for not enforcing the law. The general and vague wording of Article 9 of the Aarhus Convention does not contain any requirement to give environmental organisations the right to bring claims for damages against possible polluters.

- **Financial security**: The Commission’s objective that it should be possible to insure against environmental liability makes further demands on how the methods of evaluating biodiversity damage are designed. Given the difficulties involved in calculating the risk of damage to biodiversity, it is not very likely that insurance companies will be able to provide liability insurance to cover such damage. Even if it were technically possible to provide such insurance, the premiums would be too high to be commercially attractive.
- Different options: Although the Federation does not see any need for legislative measures at the EU level, should the EU decide to proceed with the proposal the Federation concurs with the Commission that the most appropriate option for a Community action is a framework directive.

- Subsidiarity and proportionality: Information obtained by the Federation indicates that liability under civil law covering damage to persons and property and liability under public law for the clean up of contaminated sites are satisfactorily regulated in all Member States. Therefore, for reasons of subsidiarity and insufficient need, the Federation does not consider legislation in the field of environmental liability to be a task for the Community.

- National Industrial NGOs; sectorwise

  - Swedish Construction Federation

  - General comments: The Federation in this response has limited itself to pointing out those elements of the European Construction Industry Federation’s (FIEC) response in respect of which it is not in agreement. This response should therefore be read in conjunction with FIEC’s response. According to the Swedish Environmental Code (which came into force in Jan 1999) all construction activities should be considered as dangerous for the environment and comply with the requirements of the Code. “General rules of consideration” are applicable to all construction activities whether they require a permit or not. According to the “general rules of consideration” in the Swedish Environmental Act, a party exercising an activity which is covered by the Act has to prove that the general rules of consideration have been complied with. The burden of proof in this respect is reversed. One of the rules requires the relevant party to demonstrate that precautionary measures have been taken in order to prevent harm to health or the environment. Such precautionary measures must be taken by the contractor as soon as there is reason to assume that an operation may injure human health or the environment. Federation therefore is of the opinion that a contractor may be liable for the consequences of his client’s requirements if he doesn’t comply with the requirements set out in the Environmental Code or Act.

  - Swedish Oil Ports Forum

  - General comments: SOHF agrees with the underlying principle in the WP that the polluter should pay for the costs of repairing the damage he causes. And although SOHF finds it difficult to assess the discussion in respect of the various possible forms of an environmental liability regime, it believes that an EU Directive may be most appropriate approach. SOHF accepts that, although very difficult, it will be necessary to strike a balance between a text which is too watered down and therefore meaningless and a text which is over-zealous and tends to stifle certain areas of business.

  - Type and other features of liability: It is debatable whether it is reasonable to apply the same rules to, for example, oil tankers and genetic engineering. The regime should not be so general that it does not give guidance on specific matters and the SOHF points to the Swedish environmental code as an example of how not to draft legislation.

  - Financial security: SOHF understands that insurance solutions currently available on the market are relatively under-developed and so the Forum shares the view set out in the WP. A system where insurance costs reflect in some way the risk will automatically involve a trend towards risk reduction - as compared with a purely regulatory approach which
normally implies compliance with the rules in force in the cheapest possible manner.

- Different options: Although SOHF finds it difficult to assess the discussion in respect of the various possible forms of an environmental liability regime, it believes that an EU Directive may be most appropriate approach.

- Economic impact: SOHF believes that the WP paints too positive a picture of the impact on the external competitiveness of EU industry. A situation whereby certain industrial sectors relocate to outside of the EU because of the high costs of operations within the EU needs to be avoided, as does the situation where tankers registered outside of the EU benefit from more favourable treatment than EU-flagged ships.

- SWITZERLAND

- International Organisations

- United Nations Environment Programme

- General comments: UNEP’s comments emanate from their Technology, Industry and Economics Division and a copy of UNEP’s strategy to initiate and promote the development of a global regime to effectively address damage in the environment has also been provided (please refer to section entitled "Miscellaneous" below for more details). The relevant UNEP Division feels that the WP is very well written, clear and concise and takes into account all the important aspects concerning environmental liability. However, it points out that defining the parameters of an environmental liability regime is not an easy task and that this needs to be done carefully in order to design a meaningful liability regime.

- Activities to be covered: The regime should not just cover activities which bear an inherent risk of causing damage. Different degrees of represented danger can be taken into account when looking at the type of liability. Harmful activities should be defined and a non-exhaustive list of activities should be provided.

- Type and other features of liability: Liability should be strict for potentially harmful activities, which should be defined and a non-exhaustive list of activities should be provided. For other activities, fault may be required.

- Burden of proof: Proving that damage was caused by the defendant’s alleged polluting substance or emission is often the most difficult obstacle for the victim of environmental pollution to surmount as it is very difficult for the victim to look into a polluter’s internal processes. Therefore, a reversal of the burden of proof is necessary as the polluter has all the information to hand.

- Liable party/parties: Where there are multiple defendants, liability should be joint. This would further ensure that the totally of a plaintiff’s full claim would be satisfied. The fault of managers must be counted as the fault of the company.

- Environmental damage: This notion needs to be broad enough to cover different sorts of environmental damage. A horizontal liability regime is preferable.

- Biodiversity damage: As it is so difficult to value the cost of the environment, this point needs to be treated with care.
- Ensuring effective restoration: Restoration has clear priority. Limitations as to technical and economic feasibility will have to be designed very carefully to ensure the regime is not undermined.

- Access to justice: Public interest groups should have standing for damage done to the environment. The trigger of "sufficient interest" and "objective qualitative criteria" should be rather low. The proposed "two-tier" approach is suitable in combination with the "emergency right" for interest groups to act and then be reimbursed but the definition of urgent cases needs to be clarified and made precise. Arbitration is generally quicker and less costly than a court hearing and is therefore a good option.

- Financial security: It is necessary to develop a scheme to provide supplementary funding in the event that the liable person becomes insolvent. In order for the polluter pays principle to remain valid, those companies that damage the environment frequently should not be able to obtain adequate insurance or if they are able to do so should only be able to obtain it at a very high cost.

- Miscellaneous: During the past decade there have been a sequence of events that resulted in significant damage to the environment. The frequency of such events is rising and the magnitude of environmental damage is growing. The existing global and regional legal instruments address the issue in a fragmented way. A number of such instruments are either not in force or not satisfactorily implemented. UNEP’s overall assessment is that the existing body of international agreements addressing environmental damage does not deliver the necessary efficiency and needs to be significantly strengthened and improved. The overall objective of the UNEP strategy is to catalyse and promote the development of a coherent global regime to address effectively prevention, mitigation and compensation of environmental damage. As part of that strategy, UNEP is envisaging the preparation of a White Paper on preventing, mitigation and compensation of environmental damage.

- UNITED KINGDOM

- Academics

- Mr Gerrit Betlem

- Damage to be covered: From the point of view of clarity and of consistency with both domestic laws of damages and international environmental liability instruments, it is preferable to list several non-overlapping categories of loss next to personal injury and property damage. See for example the approach taken in the Lugano Convention, the 1997 Vienna Convention on Civil Liability for Nuclear Damage and the Basel Protocol on Transboundary Movement of Hazardous Waste.

- Activities to be covered: Linking the scope of the regime to existing EC legislation is unfortunate as this will inevitably produce gaps in the scope of the regime since the regulator will be unable to keep up with technical developments. This limitation is inconsistent with one of the stated aims of the liability regime – namely, the implementation of the precautionary principle, which by definition cannot wait for prior legislation in a situation where harm has already arisen. This limitation is also out of step with the most significant other non-contractual liability regime harmonised at Community level, the product liability regime, which applies to all defective products without a connection to any coverage by further EC
product safety rules.

- Type and other features of liability: Linking the scope of the regime to existing EC legislation and to the Natura 2000 network is unfortunate as this will inevitably produce gaps in the scope of the regime. In the case of activities regulated under EC legislation, the regulator will be unable to keep up with technical developments and in the case of the Natura 2000 network applicability of the liability regime will depend on Member States’ action. These limitations are inconsistent with one of the stated aims of the liability regime – namely, the implementation of the precautionary principle, which by definition cannot wait for prior legislation in a situation where harm has already arisen. These limitations are also out of step with the most significant other non-contractual liability regime harmonised at Community level, the product liability regime, which applies to all defective products without a connection to any coverage by further EC product safety rules. The suggestion in the WP that compensation received should be used by an owner of damaged land on restoring damage to the environment is a welcome innovation – under traditional civil law rules, an owner is free to spend it on something else. The Commission underlines the usefulness of civil liability for the purpose of enforcing obligations under EC environmental law. Mr Gerrit considers this to be a welcome step forward compared to the Green Paper and that in order to make such enforcement effective minor adaptations to domestic tort law regimes are required (in particular regarding access to justice by NGOs).

- Burden of proof: Mr Gerrit is the opinion that an alleviation of the burden of proof in respect of the causal link between an activity and loss would be a crucial addition to existing domestic regimes. Mr Gerrit points to EC caselaw and legislation on equal treatment of men and women (Directive 97/80) as a useful source of inspiration – it provides that where a victim of discrimination establishes facts from which it may be presumed there has been discrimination, it shall be for the defendant to prove the absence of a breach. Such an approach is justifiable where it concerns data in possession of the defendant.

- Environmental damage: Inclusion of contaminated sites under the category of “environmental damage” is confusing as it will already constitute either damage to property or pure economic loss (in the form of remediation costs).

- Biodiversity damage: Linking the scope of the regime to the Natura 2000 network is unfortunate as this will inevitably produce gaps in the scope of the regime since applicability of the regime will be dependent on Member States’ action. This limitation is inconsistent with one of the stated aims of the liability regime – namely, the implementation of the precautionary principle, which by definition cannot wait for prior legislation in a situation where harm has already arisen. This limitation are also out of step with the most significant other non-contractual liability regime harmonised at Community level, the product liability regime, which applies to all defective products without a connection to any coverage by further EC product safety rules. Mr Gerrit points out that “biodiversity” does not refer to its meaning under the Convention on Biological Diversity as one might have expected.

- Contaminated sites: Inclusion of contaminated sites under the category of environmental damage is confusing as it will already constitute either damage to property or pure economic loss (in the form of remediation costs). Mr Gerrit suggests that it would preferable to leave contaminated sites out altogether from the proposed liability regime and deal with these separately in an instrument focussed on soil protection. Mr Gerrit points out that Eastern European countries involved in accession negotiations insist that the EU should establish a common approach regarding the clean up of polluted industrial sites.
- Access to justice: In order to ensure the effective enforcement of obligations under EC environmental law, minor adaptations to domestic tort law regimes are required - in particular regarding access to justice by NGOs. However, the WP does not envisage any extension of the locus standi of NGOs insofar as traditional damage is concerned. Mr Gerrit considers this to be problematic in light of his comments in respect of the inclusion of contaminated land under the category of “environmental damage” and in light of the inconsistency with the enforcement function of civil liability. For example, damage to river beds due to sedimentation of dangerous substances would never qualify for any possibly enforcement action by an NGO.

- Miscellaneous: WP has failed to mention the need to modify the prescription periods in tortious liability regimes. In particular, rules about the extinction of a right after a period of 20 years following the harmful event will be problematic where there is a long delay between the manifestation of harm and the initial event. WP has not considered any questions of private international law (jurisdiction, applicable law).

- Mr Martin Hedemann-Robinson

- General comments: Mr Hedemann-Robinson is a law lecturer at Brunel University in London.

- Activities to be covered: Mr Hedemann-Robinson has reservations about dividing activities into “dangerous” and “non-dangerous”. Legal certainty depends on an adequate definition of “dangerous” – the Directive would have to list exhaustively all the activities encompassed by this concept and Member States should ensure that domestic industries are made aware of this classification system. This system encourages the relevant industrial sectors to implement suitable precautionary behaviour patterns. In principle, any biotechnological activity currently regulated under EC legislation should fall within the definition of “dangerous activity” and this should be made clear in the Directive.

- Type and other features of liability: Mr Hedemann-Robinson supports the application of strict liability for damage caused by dangerous activities.

- Defences: State of the art and development risk should be accepted as valid defences in respect of damage caused by non-dangerous activities. As regards dangerous activities, such defences should be rejected. However, evidence of compliance with state of the art procedures should be relevant in terms of mitigating the degree of liability (with the State having to bear the residual costs of clean up). 100% strict liability in all cases would not provide an incentive to improve environmental protection processes. The point made by the WP at page 18 with regard to trade permit compliance as part of a mitigation package is to be supported.

- Burden of proof: The burden of proof should be alleviated in favour of the plaintiff in order to enable him to show the plausibility (as opposed to probability) of the causal link between environmental damage and the dangerous activity. The defendant should then be required to demonstrate that such link does not exist. However, legal proceedings could get bogged down in battles between expert witness in court, and so litigants who can afford very high costs would be favoured. Costs of litigation can become prohibitive if the parties are allowed to control the production of their own evidence before national courts, particularly within adversarial court systems (such as in the UK). The regime should require Member States to ensure that “equality of arms” applies in the courtroom. The witnesses and evidence produced
by either side should be controlled by the judge. Member States should ensure that undue delay and unnecessary costs are avoided. A solution could be the introduction of pre-trial reviews with regard to evidence.

- Liable party/parties : The Directive should make it clear that Member States’ sovereignty is unaffected in terms of their right to enhance corporate accountability, such as through criminal sanctions either on the company and/or on individual managers in cases of gross negligence or deliberate environmental damage.

- Access to justice : It might be difficult to draft a text with sufficient legal certainty to distinguish urgent from non-urgent cases. It might be better to permit NGOs to have legal standing from the outset and allow the State authorities to step in and take over any proceedings if they choose to do so (as is the case under English criminal law). However, the State should not have the power to take over proceedings in order to stop them; this power should be reserved to the courts alone. NGOs should be allowed to sue either the State authorities or the private sector for the widest possible range of remedies: injunctions, declarations, clean up compensation damages and legal expenses. However, filter mechanisms should be put in place to make sure that spurious claims are not allowed to proceed. Defendants should have the right to apply for unfounded claims to be struck out of court. If the defendant wins, costs should be awarded against the plaintiff NGO. An official list of NGOs should be registered in each Member State. Other non-listed NGOs could perhaps be granted more limited standing to sue (perhaps along the lines of the two-tier approach suggested in the WP). Each national/regional Parliament should determine which NGOs should be registered and constitutional safeguards (such as, large majority vote and judicial input) should be put in place to ensure that removal from the list is not left in the hands of national/regional governments.

- Financial security : Those who are carrying out “dangerous activities” should be obliged to set up adequate insurance schemes. Each producer should be obliged to participate in a State approved and regulated insurance system. The system already in place in the mineral oil sector might provide a suitable precedent. It is difficult to accept the point of view set out in the WP (that of no compulsory insurance) since insurance is a suitable tool to minimise the risk of damage. Community institutions and Member States should ensure that the legal framework is right for environmental insurance business to develop. Member States should consider “topping up” private insurance via State insurance mechanisms. Similar State-backed insurance cover should be contemplated for SMEs engaging in non-dangerous activities. Such schemes would not be in breach of WTO rules on state subsidies since their aim is to support environmental protection as opposed to boost export sales artificially. The international community should strive to reach a formal international agreement on this and until then the EC should negotiate with third countries on a bilateral/multilateral basis.

- Different options : The WP rightly points out the disadvantages to a “transboundary only” liability directive. The distinction between “transboundary” and “internal” pollution could lead to reverse discrimination situations and costly legal disputes. Such a distinction is increasingly difficult to justify within the context of a frontier-less single market area.

- Economic impact : External competitiveness must not be allowed to be used as an argument for abandoning the idea of strict liability - see Articles 2 and 6 of the EC Treaty (high level of protection and improvement of the quality of the environment, integration of environmental protection requirements into the definition and implementation of Community policies). The factor of external competitiveness would legitimise the Union in tending towards
a lowest international common denominator of environmental protection (if indeed there is one to be found). The EU has obliged itself to adopt a high level of environmental protection, and this should be made clear in the preamble to the Directive. The Community should be wary of utilising its external relations policy as a means of protecting EU industry from goods produced in third countries that do not attain EU environmental standards. It should adopt a tougher trade policy with the industrialised countries as opposed to developing countries and regions. Important social factors should be borne in mind before the Community considers adopting unilateral trade barriers against poorer nations.

- Miscellaneous: Incentives should be available to those engaged in dangerous activities to improve environmental protection processes.

  - Professor C.M.G. Himsworth

  - General comments: Professor Himsworth points out that numerous commentators have noted that despite the length of preparatory time taken to reach this stage, many crucial details remain unaddressed or at least insufficiently addressed to give confidence that the operation of the proposed regime has been properly thought through. Professor Himsworth’s comments express a scepticism about the probable success of the proposals until the wider issues are addressed. There is a distinct reluctance on the part of the Commission to move on from a scheme which will rely on important and detailed rules of substantive liability intended to operate EC-wide, to procedural and remedial rules which are needed to ensure implementation and enforcement. As a result of the ECJ’s restrained approach, the burden of enforcement is left to national courts. The problem which then arises is that the general rules on judicial review (or its equivalent), the rules on remedies and rules on locus standii vary greatly from one jurisdiction to another. Professor Himsworth considers it to be wholly inconsistent to attempt to institute a uniform scheme of substantive rules without a similar effort being devoted to ensuring their uniform implementation and enforcement. It is as intrusive upon a state’s legal system to insist on uniformity of substantive provisions as much as to insist on uniformity of procedural provisions. Professor Himsworth points out that this problem is not confined to environmental liability or environmental law in general. It is a problem which extends to all those EC regimes which place reliance on national courts for their enforcement. Professor Himsworth suspects that the problem will only grow as additional States join to the Community.

  - Access to justice: The general rules on judicial review (or its equivalent), the rules on remedies and rules on locus standii vary greatly from one jurisdiction to another. The need for rules on access to be broadened was addressed in the Commission’s 1996 Communication on “Implementing Community Environmental Law” but Professor Himsworth considers that those important issues remain unresolved in the WP.

  - European Professional NGOs

  - European Council of Civil Engineers

  - General comments: ECCE welcomes the Commission’s intention to implement core environmental principles and the initiative to propose a horizontal measure rather than a series of actions incorporated into several environmental directives. ECCE strongly emphasises the need for environmental liability to be clearly defined and the concept of prevention strongly stressed. Much of ECCE’s response relates to the desire for greater clarification.
- No retroactivity: ECCE is pleased to note that the proposed regime would not be retroactive.

- Damage to be covered: It may be considered that all major projects (e.g. building of dams and reservoirs) are going to cause some damage. The question is whether the ecology can recover and what the compensating environmental and amenity benefits will be. The provisions in the proposed Directive should demonstrate a full understanding of this.

- Activities to be covered: ECCE calls for greater definition of “dangerous activities”. Clarification is required on how dredging activities (where pollution is displaced rather than eradicated) are to be viewed in the context of the proposed regime.

- Type and other features of liability: Clarification is required in respect of the responsibility professional engineers might be expected to bear if they have fully complied with the environmental impact assessment obligations of a regulatory authority. Liability may arise as a result of an impact which might not have been foreseen under the EIA Directive or foreseen even by hindsight. Clarification would be required of the role the concept of “reasonable foreseeability” has to play in the proposed regime. If damage other than that foreseen occurs, who would be liable? Contrary to prior indications, joint and several liability is no longer set out as a firm option and this development is welcomed by many members of ECCE.

- Defences: ECCE is concerned as to what defences will be available. WP remains ambiguous on what may be allowed as defences. For example, legislation in the UK may allow “state of the art”, foreseeability, due diligence or permit compliance. It is unclear from the WP what the consequences would be if an operator complies with the licence conditions (e.g. for the construction of a harbour, airport or treatment works) and environmental damage occurs nonetheless. In this respect, see also the section above on “type and other features of liability”.

- Liable party/parties: In suggesting that regulators may be required to share the cost of environmental damage with operators, it may be considered that existing environmental law is being overridden, an approach which would not be welcomed either by Member States or industry. ECCE is concerned that professional engineers in their role as professional advisers may become liable owing to a lack of clarity in the definition of liable parties. The construction industry is increasingly involved in more complex contractual arrangements, such as “facilities management” which fall into a grey area in so far as liability is concerned.

- Access to justice: How are NGOs to be defined as bona fide? Will action be taken at the European level to ensure there is a level playing field for the registration of NGOs in all Member States, and which also takes into account the position within accession countries? ECCE refer to the Dutch example in this respect. ECCE raise the question of cross-indemnification for damages. If an action is taken by an NGO and it transpires in court that the action is unfounded, it is normal practice to recover damages from the plaintiff. However, ECCE accept that not all NGOs are in a position to do that and so it requests clarification on how such a procedure could be made acceptable to all concerned.

- Financial security: Insurability is a question of great concern. The insurability of a project will be a decisive element in decisions to proceed with development. If there is reluctance on the part of insurers to provide cover for clean-up and redevelopment of
contaminated sites, then this may lead to a decrease in urban regeneration and greater pressure to develop “greenfield” sites. The question of insurability is of great relevance to SMEs. Across Europe the construction sector consists in 80% or more of SMEs. Any environmental liability regime must take into account the business effect for SMEs of increased insurance premiums and administrative complexities.

- Miscellaneous : ECCE’s closing remarks remind the reader of the following:- “The pursuit of sustainability requires people to surrender individual or group interests in favour of collective interests. On the larger scale, this can mean that countries surrender national interests for the global good”.

- Governments

- United Kingdom Government

- General comments : Although the UK fully supports the concept of environmental liability and the need to ensure that those who cause damage to the environment should be made to pay for putting it right, it considers that a number of the arguments raised in the WP require considerable further work. Subject to further consideration of the requirements of subsidiarity, the UK considers that a case may exist for supplementing existing EC environmental protection rules with provisions in respect of liability and remediation of environmental damage. However, decisions on the main elements of an EC package cannot be taken until full details of all vital elements are available – such as scope, burden of proof, defences, definition of “significant damage” and standards of remediation and valuation methods.

- No retroactivity : UK agrees that the regime should not be retroactive. However, the formulation suggested in the WP does not address sufficiently the issue of cumulative effects or the difficulty of defining what is to count as a single incident.

- Damage to be covered : UK accepts that biodiversity damage and contamination of sites should be covered. In addition, consideration should given to the inclusion of other forms of environmental damage, such as water pollution. However, the UK does not accept that traditional damage (in cases where this is unrelated to environmental damage) should be covered by the EC proposals. Such a proposal would clearly affect civil procedure and so might need to be put forward under Article 65. In addition, such a proposal could disrupt existing national insurance arrangements and compensation schemes in respect of traditional damage which are, in general, working well.

- Activities to be covered : UK agrees in principle – subject to careful consideration of the detailed drafting - that the strict liability regime should cover “dangerous activities” which are regulated by EC legislation. However, it is not clear how the regime might relate to some of the activities and substances regulated by EC environmental rules. In the case of GMOs, the UK agrees with the suggestion in the WP that proposals are needed which will differentiate according to the different problems which might arise (e.g. different risks needs to be considered in the case of a high-containment facility or of a deliberate release).

- Type and other features of liability : UK is broadly in agreement that there be strict liability – with defences – for environmental damage and associated traditional damage arising from dangerous activities. However, the details in this respect will be extremely important.
- Defences : It is essential to establish the defences that are to be made available in order for decisions to be made on the overall package. UK considers that considerable further work is necessary in respect of defences.

- Burden of proof : UK does not agree that a “traditional burden of proof” exists across Member States. A wide range of arrangements exist within the EU and many systems already have ways of dealing with the problem of proving facts which are within the defendant’s knowledge. UK does not think that a case has been made for an alleviation of the burden proof.

- Liable party/parties : UK does not agree with suggestion in the WP that permitting authorities might share responsibility where the damage results from emissions authorised under a permit. This would undermine the polluter pays principle and could encourage permitting authorities to adopt an over-cautious approach when granting permits.

- Environmental damage : UK agrees with the proposal to apply the regime to environmental damage which is “significant” but considers that further work is needed in defining this concept. The views of Member States’ technical experts in the field of intervention thresholds will be particularly important.

- Biodiversity damage : It is not clear that any approach currently exists for the valuation of damage to biodiversity which is sufficiently robust to avoid disproportionate disputes or litigation. Therefore, a workable system would need to be devised and tested before liability under a regime could be based on it. UK suggests that a programme of work needs to be established to investigate these basic issues before any formal proposals are made.

- Contaminated sites : UK does not agree with the suggestion in the WP that uniform EC-wide numerical standards for soil restoration can be developed and considers that a more risk-based approach to achieving uniform standards would be desirable. Any proposals which emerge in this respect need to recognise the thinking which is already going on at the EU level in this area.

- Traditional damage : UK does not accept that traditional damage which is unrelated to environmental damage should be covered by the proposals since it does not think that a case can be made for applying the regime to cases of traditional damage which do not at the same time involve environmental damage. For cases involving both environmental damage and traditional damage, careful thought will be needed on the interface between the remediation of environmental damage and reparation to those who have suffered traditional damage.

- Relation with Product Liability Directive : New EC rules must not disrupt the coherence of Member States’ existing legal systems, which will include measures implementing international or other EC obligations.

- Access to justice : UK agrees that public interest groups should be entitled to seek review of a public authority’s failure to discharge its functions properly (in the UK this type of action is called “judicial review”). However, UK considers it important that the primary role of taking action to require restoration in the public interest be kept with public authorities and that where private rights are affected, the primary role of taking action should rest with the person whose rights have been affected. Having said that, the UK considers that the role of public interest groups in taking action for the benefit of those with direct interests could be
further considered. UK accepts that public interest groups could have a role in bringing environmental damage issues before the courts – seeing as there should be effective ways to ensure public authorities discharge their obligations. UK is also prepared to consider further how legal costs and damages regimes might be used to enable public interest groups to fund litigation in the public interest. In the UK, public interests groups bringing judicial review actions against public authorities for the authorities’ failure to discharge their obligations properly can include in their action a claim for an interim injunction – but there is a requirement that the applicant provide an undertaking in damages (that is, a financial guarantee to make good any loss caused by the interim injunction if it should prove that the grant of the injunction was not justified). UK would expect a similar requirement to form part of actions akin to judicial review in an EC regime.

- Relation with international conventions: New EC rules must not disrupt the coherence of Member States’ existing legal systems, which will include measures implementing international or other EC obligations.

- Financial security: UK agrees with the WP that the insurability of any proposals is a vital element.

- Different options: An EC regime should aim at fixing the objectives and results, leaving Member States to choose the ways and instruments to achieve these.

- Subsidiarity and proportionality: Further development of the ideas in the WP must be accompanied by a review of how the reasoning on which details of the proposals are based complies with the principles of subsidiarity and proportionality. Subject to this further consideration, the UK considers that a case may exist for supplementing existing EC environmental protection rules with provisions in respect of liability and remediation of environmental damage.

- Economic impact: A fiche d’impact is necessary and the Commission will need to ensure that there is careful examination and a thorough analysis of the likely costs and benefits of all the available options. This should explore specifically the balance between benefits to the environment and impacts on SMEs. Such an analysis needs to go hand in hand with the further clarification of the content of the whole package. Environmental liability is a field in which transaction costs can be crucial (particularly the legal costs of resolving disputes). This demands rules which are clear, unambiguous and stable and which avoid the diversion of resources away from remediation towards lengthy litigation.

- Individual Companies

  - Aventis CropScience UK Ltd

  - General comments: Aventis is a developer of genetically modified crops and crop protection products for agriculture. Aventis recognises and understands public concerns about possible environmental damage arising from GMOs and is not opposed to the concept of strict liability in respect of damage to the environment or human safety caused by its technology where that technology is properly applied. Accordingly, it welcomes the WP as a first positive and important move in increasing public confidence. Since liability in respect of human safety is already covered by the Product Liability Directive, the liability regime proposed in the WP would fill in the existing gap thus ensuring GMOs are fully covered.
- No retroactivity: Aventis welcomes the Commission’s desire to provide legal certainty and accordingly bar retroactivity. Not to do so would cause companies to incur liability for past activities even though when undertaken the companies acted in good faith and in compliance with the applicable legislation and authorisations in force at the time.

- Damage to be covered: Aventis welcomes the view expressed in the WP that biotechnology derived products and related activities should be included in comprehensive environmental liability legislation. Seeing as liability in respect of human safety is already covered by the Product Liability Directive, the liability regime proposed in the WP would fill in the existing gap thus ensuring GMOs are fully covered.

- Activities to be covered: Aventis welcomes the proposal to limit the scope of the proposed regime to hazards which are already regulated by EU law but would like to see a clear outline of exactly which activities are envisaged in order to enable it to provide more comments. Any proposed legislation should provide for a system which allows for regular reviews to ensure that certain GMOs which no longer present any risk to health or of significant environmental damage could be transferred from any category of potentially dangerous products to the non-dangerous category – thereby enabling application of fault-based liability those GMOs. The same could apply to other activities proposed to be covered by the liability regime. Since liability schemes in respect of traditional damage are enshrined in Member States’ legal systems, Aventis considers that there is no immediate need for EU regulation in this respect.

- Type and other features of liability: Aventis is not opposed to the concept of strict liability – provided that strict liability mean that although the fault of the actor need not be established it would still be necessary to establish the causal link between the act or omission and the damage caused.

- Defences: Aventis strongly urges the Commission to consider including state of the art and/or development risk as a possible defence and points out that this is already the case in the Product Liability Directive and the draft Spanish Law on Environmental Liability.

- Burden of proof: Aventis urges that the burden of proof in respect of the causal link between the act and the damage remain with the plaintiff and points out that all Member States’ liability regimes contain elaborate tools for a plaintiff to obtain detailed proof. If the burden of proof in respect of the causal link were reversed defendants would be put in the impossible position of having to prove a negative – that is, of proving that their act could not have caused the damage.

- Liable party/parties: Aventis welcomes the proposal that when operating entirely within the duly requested permits, some kind of equity would be applied and it suggests that this idea be extended so that this may be used as a defence. Aventis points out that there are some particular difficulties with the concept of “exercising control of an activity” when it comes to bringing a GMO into the environment. For example, a specific GMO technology might be discovered and developed by Aventis who will then co-operate with a seed partner in order to exploit that technology. The seed partner will then introduce that technology into their germoplasm and trials will be carried out by different persons (such as, sub-contractors, affiliates of the seed partner, etc). If the trials go well, various parties will breed, produce or multiply various lines of the seed under a license or sub-licence of Aventis, a seed partner or one of its affiliates or even of a third party. The seed may then end up with a distributor who will sell it to a farmer who will plant, grow and harvest it. The company which delivers the
technology cannot realistically control this entire chain of actors. Accordingly, Aventis would be grateful for a very clear definition in the liability regime of who exactly exercises control of an activity.

- Environmental damage: It is very difficult to value and quantify environmental damage.

- Traditional damage: Since liability schemes in respect of traditional damage are enshrined in Member States’ legal systems, Aventis considers that there is no immediate need for EU regulation in this respect.

- Relation with Product Liability Directive: Since liability in respect of human safety is already covered by the Product Liability Directive, the liability regime proposed in the WP would fill in the existing gap thus ensuring GMOs are fully covered.

- Access to justice: Aventis subscribes to the view that it is indeed the government’s right and obligation to act in the interest of the public good. And although Aventis understands the Commission’s wish to provide a safeguard for protection of the public good in the event that a public authority is negligent in doing its job, it considers that the proposals set in the WP in respect of access to justice for public interest groups is open to abuse. Organisations wishing to highlight their opposition to biotechnology per se might use the proposed access to justice mechanism merely as a publicity tool.

- Financial security: Aventis strongly welcomes the Commission’s recognition that insurability is crucial to ensuring the goals of environmental liability. However, in an operating environment as uncertain as is that of GMOs at present, it is impossible for any company – large or small – to find adequate insurance. In order to help make insurance possible Aventis suggest that a maximum cap on liability be introduced, along with provisions specifying for how long companies may held liable and the period within which claims must be brought.

- Subsidiarity and proportionality: Since liability schemes in respect of traditional damage are enshrined in Member States’ legal systems, Aventis considers that there is no immediate need for EU regulation in this respect.

- BP Amoco plc

- General comments: BP Amoco acknowledge that companies which negligently damage the environment must be held responsible for their actions. However, a legal regime which consists of strict liability with no defences, with a reversal of the burden of proof and the risk of unfounded claims from unaccountable organisations, is unlikely to provide an incentive for companies to act more responsibly. Such a regime is likely to lead to companies relying too heavily on insurance. There is a need for a clear distinction between liability and non-liability - only when the polluter is identified and administrative remedies are inadequate should civil liability apply. Legal certainty must be provided by means of a statutory provision. The following criteria should be the key tests of any regime: - Establish clear EU remediation obligations that will help protect the single market. - Ensure effective remediation to standards agreed "as fit for purpose". - Ensure that the practical effect on behaviours of proactive companies will be consistent with stated environmental objectives (adoption of best environmental risk management practices). - Ensure that the optimum level of costs involved are spent on environmental protection and remediation, not administration. - Effectively protect the environment without damaging the EU’s global competitiveness.
- Damage to be covered: It should be clarified how "significant damage" can be operationally identified and legally defined.

- Type and other features of liability: There is a need for a clear distinction between liability and non-liability. Only when the polluter is identified and administrative remedies are inadequate should civil liability apply. Legal certainty must be provided by means of a statutory provision.

- Defences: Meeting operating permits should at least be a "mitigating defence". State of the art and risk of development should also be allowed as defences.

- Burden of proof: The burden of proof should rest on the plaintiff. Reversing the burden of proof should be considered on a case-by-case basis by national courts.

- Biodiversity damage: Legal regimes in this area are generally underdeveloped and BP Amoco welcome a EU initiative that would bring greater clarity and legal certainty. However, the same liability regime will not be appropriate to both damage to biodiversity and to contaminated sites. Letting nature recover naturally is often the best option. The Commission’s proposal to use Natura 2000 sites is a helpful starting point. Clear criteria are needed to assess biodiversity damage before a liability regime can be proposed. These should include a definition of "significant damage" and of an appropriate remediation obligation on a practical time-scale.

- Contaminated sites: There is a need to define EU remediation obligations that are agreed as "fit for purpose". This would provide a common reference point in the single market to the financial exposure of a company, and so assist insurability. Liability should be based on operational control and be proportionate by being based on actual damage caused.

- Traditional damage: A case for harmonisation would need very clear justification, including proof that existing national regimes are inadequate and/or that there is damage to the single market from the existing different national approaches. There is a significant danger of legal confusion if a framework directive were superimposed on existing regimes that are already effective in allocating responsibility for and compensation to people and property. BP Amoco could support a framework of EU principles and general provisions that would test the way that MS should comply.

- Access to justice: Member States should determine how to implement the Aarhus Convention obligations. Implementation of the Convention should focus on administrative remedies and provide for private involvement only where a proper balance between cost and environmental benefit has been demonstrated. A low barrier to unsubstantiated claims, especially if accompanied by reversal of the burden of proof, will pose a serious risk for business and insurers, with no demonstrated environmental benefits.

- Financial security: Unlimited uncertainties can lead to an inability to insure. Insurance is unlikely to be made available unless a liability regime provides companies with clear incentives for more responsible behaviour (e.g. by having a legal regime which allows for defences). In the field of contaminated sites, EU remediation obligations agreed as "fit for purpose" would provide a common reference point in the single market to the financial exposure of a company, and so assist insurability.
- Economic impact: Unlimited uncertainties can lead to high costs and damage the global competitiveness of European business and industry.

- Novartis

- General comments: Novartis supports the EU's efforts in the creation of uniform rules for an efficient environmental liability regime which is based on the polluter pays principle. Novartis also recognises the utmost importance of such an exercise since this effort will serve as a model at the EU and at the national levels. Novartis considers that environmental liability must form part of an overall regulatory system ensuring environmental compliance and protection. Such a system should include the licensing of an activity, the monitoring of the potential impacts of licensed activities on the environment, and as a last resort, a liability regime. Any environmental liability scheme which is implemented would have to support and complement the other two types of environmental measures.

- Type and other features of liability: Environmental liability should be measurable and have a clear scope. Since plant protection products are among the best-controlled and regulated chemicals in the EU, it is not clear what type of liability would apply under the proposed regime to such products if damage were to occur. Would they be classified as an inherently dangerous activity so that strict liability would apply or as a non-dangerous activity so that fault-based liability would apply? Or does the Commission intend to define two different types of agriculture, one falling into each of the two categories? It is not easy to define agriculture as either a dangerous or non-dangerous activity since it will always carry some type of inherent risk of environmental damage and of damage to biodiversity because crops are grown at the expense of many other wild species which prosper on the same land. A consistent and transparent regime of environmental liability must limit the liability of farmers to cases of negligence or non-compliance with authorised users - i.e. to fault-based liability. Any attempt to draw lines between hazardous and non-hazardous activities will inevitably lead to an inconsistent, unclear and therefore uncertain legal framework. An environmental liability scheme should distribute the burden of remediation equitably in order to ensure that all the parties responsible for the pollution are held accountable. With regard to the choice of public or civil law (or both), for the protection of private property having a monetary value, civil law has been developed and is the means of choice. For the protection of those parts of the environment which are not private property, public law administered by the State may be the better choice since the main issue is normally remediation action and the payment of "damages" cannot really be calculated. The Swiss legal experience is conclusive in this respect.

- Burden of proof: In order to maintain an equality of terms, the regime should preserve a sound approach to the burden of proof in respect of the causal link.

- Liable party/parties: Novartis agrees that environmental liability should be based on the notion of operational control. The suggestion in the WP that liability might be borne or shared by the permitting authority where the damage was caused by emissions explicitly allowed by a permit will need to be clarified.

- Biodiversity damage: The concepts of "biodiversity" and of "biodiversity damage" need to be defined. In the Habitats Directive "biodiversity" has been defined by reference to indicator species and ecosystems. And under that Directive, damage to biodiversity seems to be equivalent to significant impacts on "special areas of conservation". Does the Commission intend to use the same approach in the liability regime? Novartis takes the view that the concepts contained in the Habitats Directive need to be defined in much more detail.
Experience in the US with actions "on behalf of nature" shows that this laudable concept is quite difficult to implement effectively. In particular, restoration of "damage afflicted upon natural resources" is frequently an amorphous and unquantifiable concept. In order for an EU environmental liability regime to be able to address damage to natural resources, the regime would have to address carefully the scope of the provisions with a special effort to create a quantifiable and easily implemented system for addressing the special element of environmental liability.

- Ensuring effective restoration: An EU environmental liability regime should facilitate rapid and technologically sound clean-ups rather than run the risk of fostering disputes and delays, as is the case with the US Superfund legislation.

- Access to justice: NGOs, like other stakeholders (e.g. private citizens) should have a well-defined role and specific rights regarding participation in the process of site investigation, remedy selection and the design and implementation of remedies. However, access to justice for public interest groups should be strictly limited to actions against decisions, acts and omissions of public authorities.

- Nycomed Amersham

- General comments: Nycomed Amersham is the world’s leading provider of in-vivo diagnostic imaging agents (which produce improved pictures of organs or tissues enabling early accurate diagnosis of illnesses). Nycomed Amersham incorporates a world leading research based biotechnology supply company which supplies prescriptions, over-the-counter drugs and consumer health products. Nycomed Amersham is also one of the leading manufacturers of radio-pharmaceuticals. Nycomed Amersham considers the two main benefits of an EC environmental liability regime to be: (1) ensuring decontamination and restoration of the environment and (2) bringing about better integration of environmental policy into other fields.

- Damage to be covered: It will be difficult to work out satisfactory definitions of sites to which the considerations of the WP apply. Damage to biodiversity should be the subject of a separate WP, so that it can be given the attention it merits without slowing down the implementation of the other WP recommendations. The WP concludes that an EC-wide regime is necessary in order to avoid inadequate solutions to transfrontier damage. However, it is not clear whether this conclusion takes sufficient account of the provisions of the Brussels and Lugano Conventions which enable polluters domiciled in other European Economic Area States to be sued for liabilities in tort/delict/quasi-delict in the place where the damage is caused.

- Type and other features of liability: In many circumstances under existing England law there is already no need to prove fault, but in such cases the foreseeability of the damage will be relevant to the existence of liability. In the case of nuclear events, liability is extinguished after 10 years. Nycomed Amersham recommends that the same restriction should apply to the proposed environmental liability regime.

- Defences: In many circumstances under existing England law there is already no need to prove fault, but in such cases the foreseeability of the damage will be relevant to the existence of liability – a concept related to the “state of the art”. Nycomed Amersham foresees that there will be problems in assessing the case for defences such as “state of the art”.

- Liable party/parties: It is not always easy to decide who “exercises control” over an activity, particularly where one or more contractors are employed to carry out activities as part of a wider undertaking. English law has tended to concentrate on the concept of persons, rather than activities, causing damage, and has then considered whether anyone in addition to those persons should bear liability for that damage. In this context, it seems contradictory that the WP excludes the liability of managers and employees in cases where the operator is a corporation. With regard to the position of lenders, Nycomed Amersham notes that lenders may fail to secure repayment of their loans if the cost of clean-up bankrupts a client and that in that sense lenders will be penalised. Nycomed Amersham therefore recommends that the position of lenders receive further consideration. WP suggests that in certain circumstances regulators might be made liable to contribute if the damage was “entirely and exclusively caused” by explicitly permitted emissions. Nycomed Amersham considers that such an approach would encourage regulators to impose unreasonably tight requirements so as to minimise their risk. This would obviously have a bearing on any defences based on the “state of the art”.

- Biodiversity damage: It will be difficult to work out satisfactory definitions of sites to which the considerations of the WP apply. Damage to biodiversity should be the subject of a separate WP, so that it can be given the attention it merits without slowing down the implementation of the other WP recommendations.

- Contaminated sites: Given the wide variations in geology, climate, crop-patterns and land-use across Europe, Nycomed Amersham believes that it is not realistic to aim at uniform numerical standards for the soil and water standards to be achieved. Instead the standard should be the risk posed by the soil contamination. Any remediation which is required must be “reasonable” having regard to the cost which is likely to be involved and the seriousness of the contamination or the pollution involved. One test of whether or not a remediation action is reasonable is whether or not the costs likely to be incurred are justified by the benefits secured as a result of remediation. Under the proposed regime, liability in respect of contamination of sites will only arise if the contamination was caused by a dangerous or potentially dangerous activity. Difficulties will arise if contamination by the same substance may be subject to different rules depending on the activity in which that substance is used.

- Traditional damage: Nycomed Amersham is concerned that difficulties will arise if there are to be different rules for damage to persons and property depending on the nature of the activity that causes the damage. Equally, it will cause problems to have different rules for “environmental damage” and for “traditional damage”. It is not acceptable to leave pure economic loss out of account, and indeed, if possible, the monetary value of the loss should be evaluated in its entirety as the basis of the cost-benefit calculations.

- Ensuring effective restoration: The process of carrying out remediation may in some circumstances create adverse environmental impacts. Nycomed Amersham believes that the possibility of such impacts should affect the determination of what remediation package represents the best practicable techniques for remediation. The enforcing authority should be required to consider whether a particular remediation package can be carried out without damaging the environment. If such a risk exists, the authority should consider whether it is possible to reduce it by means of particular precautions or whether it would better to choose an alternative approach even if this might not fully achieve the objectives of remediation. The decision would depend on the trade-off between the harm due to contamination and the harm, cost and disturbance necessitated if the contamination was to be reduced.
- Access to justice: It is not realistic to envisage applications by public-interest groups without setting aside the provision, foreseen by most European legal systems, that provides for a guarantee by a party applying for interim relief (such an injunction), to make good any adverse impact of that relief if the main question is decided against the applicant (the “cross-undertaking in damages” in English law). Public interest groups should not be given powers to spend sums of money which it will be beyond the reasonable capabilities of the polluter to repay (i.e. where a public interest group spends excessive sums on remediation and then seeks to recover the money from the operator).

- Relation with international conventions: The Paris and Vienna Conventions are practically identical in respect of radioactive transport. The Conventions apply both to fixed installations and to transport and they provide for strict liability and a limit of liability of $140 million, above which governments accept liability.

- Financial security: There needs to be a sound assessment of the effects the WP proposals might have on business costs, availability of insurance, transaction costs and on the potential for litigation.

- Economic impact: There needs to be a sound assessment of the effects the WP proposals might have on business costs, availability of insurance, transaction costs and on the potential for litigation.

- United Kingdom Nirex Limited

- General comments: Nirex considers the WP to be a significant and welcome step towards establishing an EU-wide framework for dealing with environmental damage.

- No retroactivity: With regard to the cut-off point, Nirex suggests that this is an aspect where discretion could be allowed at Member State level in order to avoid over-complicating the EC regime.

- Activities to be covered: It is unclear whether the proposed regime is intended to cover radioactive substances. If so, very careful consideration would need to be given to the implications of introducing a liability regime based on strict unlimited liability for damage caused by nuclear activities. Such consideration would have to include the implications for current liability regimes in the UK and internationally, as well as the consequences for establishing an appropriate insurance market.

- Defences: Nirex is concerned that a defence might not be allowed in relation to damage caused by releases made in accordance with a permit and EC regulations and for “state of the art”. Such an approach would seem to undermine the usefulness of criteria established internationally, including the long-established principle of optimisation of protection, and could place operators and regulators in an intolerable position.

- Burden of proof: The reasons behind the suggestion that there might an alleviation of the burden of proof are questionable, given the proposal to establish a strict liability regime for dangerous and potentially dangerous activities. Nirex does not see why it is appropriate to alleviate the requirement on a plaintiff to demonstrate the causal link between the damage and the activity carried out by the defendant.
- **Liable party/parties**: Whilst it may be appropriate in certain circumstances for regulators to be liable for environmental damage, Nirex believes that there should be a defence for acting in accordance with EC regulatory standards or in accordance with the state of the art knowledge prevailing at the time. Careful consideration needs to be given to the implications of imposing liability on regulators and its potential effects on regulatory practice. One effect could be the setting of unnecessarily stringent requirements.

- **Contaminated sites**: The wide natural variability in background levels of many naturally occurring chemotoxic or radiotoxic substances, coupled with the objective that soil should be fit for actual and plausible future use, makes it both difficult and inappropriate to establish uniform standards for intervention based simply on concentrations of different substances.

- **Access to justice**: The “two-tier” approach advocated in the WP seems reasonable. As regards urgent cases, Nirex can see no objection in principle to public interest groups having the right to ask the court directly for an injunction to require a potential polluter to abstain from action that may cause significant damage to the environment. However, in the interests of fairness, the legislation must provide security for operators that they will be able to recover damages where they are later shown not to be causing serious harm and have incurred losses because of an interim injunction.

- **Relation with international conventions**: It is unclear whether the proposed regime is intended to cover radioactive substances. If so, very careful consideration would need to be given to the implications of introducing a liability regime based on strict unlimited liability for damage caused by nuclear activities. Such consideration would have to include the implications for current liability regimes in the UK and internationally.

- **Financial security**: It is unclear whether the proposed regime is intended to cover radioactive substances but if so, then very careful consideration would need to be given to the consequences for establishing an appropriate insurance market of a liability regime based on strict unlimited liability for damage caused by nuclear activities.

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**Individual Lawyers**

- **Mr Richard Hawkins**

- **General comments**: Mr Hawkins is an international environmental lawyer (non-practising barrister). Mr Hawkins considers that the WP is incomplete, that it leaves far too many questions unasked and that when questions are asked the responses provided are not properly researched. Mr Hawkins also considers that the drafters of the WP have no real understanding of the commercial or field issues involved.

- **No retroactivity**: Mr Hawkins is relieved to note that the proposed EC liability would not apply retrospectively, unlike the UK contaminated land regime.

- **Damage to be covered**: The proposed regime would not cover diffuse pollution from multiple unidentifiable sources. Mr Hawkins considers this to be a significant omission and one which is not unrelated to the disappearance without mention from the WP of the reference to joint and several liability.

- **Type and other features of liability**: A list of the relevant EC environmental
legislation needs to be provided. Mr Hawkins expects that once this has been done the Commission will realise that the catchment area of the proposed liability regime is extraordinarily wide and would include some activities which are not seriously potentially dangerous at all. In respect of non-dangerous activities which result in damage to biodiversity, if the fault of the polluter cannot be shown the polluter will not be liable for restoration. In such cases, it would appear that the WP has in mind that the State will then be responsible for the restoration or compensation. At present, UK regulators have a power, not a duty, to carry out remedial works at their own expense.

- Burden of proof: One of the great preoccupations of the Commission has been its belief that plaintiffs often and unfairly are unable to prove their case in environmental matters. Earlier drafts of the WP were therefore concerned with reversing the burden of proof. The emphasis on reversal has been considerably toned down in the final version of the WP.

- Biodiversity damage: There is much discussion concerning the appropriate method of valuing biodiversity. However, Mr Hawkins considers that the practicality of this concept should have been determined before the WP was published.

- Contaminated sites: Mr Hawkins believes that the approach to the clean up of contaminated sites set out in the WP owes much to the UK contaminated land regime.

- Traditional damage: Mr Hawkins points out that the former justification for harmonising domestic rules for traditional damage - that is, that a harmonised European regime would facilitate the single market – has disappeared without trace. The Commission had been requested persistently to provide evidence of this since the conclusion drawn from the two studies carried out in 1995 was that the differences between the Member States’ existing environmental liability regimes did not affect the internal market.

- Access to justice: In respect of the proposal that NGOs be entitled to apply for injunctions against polluters, there is no mention in the WP of an NGO’s obligation to give a cross undertaking in damages should the NGO’s case proved to be unfounded.

- Financial security: The WP reviews the US Superfund legislation and notes the loopholes for circumventing liability by transferring hazardous activities to thinly capitalised firms which become insolvent in the event of significant damage. However, rather than discussing the ability to pierce the corporate veil with an individual’s direct liability, there is far too much emphasis on the use of insurance. The Commission only wants to proceed with this Directive if insurance or similar products are available for the liabilities it proposes to cover. If so, then why was this not researched first before proceeding with the WP?

- Economic impact: Mr Hawkins points out that the former justification for harmonising domestic rules for traditional damage - that is, that a harmonised European regime would facilitate the single market – has disappeared without trace. The Commission had been requested persistently to provide evidence of this since the conclusion drawn from the two studies carried out in 1995 was that the differences between the Member States’ existing environmental liability regimes did not affect the internal market.

- Individuals

- Mr Gergely Jambor
- General comments: Mr Jambor is in favour of an environmental liability regime as proposed in the WP but is concerned with the “closed” scope of application of the regime.

- Type and other features of liability: Mr Jambor believes that a “closed” scope of application would create loopholes whereby there would be no liability for environmental damage which is caused (possibly intentionally) by activities which are not covered by existing EU regulations. Mr Jambor also believes that there should be some scope for prosecuting retrospectively (e.g. in clear cases of negligence when specific regulations do not apply).

- Mr Tilak Abhayaseela Ginige

- General comments: Mr Ginige is preparing a thesis on a question related to the WP on Environmental Liability.

- No retroactivity: With regard to the non-retroactive nature of the proposed regime, a key difficulty is damage which is caused by an ongoing process - such as water pollution from a contaminated mine or a leaking landfill which may have originated before the regime came into force but which is continuing and may only become known after the regime has entered into force. Without clear statutory distinctions between events occurring before and after the entry into force of the regime, there is a risk that the regime might become a lawyer’s charter.

- Damage to be covered: With regard to the exclusion of diffuse damage, Mr Ginige points out that it would be feasible with contemporary monitoring and modelling capabilities to identify the contributions made by routine releases from dominant pollutant sources to designated wildlife sites (e.g. eutrophication caused by nutrient discharges from sewage works). Mr Ginige is of the opinion that claims in such cases could become a driving force for cleaner processes and asks whether the Commission is aware of this possibility.

- Activities to be covered: Although the proposed scope of activities is closed, it is not a narrow scope. By applying to dangerous substances and preparations, the regime could capture almost any polluting chemical.

- Burden of proof: What are the Commission’s intentions with regard to its proposal to "alleviate" the burden of proof?

- Liable party/parties: What exactly are the Commission’s intentions in respect of its proposal that liability could be shared between an operator and the permitting authority in cases where the damage results exclusively from a permitted release? This would constitute a major departure in UK law, which exempts regulators from liability.

- Biodiversity damage: Extending liability to damage to the unowned environment is by far the biggest innovation in the Commission’s proposals and it is also the one most likely to create the biggest uncertainties with regard to potential costs for industry. The first unknown is the question of determining when liability for damage to biodiversity would be triggered. The WP proposes a trigger of "significant damage" but what is meant by this? Mr Ginige also queries some of the references to valuation methods which appear in the WP.

- Contaminated sites: Does the Commission envisage setting EC-wide clean-
up standards to meet its goal of a "certain level of harmonisation" in this field?

- Relation with international conventions: Although the WP uses the example of the Erika tanker incident in order to make out a case for a liability regime, the Commission’s proposal does not seem to provide redress for those type of cases, except if an oil or chemical spill at sea were to damage a designated coastal habitat.

- Financial security: The WP states that "capping liability for national resource damage is likely to improve the chances of early development of the insurance market in this field, though it would erode the effective application of the polluter pays principle". Which approach is the Commission likely to favour in this respect?

- Economic impact: Extending liability to damage to the unowned environment is by far the biggest innovation in the Commission’s proposals and it is also the one most likely to create the biggest uncertainties with regard to potential costs for industry.

- Ms Helen Brinton

- General comments: Ms Brinton is a Member of the UK Parliament, Convenor of the Parliamentary Labour Party Environmental Protection Group and Chair of the All Party Wildlife Protection Group. Ms Brinton considers that the WP is still unclear in respect of a large number of areas and that more research needs to be done to ensure that the proposed regime is effective in terms of environmental protection and does not harm the competitiveness of EU businesses, in particular of SMEs.

- Damage to be covered: Marine pollution should be given more consideration. Damage to shoreline or estuarial environmental sites and damage to marine sites from both off-shore and land-based pollution incidents should be included. Small scale incidents should be excluded.

- Activities to be covered: The differentiation between strict and fault-based liability and between dangerous and non-dangerous activities may make the regime overly complex and harm its effectiveness. Activities causing marine pollution should be included in the regime, but not small fishing businesses.

- Type and other features of liability: The differentiation between strict and fault-based liability and between dangerous and non-dangerous activities may make the regime overly complex and harm its effectiveness.

- Biodiversity damage: The current protection afforded to environmental sites within national legislation should be given further consideration in order to ensure that the proposed Directive is not merely reproducing existing legislation.

- International Industrial NGOs; sectorwise

- Comiti Maritime International

- General comments: CMI’s principal concern is that nothing should be done which could conflict with or otherwise affect the existing international liability and compensation regime for pollution of the maritime environment embodied in the Civil Liability and Fund Conventions 1992. It is widely acknowledged that these instruments and the claims
practice which has developed ensure that victims receive prompt and reasonable compensation for legitimate claims. CMI is of the view that pollution of the maritime environment should continue to be regulated with the framework of the existing Conventions. Great care should be taken in drafting laws relating to non-marine environmental pollution within the EC to ensure that there is a clear interface between ship-sourced and land-sourced pollution.

- Relation with international conventions: CMI’s principal concern is that nothing should be done which could conflict with or otherwise affect the existing international liability and compensation regime for pollution of the maritime environment embodied in the Civil Liability and Fund Conventions 1992 (CLC). It is widely acknowledged that these instruments and the claims practice which has developed ensure that victims receive prompt and reasonable compensation for legitimate claims. CMI is of the view that pollution of the maritime environment should continue to be regulated with the framework of the existing Conventions. Great care should be taken in drafting laws relating to non-marine environmental pollution within the EC to ensure that there is a clear interface between ship-sourced and land-sourced pollution particularly when the basis of liability, the levels of compensation and many other relevant factors are to differ between land and sea. Any domestic laws introduced as a result of an EC Directive on environmental liability should exclude oil pollution damage for which liability is incurred under the CLC. A similar provision would be needed in relation to hazardous and noxious substances once the HNS Convention comes into force.

- International Oil Pollution Compensation Fund

- General comments: The Commission should take fully into account the existing global regime based on the 1992 Conventions on oil pollution compensation and should ensure that any action by it does not hamper the functioning of that international regime.

- Relation with international conventions: There are several conventions dealing with liability for oil pollution. The international regime is based on a two-tier compensation system. The owner of a tanker is strictly liable - with very limited defences - for damage caused by oil escaping from the vessel (polluter pays principle). The shipowner is normally entitled to limit his liability to an amount which is calculated on the basis of the tonnage of the vessel. In 1992 a supplementary compensation system was established. If the compensation paid by the shipowner and his insurer is not sufficient to provide full compensation to the victims, then supplementary payments are made by the International Oil Pollution Compensation Fund 1992, which is financed by levies on the maritime transport of certain types of persistent oil. The States have no responsibility for these contributions. The oil industry as a collective provides the necessary funds (polluter pays principle in a collective sense). A proposal for increasing the limits of the conventions will be discussed in October 2000. A Working Group was established in April 2000 to examine the adequacy of the international compensation regime in force. This international regime is global in scope – the Conventions apply to oil pollution in a State Party even if the ship from which the oil escaped is registered in a State which is not a party to the Conventions. The following types of damage are covered: damage to property, costs of clean-up and of measures to prevent or minimise pollution damage and economic loss caused by pollution. Damage to the environment as such is not covered. However, compensation is available for reasonable measures taken or to be taken to reinstate the polluted environment. The Commission should take fully into account the existing global regime based on the above mentioned 1992 Conventions and should ensure that any action by it does not hamper the functioning of that regime.

- International Tanker Owners Pollution Federation Limited
- General comments: ITOPF’s comments are mainly restricted to damage to the marine environment caused by accidental spills of oil and other hazardous substances from ships.

- No retroactivity: The lack of retroactivity in any new liability regime is very important but the distinction between previous and new environmental damage will be difficult to determine with certainty in many cases - above all in case of maritime pollution.

- Damage to be covered: There will always be a need to distinguish between changes brought about by a pollution event and changes caused by natural factors or other human activities. Marine ecosystems in particular are highly complex.

- Type and other features of liability: A strict liability regime in respect of environmental damage would mean the same treatment as that which is already in force for oil spills. However, the prevention and minimisation of environmental damage could be even better achieved by making all parties (including those engaged in non-dangerous activities, as well as governmental agencies) subject to the same type of liability for any damage which they caused through their activities.

- Liable party/parties: It will be difficult to define “who exercised the control”. The approach in the 1992 Convention of channelling of liability has proven to be a very workable solution.

- Environmental damage: Many concepts need a more precise definition – namely, significant damage; injury; harm; loss; impairment; threshold; recovery; restoration and reinstatement. Uniform numerical standards cannot be validly applied everywhere.

- Traditional damage: Traditional damage is precisely that which the 1992 Conventions are designed to compensate.

- Ensuring effective restoration: The distinction between real pollution and changes caused by other factors must always be taken into account in any assessment of damage that may lead to restoration measures. The purpose of compensation is to restore an injured party to the same financial position that existed before the damage occurred. When natural resources are damaged this operation is more difficult since they are not traded in the market. The 1992 Convention provides compensation only for costs of reasonable reinstatement measures on the basis of an abstract quantification of the damage founded on theoretical models. The potential for and the speed of natural recovery must be taken into account. If natural recovery is sufficiently quick it is not appropriate to calculate the lost value and spend the money on “comparable projects of restoring or improving protected natural resources”. Returning damaged natural resources to their previous state is neither feasible nor a relevant concept in many cases. A far more realistic concept is the re-establishment of a healthy biological community. Clean up techniques can be very aggressive. The science of restoration is still relatively new and there is considerable scope for innovative approaches. Economic assessments have been shown to be unreliable and are usually more akin to fines or penalties than to compensation. Databases such as EVRI can help reduce transaction costs but they do not solve the problem.

- Access to justice: Allowing public interest groups to take direct action might cause innocent defendants to suffer serious loss and prevent parties from taking prompt
remedial measures. It is encouraging that the WP acknowledges the need to avoid excessive transaction costs.

- Relation with international conventions: The 1992 Civil Liability Convention already makes those who caused environmental damage as a result of spills of persistent oil from tankers strictly liable for the costs of reasonable clean up and reinstatement measures. Other closely involved parties are required to contribute to an international fund that provides supplementary compensation. Tanker owners are required to maintain insurance and the providers of this insurance can themselves be held strictly liable for the payment of compensation. This regime has been operating for over 20 years and might be regarded as a model which could potentially be applied to other forms of environmental damage. A similar Convention in respect of spills of hazardous and noxious substances from ships has been agreed within the International Maritime Organisation and awaits ratification. A new convention dealing with bunker spills from ships other than tankers is likely to be agreed in 2001. Therefore, European action in this particular field is both unnecessary and potentially counterproductive. It is vital that any European initiative does not affect the existing international oil pollution compensation regime and that any changes in this domain be brought about through the IMO and the 1992 International Oil Pollution Compensation Fund. The existing regime already provides a “level playing field”.

- Financial security: The availability of insurance is likely to depend on the extent to which compensation is required beyond the reasonable costs of reinstatement/restoration - any further evaluation is invariably based on poor science.

- Subsidiarity and proportionality: In light of the existing international oil pollution compensation regime, EU action is unnecessary and potentially counterproductive.

- Economic impact: The existing international oil pollution compensation regime already provides a “level playing field”.

- Oil Companies International Marine Forum

- General comments: The 1992 Civil Liability and Fund Conventions (as well as other Conventions dealing with ship source pollution) already provide compensation, on a strict liability basis, for the restoration of environments damaged as a result of oil spills from tankers. OCIMF strongly believes that regional initiatives - such as those proposed in the WP - no matter how well intentioned, will result in the destabilisation of the present international liability and compensation regimes for tanker spills. This would be detrimental, principally to victims and Governments but also to industry, and should be avoided. Although OCIMF believes that transportation of oil by sea is well covered by the existing international regimes, it recognises that a review of the present limits of compensation is appropriate, within the framework of the existing Conventions. OCIMF considers that whilst the WP is very comprehensive, it leaves a number of important issues unresolved to be addressed at a later stage.

- No retroactivity: OCIMF generally welcomes the proposal that the regime not apply retroactively but considers that in the absence of a definition of "past pollution" it is impossible to assess the full impact of the proposed regime. In particular, it is frequently difficult to establish the precise extent or likely duration of environmental damage caused by an oil spill, even in the rare instances where long-term baseline data exist.
- Activities to be covered: The scope of the activities to be covered is very imprecise at this stage and so OCIMF requests that "dangerous activities" be clearly defined so that industry can know with certainty which activities are covered, and in so far as it concerns transportation of oil by sea, avoid any risk of incompatibility with existing international Conventions.

- Burden of proof: The WP appears to be proposing an alleviation of the burden of proof placed on the victim by increasing the burden on the operator, who would effectively have to prove a negative. This could lead to the creation of a presumption that the operator is guilty unless he can prove that he is innocent. This may also raise problems with regard to insurability since insurers generally require proof that the insured caused the damage before they will pay any compensation.

- Liable party/parties: In the context of damage resulting from oil spills from tankers, OCIMF firmly believes that the "operator" is the ship-owner since he is the one solely responsible for the seaworthiness of his ship and its safe operation. The reason why cargo interests are not made directly liable for oil pollution damage under the Civil Liability Convention include their inability to inspect or check the internal condition of the ship that will carry their cargo and their lack of control over the care and the operation of the vessel. OCIMF firmly believes that eliminating sub-standard vessels from the market can best be achieved by proper enforcement of existing regulations, not by making cargo interests responsible for matters over which they have no direct control.

- Environmental damage: The Civil Liability and Fund Conventions (as well as other international Conventions dealing with ship source pollution) already provide compensation, on a strict liability basis, for restoration of environments damaged as a result of oil spills from tankers. It would be regrettable if this successful international regime were to be distorted or destroyed by regional initiatives such as that proposed in the WP.

- Traditional damage: In addition to providing compensation in the case of environmental damage, the Civil Liability and Fund Conventions also provide compensation for consequential and pure economic loss. OCIMF considers that bringing traditional damage within the strict liability regime would undermine these international regimes, would inevitably lead to an increase in the number of legal proceedings to the detriment of the victims and would lead to differences between various national legislations thereby creating uncertainty.

- Ensuring effective restoration: OCIMF is in principle opposed to the introduction of arbitrary and theoretical calculations of damage, which have less to do with compensation and more to do with fines or penalties. OCIMF considers that the purpose of any compensation scheme should be to ensure that those who suffer damage are placed in the same position as they would have been had the incident not occurred. This poses a problem in the case of damage to natural resources that are not commercially exploited and which therefore have no demonstrable commercial value. For this reason, under the Civil Liability and Fund Conventions, what is payable in respect of impairment of the environment are the costs incurred for reasonable measures to reinstate the contaminated environment.

- Relation with international conventions: The 1992 Civil Liability and Fund Conventions (as well as other Conventions dealing with ship source pollution) already provide compensation, on a strict liability basis, for the restoration of environments damaged as a result of oil spills from tankers. OCIMF strongly believes that regional initiatives - such as those proposed in the WP - no matter how well intentioned, will result in the destabilisation of the
present international liability and compensation regimes for tanker spills. This would be detrimental, principally to victims and Governments but also to industry, and should be avoided. Although OCIMF believes that transportation of oil by sea is well covered by the existing international regimes, it recognises that a review of the present limits of compensation is appropriate, within the framework of the existing Conventions.

- Financial security: It is essential that all the necessary insurance instruments are developed and made available before the entry into force of the Directive. In so far as they relate to shipping, the proposals in the WP must not conflict with, or in any way undermine, the international systems already in place. Under the Civil Liability Convention, owners of tankers carrying more than 2,000 tons of persistent oil in bulk as cargo are required to maintain insurance or other financial security in order to cover their potential liability. The proposals in the WP in respect of alleviation of the burden of proof could raise problems with regard to insurability since insurers generally require proof that the insured caused the damage before they will pay any compensation.

- Law Groups and Associations

  - European Environmental Law Association

    - General comments: EELA considers that a framework environmental liability regime would be preferable to having distinct liability regimes for each piece of environmental legislation. EELA considers that the WP leaves several important matters unresolved, such as: - the role of public authorities in respect of contaminated sites and damage to biodiversity; prescription periods; apportionment of liability in multiple party cases; whether liability under the regime should be capped; the list of activities to be covered and what is meant by alleviation of the burden of proof. Close attention needs to be given to the differences between traditional damage and environmental damage - the role and responsibilities of public authorities in respect of these two types of damage are usually different.

    - No retroactivity: EELA agrees with the decision not to extend application of the regime to pollution which occurred prior to the entry into force of the regime but considers that the cut-off line between retroactive and prospective liability needs to be clear. Much of the confusion in this respect is due to the fact that the WP does not clearly circumscribe the type of action which gives rise to liability.

    - Damage to be covered: EELA agrees that the regime should extend to damage to biodiversity and damage in the form of contamination of sites. EELA considers that the inclusion of liability for damage caused by GMOs could create additional complex issues, such as the determination of causation and the cost of clean up and restoration.

    - Activities to be covered: Earlier drafts of the WP proposed a list of dangerous activities and substances which would have been indicative rather than exhaustive. EELA considers that the main reason for a narrowing of the scope of activities to a closed list is the perception that some Member States have confined their private law regimes to listed or regulated activities. However, EELA points out that those restrictions only apply to third party claims and not to public law actions (e.g. for site clean up) brought by public authorities. And therefore, the narrow scope which is currently being proposed is excessive vis-a-vis environmental damage (where the primary responsibility will almost certainly lie with public authorities). In addition, the proposed "closed scope" risks being inflexible and unable to respond to the rapid rate of technological change.
- Type and other features of liability: The distinction between strict and fault-based liability for biodiversity damage depending on whether the damage was caused by a "dangerous" or a "non-dangerous" activity is likely to work badly. Firstly, because national law in some Member States will impose strict liability for non-dangerous activities anyway and secondly because some activities might narrowly escape being classified as "dangerous" because they fall marginally below the regulatory threshold limits. EELA asks whether the particular environmental sensitivity of natural resources and biodiversity does not present a sufficient justification of itself for imposing strict liability for biodiversity damage, regardless of the nature of the activity which caused the damage.

- Defences: EELA asks whether it is right to equate Act of God with force majeure, whether the defences of contributory negligence and third party intervention do not need to be defined more tightly and whether further research might not be needed on the similarities and dissimilarities between foreseeability and state of the art.

- Burden of proof: Alleviation of the burden of proof so as to allow the victim to establish a prima facie proof of causation might be preferable. However, EELA asks whether this should not be left up to the individual Member States to decide if they so wish to in accordance with their own rules of civil procedure.

- Liable party/parties: EELA agrees that the person who actually exercises control of an activity (the operator) should be liable. Objections to "piercing the corporate veil" by imposing liability on parent companies and other shareholders are generally well founded - the liability of one company should not automatically fall on a parent company or other shareholders by reason only of the relevant corporate structure. However, EELA agrees that the Commission should provide Member States with the option of imposing liability in respect of "sham companies" which have been set up for the sole purpose of avoiding potential environmental liabilities. If permitting authorities are to share liability where the damage is caused wholly by a consented emission then regulators might impose more stringent conditions in permits than would otherwise be the case.

- Biodiversity damage: Adequate protection of natural resources and biodiversity cannot be provided by a regime that is restricted to Natural 2000 sites alone. The majority of EU ecosystems and biodiversity will not be covered since only a small percentage of the EU’s territory is designated as Natura 2000 and Member States continue to show considerable reluctance in designating further areas. The EC’s own biodiversity strategy, which is designed to fulfil responsibilities under the Biodiversity Convention, envisages protection of a much wider range of locations and resources. In addition, the forthcoming Water Framework Directive requires maintenance of satisfactory ecological status of whole river basins. It may be appropriate to consider damage to biodiversity by reference to the tests of "significant effect" and "integrity of the site" issued under the Habitats Directive.

- Traditional damage: EELA has not provided an opinion on the advisability of including traditional damage in the proposed regime due to a wide difference in views between members of the EELA.

- Ensuring effective restoration: Guidelines on techniques for the valuation of environmental damage are needed. Introduction of quantified numerical standards for the remediation of soil and water would be useful as long as guidance is given as to how they should be applied and site-specific factors are considered in their application. Commission
should taken into account that in some cases where there is damage to natural resources it may be preferable to opt for monitored natural regeneration rather than opt for "managed" restoration. With regard to the clean up of contaminated sites, "actual and reasonably likely" or "actual and reasonably anticipated" future use would be preferable to the less precise term of "actual and plausible" future use. The proposed liability regime should set out a hierarchy of clean up methods (e.g. is on-site remediation to be preferred over removal and landfilling) so as to accord with the Landfill Directive.

- Access to justice : The fear that public interests groups would harass companies with inappropriate litigation, although a real is not supported by facts. Public interest groups do not have the resources to pursue frivolous cases and the courts can be relied on to ensure that they are penalised (by making appropriate costs orders) in cases where they do so. EELA does not oppose the concept of public interest groups being given the right to seek judicial review of a regulator’s failure to act or inappropriate action but it calls on the Commission to consider carefully whether such groups should be granted the right to seek an injunction. EELA is particularly concerned with the mechanics of the proposals to grant public interest groups access to justice. Please refer to the full text of the EELA response for suggestions in respect of such mechanisms.

- Relation with international conventions : EELA does not see anything in the existing international regimes in respect of oil pollution which would be inherently inconsistent with the operation of an EC environmental liability regime.

- Financial security : It is essential that the regime be designed in such a way that potential liabilities are insurable. This will require, among other things, that reliable methods are established for valuing natural resources and for quantifying damage to them. EELA agrees that installations should not be required to provide proof of financial security for potential liabilities since at present the market for environmental insurance is still insufficiently developed.

- Different options : If the Commission is intent on harmonising the environmental liability rules of the Member States then a directive would be most appropriate instrument. However, EELA points out that if Member States are given the option of implementing certain parts of the Directive in different ways then vital differences in points of detail could arise.

- Lawyers for the Environment Group

- General comments : The WP includes a number of weaknesses and omissions. The Group’s comments are not comprehensive and so the absence of comments on certain points should not be construed as unqualified approval from the Group.

- No retroactivity : It is important to limit the definition of “past pollution”. In particular, it must not include pollution from continuing operations that began before the introduction of the environmental liability regime.

- Damage to be covered : Limiting the regime to contaminated sites and to traditional damage caused by selected dangerous and potentially dangerous activities and substances already regulated by EU legislation means going backwards vis-a-vis the regimes already in existence in some Member States (UK, Finland and Sweden). The WP should cover a wider range of damage – the definition of which should be set out clearly.
- Activities to be covered: Covering non-dangerous activities on the basis of fault-based liability weakens the liability regime. Such activities should be covered on the basis of strict liability. GMO-related activities must be included in the environmental liability regime.

- Defences: A defence of force majeure should only be allowed in very limited and clearly defined situations in order to avoid the risk of the definition being extended to include incidents such as flooding. The state of the art defence should not be allowed at all because this would turn the strict liability regime into a fault-based one, would remove the incentives to invest in best technology and would undermine the precautionary principle.

- Burden of proof: The WP is too vague on this point. The burden of proof should be reversed and placed on defendants (see German Environmental Liability Law 1990).

- Liable party/parties: The concept of joint and several liability should be reintroduced in order to avoid placing an even greater burden on the claimant who would have to prove which defendant caused which part of the damage.

- Environmental damage: A clear definition of “significant damage” is vital in order to ensure that its interpretation does not create loopholes in the liability regime and does not become the basis for allowing companies to evade environmental responsibility. The EC needs to set out comprehensive methods for evaluating environmental damage in such a way as to avoid an excessive limitation of the liability regime and the undoing of its effectiveness.

- Biodiversity damage: There is no reason to exclude damage to rare and protected biodiversity outside of the Natura 2000 network. All significant damage to biodiversity should be covered, inside and outside protected areas.

- Access to justice: All public interest groups whose activities show that they have a genuine interest in protecting the environment should have standing without having to wait for the relevant public authority to take action.

- Financial security: Compulsory insurance is not necessarily the solution but it is important to ensure that there is an alternative form of financial security available. This should be specified in the Commission’s proposals. The availability of insurance should be encouraged. In addition, joint funding or some kind of liability funding should be set up.

- **UK Environmental Law Association**

- General comments: UKELA considers that a framework environmental liability regime would be preferable to having distinct liability regimes for each piece of environmental legislation. While UKELA endorsed the general strategy of leaving much of the detailed implementation of the regime to the discretion of the Member States, it considers nevertheless that a Directive needs to address some of those gaps, including:- the role of public authorities in respect of contaminated sites and damage to biodiversity; prescription periods; apportionment of liability in multiple party cases; precise enumeration of the activities to be covered and alleviation of the burden of proof.

- No retroactivity: The cut-off line between retroactive and prospective liability needs to be clear. Commission will need to define the "incident" or other event which triggers the regime. Please refer to full text of UKELA’s response for examples of how this
might be defined. It is desirable that there be consistency between the proposed regime, other EC legislation (e.g. IPPC Directive) and the UK contaminated land regime.

- Damage to be covered: UKELA agrees that the regime should extend to damage to biodiversity and damage in the form of contamination of sites.

- Activities to be covered: Earlier drafts of the WP proposed a list of dangerous activities and substances which would have been indicative rather than exhaustive. UKELA considers that the main reason for a narrowing of the scope of activities to a closed list is the perception that some Member States have confined their private law regimes to listed or regulated activities. However, UKELA points out that those restrictions only apply to third party claims and not to public law actions (e.g. for site clean up) brought by public authorities. And therefore, the narrow scope which is currently being proposed is excessive vis-a-vis environmental damage (where the primary responsibility will almost certainly lie with public authorities). In addition, the proposed "closed scope" risks being inflexible and unable to respond to the rapid rate of technological change.

- Type and other features of liability: The distinction between strict and fault-based liability for biodiversity damage depending on whether the damage was caused by a "dangerous" or a "non-dangerous" activity is likely to work badly. Firstly, because national law in some Member States will impose strict liability for non-dangerous activities anyway and secondly because some activities might narrowly escape being classified as "dangerous" because they fall marginally below the regulatory threshold limits. UKELA considers that a mitigated joint and several liability system is preferable to a several liability system and recommends that the regime either contain provisions to establish independent allocators to apportion liability on an equitable basis or provide the Member States with the option of establishing funding mechanisms to pay for "orphaned shares" (i.e. where a share of the liability is attributable to an identified person but that person has insufficient funds). If a party were to reject the conclusion of an independent allocator then he would remain subject to mitigated joint and several liability.

- Defences: UKELA asks if it is right to equate Act of God with force majeure and whether the defences of contributory negligence and third party intervention need not be defined more tightly. UKELA points out that under English water pollution law, intervention by a vandal is not a defence. If the concept of foreseeability were not relevant under the proposed regime this would cause a significant departure from current UK law in so far as personal injury and damage to owned property is concerned, but not in respect of decontamination and biodiversity damage. Under English law, compliance with an authorisation does not provide the operator with immunity from liability to third parties.

- Burden of proof: It is not always the case that it is much easier for a defendant to establish the facts concerning a causal link than it is for the claimant. Where the issue in dispute is the nature of the damage, alleviation by means of switching the burden of proof would be unjust to the defendant. Commission should consider whether the question of alleviation of the burden of proof should be left to the Member States to provide for if they so wish in accordance with their own national rules on civil procedure.

- Liable party/parties: UKELA agrees with concerns about determining who has exercised operational control. A solution could be to impose liability on all persons who could be considered to be operators and then apportion liability between them. Commission may wish to consider extending liability to directors, officers and managers where the damaging act
is attributable to their consent, connivance or neglect (as under English law). Objections to "piercing the corporate veil" by imposing liability on parent companies and other shareholders are generally well founded - the liability of one company should not automatically fall on a parent company or other shareholders by reason only of the relevant corporate structure. However, UKELA agrees that the Commission should provide Member States with the option of imposing liability in respect of "sham companies" which have been set up for the sole purpose of avoiding potential environmental liabilities, in accordance with the corporate law of each Member State. If permitting authorities are to share liability where the damage is caused wholly by a consented emission then regulators might impose more stringent conditions in permits than would otherwise be the case.

- Biodiversity damage: Adequate protection of natural resources and biodiversity cannot be provided by a regime that is restricted to Natural 2000 sites alone. The majority of EU ecosystems and biodiversity will not be covered since only a small percentage of the EU’s territory is designated as Natura 2000 and Member States continue to show considerable reluctance in designating further areas. The EC’s own biodiversity strategy, which is designed to fulfil responsibilities under the Biodiversity Convention, envisages protection of a much wider range of locations and resources. In addition, the forthcoming Water Framework Directive requires maintenance of satisfactory ecological status of whole river basins. It may be appropriate to consider damage to biodiversity by reference to the tests of "significant effect" and "integrity of the site" issued under the Habitats Directive.

- Traditional damage: If the proposed regime were to be applied to personal injury caused by a "dangerous activity", this would create serious anomalies between "favoured" environmental personal injury and "unfavoured" employment/medical/road traffic personal injury. Therefore, it must be preferable for Member States to be provided with the option of applying their own rules in respect of personal injury. The introduction of the regime for property damage would lead to less, though still difficult, problems. For example, it could lead to the withering away of the UK law of nuisance in respect of damages in most cases of environmental damage. If the regime were to include pure economic loss then this would be a major change in English law and would have significant implications for the insurance industry.

- Ensuring effective restoration: Guidelines on techniques for the valuation of environmental damage are needed. Introduction of quantified numerical standards for the remediation of soil and water would be useful as long as guidance is given as to how they should be applied and site-specific factors are considered in their application. Commission should taken into account that in some cases where there is damage to natural resources it may be preferable to opt for monitored natural regeneration rather than opt for "managed" restoration. With regard to the clean up of contaminated sites, "actual and reasonably likely" or "actual and reasonably anticipated" future use would be preferable to the less precise term of "actual and plausible" future use. UKELA also refers to the standard used under the UK contaminated land regime and the standard of "satisfactory state" under the IPPC Directive.

- Access to justice: The fear that public interests groups would harass companies with inappropriate litigation, although a real, is not supported by facts. Public interest groups do not have the resources to pursue frivolous cases and the courts can be relied on to ensure that they are penalised (by making appropriate costs orders) in cases where they do so. UKELA does not oppose the concept of public interest groups being given the right to seek judicial review of a regulator’s failure to act or inappropriate action but it calls on the Commission to consider carefully whether such groups should be granted the right to seek an injunction. UKELA is particularly concerned with the mechanics of the proposals to grant
public interest groups access to justice. Please refer to the full text of UKELA’s response for suggestions in respect of such mechanisms.

- Relation with international conventions: UKELA does not see anything in the existing international regimes in respect of oil pollution which would be inherently inconsistent with the operation of an EC environmental liability regime.

- Financial security: It is essential that the regime be designed in such a way that potential liabilities are insurable. This will require, among other things, that reliable methods are established for valuing natural resources and for quantifying damage to them. UKELA agrees that installations should not be required to provide proof of financial security for potential liabilities since at present the market for environmental insurance is still insufficiently developed.

- Different options: If the Commission is intent on harmonising the environmental liability rules of the Member States then a directive would be most appropriate instrument.

- Miscellaneous: Please refer to the full text of UKELA’s response for suggestions on how to deal with the question of prescription periods.

- National Agricultural NGOs

- National Farmers’ Union of Scotland

- General comments: The impact of the introduction of an environmental liability regime to small-scale enterprises such as farms, which have neither the financial nor the technical instruments available to large enterprises, needs further consideration. Therefore, the Union cannot support the Commission’s proposals in their current form. The Union cannot accept that farmers be made liable for damage over which they have no control or for environmental harm caused by agricultural inputs such as plant health products or fertilisers used within the limits of existing legal provisions.

- Damage to be covered: Although the Union welcomes the Commission’s intention not to extend the regime to diffuse pollution, it considers that since no clear definition of diffuse pollution is given and multi-party actions are not explicitly ruled out in the WP this could have implications for farmers, especially where diffuse pollutants can be traced back to a finite number of farms.

- Activities to be covered: The Union cannot accept that farmers be made liable for damage over which they have no control or for environmental harm caused by agricultural inputs such as plant health products or fertilisers used within the limits of existing legal provisions.

- Type and other features of liability: The Union does not support the principle of strict liability. While a strict liability regime can increase incentives for better risk management and provide legal certainty, it runs contrary to the fundamental basis of the fault-based Scot law of reparation.

- Defences: In addition to the defences cited in the WP, it should also be a defence if a farmer could demonstrate that he took reasonable precautions, exercised a duty of
care or complied fully with a recognised code of good agricultural practice. The scope of the third party defence has to be addressed especially with regard to vandalism and contractor liability.

- Burden of proof: Burden of proof should remain with the pursuer. In particular, the pursuer should be required to prove the facts concerning the causal link between an activity carried out by the defendant and the damage.

- Biodiversity damage: Introduction of a liability regime for damage to biodiversity is novel and so needs further discussion - in particular on the feasibility and economic impact of such a system. A definition of “significant damage” has to be established at European level in order to avoid a different interpretation in Member States. In addition, European level criteria should be set for assessing significant damage to biodiversity and for restoring it.

- Access to justice: The Union rejects the introduction of a remedy in civil proceedings for public interest groups to claim restoration for biodiversity damage and considers that this has to be the responsibility of the public authorities.

- Economic impact: The impact of the introduction of an environmental liability regime to small-scale enterprises such as farms, which have neither the financial nor the technical instruments available to large enterprises, needs further consideration. Therefore, the Union cannot support the Commission’s proposals in their current form.

- National Farmers' Union of England and Wales

- General comments: Whilst in principle the NFU see merit in the concept of an environmental liability regime, they cannot support the proposals in their current form since there are still an enormous number of issues to be addressed, many of which relate to the fundamental structure of the regime. Since the WP is vague on so many key points, it difficult for the NFU to evaluate the possible implications for the farming industry. In its current form the proposed regime is overly complex and may impose high costs on businesses, in particular on SMEs, without providing an incentive for improved practices and thus increased environmental protection.

- No retroactivity: NFU welcomes the exclusion of retroactivity from the regime. However, it considers that there is uncertainty associated with on-going pollution that spans the time of introduction of the regime.

- Damage to be covered: The differentiation between traditional and biodiversity damage and between dangerous and non-dangerous pollution sources is too complex. The regime should be exclusively based around the concept of “damage” rather than create an artificial differentiation between different source of damage. Liability should not be extended to potential or possible pollution. WP is not sufficiently clear about the treatment of diffuse pollution. The fact that no clear definition of diffuse pollution is given and that multi-party actions are not ruled out could have implications for farmers – particularly where diffuse pollutants can be traced back to a finite number of farms but not to any one specific farm. Accordingly, NFU believe that diffuse pollution should have no place in the proposed regime. Developments since the publication of the WP mean that there will be no biotechnology specific environmental liability within the regime. GMOs are currently covered under the EU product liability regime, such that GMO suppliers are liable if their products are defective. In respect of
water abstraction, the EU Water Framework Directive and the new UK Water Bill will probably offer the necessary legislative and economic instruments to assure protection without recourse to a liability regime. Therefore water abstraction should be removed from the regime or those acting in accordance with a licence should be exempt from liability.

- Activities to be covered: The differentiation between traditional damage and biodiversity damage and between dangerous and non-dangerous pollution sources is too complex. How and by whom would the distinction between dangerous and non-dangerous activities be defined?

- Type and other features of liability: It is unclear why the WP proposes two different regimes (fault-based and strict liability). NFU believe this will cause complications. The concept of encouraging best practice via the threat of liability only works if the polluter is aware of the potential damage of his action and can do something about it. This may not be the case with a strict liability regime where polluters who are not at fault will be punished. Until there is greater clarity on a number of issues, the NFU are unable to support the concept of strict liability.

- Defences: Additional defences should be considered, especially given the proposals for strict liability. Acting within a permit should be a defence for SMEs.

- Liable party/parties: Multi-party actions are not explicitly ruled out in the WP. The licensing body should also be liable for damaging actions that take place under licence. However, NFU are concerned that this may lead to a reluctance to grant licences. There needs to be further clarification of the position of farmers acting under contract and of farmers using contractors on their farm. There should be a more detailed assessment of how to apportion liability in the agricultural sector. Hardship and ability to pay must be taken into account when liability is apportioned.

- Environmental damage: It is difficult to see how environmental damage will be assessed in practice. There is currently insufficient information about many sites to enable detailed scientific evidence of damage to be gathered. NFU would like to see information on how assessment of damage will be treated within the regime.

- Relation with Product Liability Directive: GMOs are currently covered under the EU product liability regime, such that GMO suppliers are liable if their products are defective.

- Ensuring effective restoration: In order to restore a damaged site, a previous assessment of it would be necessary and this would require a constantly updated database. NFU seek reassurance that all the money raised should effectively be spent on physical restoration (and not cover administrative costs).

- Access to justice: Third parties should not have the right to take action against polluters since this is the job of public authorities and third parties should not be entitled to obtain an injunction against potentially polluting activities unless a mechanism of compensation for wrongful accusation and loss of earnings is developed. NFU is concerned that the proposals set out in the WP in respect of access to justice for public interest groups could result in vexatious litigation and in significant financial damage to farm businesses.

- Financial security: WP suggests capping liability for natural resource
damage. NFU believe that capping of liability is essential. There is also a need for an independent body to assess costs and consider both proportionality of liability and the economic effects of the “fines”.

- Subsidiarity and proportionality: NFU questions why the proportionality principle has not been considered since any regime of the kind which is proposed must include a proportionate response to pollution. For instance, costs for reinstatement of a wetland would be disproportionate to the ability to pay of almost all farm businesses.

- Economic impact: Introduction of a single European wide system may avoid distortion of competition between MS but this relies on uniform application across all MS, which in the NFU’s experience is seldom the case. The lack of proportionality, the concept of strict liability and the absence of defence for those acting under licence are at odds with the aim of protecting SMEs. There should be a detailed study of potential effects on SMEs and microbusinesses.

- Miscellaneous: NFU would like to review and comment on the studies regarding the impact of the proposed regime and would wish to reserve the right to revise their comments in light of the conclusions of those studies. The NFU considers that there is a lack of definition both at EU and national level of the exact meaning and scope of the precautionary principle and so would welcome a clear detailing of this principle since it is one of the principles which the proposed regime is intended to implement.

- Ulster Farmers’ Union

- General comments: Union considers that there are many areas in the WP which need further clarification and detail. Many of these areas relate to fundamental detail which must be dealt with before the Union can give its support for such a regime. Union stresses that environmental liability must be developed in such a manner that it does not further impede the development of rural areas. The question of how environmental liability would be applied in cases where Crown Immunity exists is of particular concern to the Union.

- No retroactivity: Union is pleased that Commission has decided that the regime should not be retroactive. However, it considers that clear guidelines need to be given in respect of the cut-off dates for past and new pollution.

- Damage to be covered: Union agrees that the proposed regime is unable to, and must not, deal with pollution from diffuse sources.

- Activities to be covered: Clarification is needed on what constitutes a dangerous activity and a non-dangerous activity. Union suggests that it would be more environmentally beneficial to concentrate on ensuring that identified polluters pay for restoration rather than introducing complexities into the system based on the type of activity which causes the damage.

- Type and other features of liability: Union feels that fault-based liability is sufficient to address the needs of environmental liability (as well as being in line with the polluter pays principle) and therefore questions the need for strict liability. Although the Union has come across the precautionary principle in relation to food safety, it questions the appropriateness of its use in relation to environmental liability. Union considers it essential that the Commission clarify what exactly this particular principle covers and how it would apply in
an environmental situation. Use of the precautionary principle in an environmental liability regime would severely restrict progress and innovation within many industries. The level of hardship and the ability to pay must be taken into account as a defence.

- Defences: Compliance with a permit and with EC regulations should be available as a defence, especially in relation to SMEs (including agricultural and horticultural businesses). The level of hardship and the ability to pay must be taken into account as a defence.

- Burden of proof: The proposal to alleviate the burden of proof for the plaintiff in the context of a strict liability regime is in complete contravention with the basic legal principle of “innocent until proven guilty”. Therefore, the Union cannot support this proposal.

- Liable party/parties: In relation to new developments and use of new products, the Union seeks assurances that it would be the manufacturer of the product or technology who would bear liability, rather than the producer using the product. Details need to be given with regard to farmers working as contractors or employing contractors. Union is concerned that liability might be imposed on farmers in cases where the damage is caused by persons who gain access to agricultural land, whether it be legal or illegal access (e.g. walkers, users of mountain bikes, climbers, etc).

- Environmental damage: Details of how assessment of damage should be carried out must be included in the regime, otherwise this will be open to different interpretations in the different Member States. Independent bodies must be used to carry out assessment of habitats as well as evaluation of the lost asset. Criteria for assessing the level of damage must be clearly set down.

- Biodiversity damage: Union strongly urges the Commission to ensure that the Natura 2000 sites are designated and established prior to implementation of the liability regime since it considers unacceptable to impose a liability regime for biodiversity damage while the sites are still in the process of being proposed and agreed.

- Ensuring effective restoration: All money paid by the polluter to decontaminate and/or restore areas should be used only for these purposes. This money should not be used to build up databases of site and habitat information or to carry out evaluation work.

- Access to justice: Union is particularly concerned that the proposals in respect of access to justice for public interest groups could lead to some such groups with “axes to grind” taking unjustified action and that this could have severe financial implications for farming businesses. The ability to take action, including the ability to seek an injunction, should remain solely with the public authorities. Public interest groups should only be allowed to seek judicial review of the performance or actions of the public authorities. The regime should include mechanisms to recompense those who have an injunction wrongly awarded against them.

- Financial security: Union is pleased that the Commission has made it clear that insurance would not be compulsory under the regime. Union welcomes the inclusion within the proposals of the concept of capping of liability but recognises that this concept requires further explanation. Capping is one of the possible ways of enabling insurance schemes to be developed.
- Economic impact: Union represents SMEs which are likely to be put out of business through the implementation of environmental liability if the regime is not carefully constructed. Union stresses that the Commission must ensure that suitable mechanisms are in place so that the competitiveness of SMEs is not affected by the implementation of the proposed regime.

- Miscellaneous: Mechanisms must be put in place to ensure that where transboundary damage occurs, all parties creating or adding to the problem are identified – not just those one side or the other of the border.

- National Industrial NGOs; general

    - Forum of Private Business

    - General comments: The introduction of the phrase “SME Sector” in the WP has lead to a serious misunderstanding of the sizes of businesses. “Micro Businesses” having nothing in common with a business employing 249 people. It is essential that those responsible for legislation, both at the UK and at the European level, appreciate the importance of the “Small Business Litmus Test”. Without the understanding of how a particular issue will affect a small business, it could well impose a disproportionate burden. For example, the costs for small businesses to insure to the same value as larger businesses would be greater. The proposed regime should be drafted in such as way as to recognise these problems and, wherever possible, de minimis levels should be stated.

    - Financial security: Without the understanding of how a particular issue will affect a small business, it could well impose a disproportionate burden. For example, the costs for small businesses to insure to the same value as larger businesses would be greater. The proposed regime should be drafted in such as way as to recognise these problems and, wherever possible, de minimis levels should be stated.

- House Builders Federation

    - General comments: Although HBF is concerned with the specifics of the implementation of the regime, it is supportive of the wider general polluter pays principle.

    - No retroactivity: If it is left to Member States to deal with pollution from the past, there will not be a level playing field. Under UK law, the owner of a contaminated site can face the cost of liability for clean up of historical contamination. The additional costs arising from the new regime may well make the UK’s operations less competitive than those carried out in other Member States.

    - Activities to be covered: The proposal to link strict liability to EU regulated dangerous and potentially dangerous activities and fault-based liability to non-dangerous activities is positive. Nevertheless, there should be a special protection for the innocent owner in cases where the polluter cannot be identified.

    - Defences: Compliance with licences/regulations/consents should be allowed as a defence. The proposal that the State should bear a part of the clean up costs in cases where the damage is caused by emissions permitted under a consent is unlikely to be implemented.
- **Liable party/parties**: The regime could result in a situation where if the original polluter cannot be found or has ceased to exist the obligation for the clean up is imposed on the State or – as it is more likely to be – on the landowner. This would increase considerably development costs where the owner/developer is nevertheless innocent. The proposal that the State should bear a part of the clean up costs in cases where the damage is caused by emissions permitted under a consent is unlikely to be implemented.

- **Contaminated sites**: The parameter “fit for actual and plausible future use” suggests a higher clean up standard than that which currently applies under UK law (current use).

- **Traditional damage**: The extension of liability to traditional damage would have the effect of increasing costs and overall development costs. At a time when the HBF is pressed by the UK Government to support the development of more brownfield sites (with up to 60% of new housing sites being within this category) this is a significant consideration.

- **Financial security**: The availability of effective insurance which would underwrite the condition of the site as “clean” once clean up has occurred would be of great value. The insurance sector should also consider products covering - for instance - damage caused notwithstanding compliance with regulations.

- **Economic impact**: If it is left to Member States to deal with pollution from the past there will not be a level playing field. Under UK law, the owner of a contaminated site can face the cost of liability for clean up of historical contamination. The additional costs arising from the new regime may well make the UK’s operations less competitive than those carried out in other Member States.

- **National Industrial NGOs; sectorwise**

  - **British International Freight Association**

  - **General comments**: WP is too vague on many aspects of its proposals. Legislation which is open to interpretation will only encourage unnecessary litigation. The imposition rules which are too draconian rules will encourage criminal activities and lead many members of the Association to limit their activity to non-hazardous materials, thus reducing choice and increasing cost for the consumer.

  - **No retroactivity**: Discretion as to where to draw a cut-off point should be left to Member States in order to avoid over-complicating the EC regime.

  - **Activities to be covered**: Some members of the Association are only temporary custodians of goods. They might not even be aware of the fact that the goods are dangerous if their customers have not declared it.

  - **Liable party/parties**: Liability for pollution should rest with the owners of the good, thus placing on them the onus to ensure that any third party they entrust with storage, transport, etc are competent to do so.

  - **Financial security**: In order to create an insurable risk it will be necessary to create, for the insurance market, a quantifiable risk by either capping or limiting liability in some way. Unless there is insurance available, recovery of damages would be limited to the
resources of the responsible party - and this may be quite low or nil.

- **British Maritime Law Association**

- General comments: The Association draws its members from the British shipping community, including shipowners, insurers, insurance brokers and maritime lawyers. The Association is affiliated to the Comite Maritime International. Although the proposals contained in the WP are clearly aimed at pollution from land-based sources, since land-based pollution can escape to the marine environment, the proposals could cover pollution of the marine environment. The Association’s principal concern is that nothing should be done which would conflict with or otherwise affect the existing international liability and compensation regime for pollution of the marine environment embodied in the Civil Liability and Fund Conventions 1992 and the HNS Convention 1996 (when this eventually enters into force). It is the view of the Association, and it believes also the prevalent view of the international community, that pollution of the marine environment should continue to be regulated within the framework of the existing Conventions. In this context, great care should be taken when drafting laws relating to non-marine environmental pollution within the EC to ensure that there is a clear interface between ship-sourced and land-sourced pollution - particularly as the basis of liability, the levels of compensation and many other relevant factors differ between land and sea.

- **Relation with international conventions:** The Association’s principal concern is that nothing should be done which would conflict with or otherwise affect the existing international liability and compensation regime for pollution of the marine environment embodied in the Civil Liability and Fund Conventions 1992 and the HNS Convention 1996 (when this eventually enters into force). It is widely acknowledged that the Civil Liability and Fund Conventions and the claims practice which has developed ensure that victims receive prompt and reasonable compensation for legitimate claims. In addition, it should be pointed out that all EC Member States with a coast-line have embraced these Conventions and their Protocols and have been actively involved in the drafting of these instruments. It is the view of the Association, and it believes also the prevalent view of the international community, that pollution of the marine environment should continue to be regulated within the framework of the existing Conventions. In this context, great care should be taken when drafting laws relating to non-marine environmental pollution within the EC to ensure that there is a clear interface between ship-sourced and land-sourced pollution - particularly as the basis of liability, the levels of compensation and many other relevant factors differ between land and sea. The interface could most readily be devised by provisions in any new EC legislation to dovetail with the so-called channelling provisions in the Civil Liability and Funds Conventions. A similar provision will be needed in relation to hazardous and noxious substances once the HNS Convention takes effect.

- **Chemical Industries Association**

- General comments: CIA fully support the comments sent by CEFIC, the European Chemical Industry Council. WP fails to provide a clear statement of the problems or deficiencies that need to be tackled by a European Directive and any indications of the specific objective of such a Directive and as a result the proposals are incoherent. The reasons given in the WP for Community action are so general that they could be used to justify virtually any EC legislation on safety, health and environmental protection. In light of this, CIA find it deeply worrying that the Environment Commissioner has written to UNICE to say that she has already made up her mind that a framework directive is required and that it is her aim to have a proposal presented by the end of 2001.
- No retroactivity: CIA welcome the lack of retroactivity in the proposed regime but recognise that there will be some problems in differentiating between past pollution and pollution covered by the regime.

- Defences: Accepted defences should include compliance with EC legislation and permit conditions, state of the art and development risk.

- Burden of proof: It is a basic principle of law that the burden of proof rests with the plaintiff and it would be dangerous to seek to alter this in an environmental liability regime. Cases in which establishing a causal link between an activity and damage places an unreasonable burden on the plaintiff should be tackled on a case by case basis.

- Liable party/parties: CIA welcome the general principle that liability rests with the person who exercises control of an activity. CIA do not agree that permitting authorities should share liability for damage caused by authorised emissions since this would lead the permitting authorities to impose unreasonably strict permit conditions to avoid such liability.

- Financial security: CIA welcomes the recognition that insurability is important to ensure the goals of an environmental liability regime are reached – this requires clear definition of the risks involved.

- Subsidiarity and proportionality: The justification for an EC initiative concentrates on biodiversity and transboundary damage but is silent on the other forms of environmental damage covered by the WP. Since the current situations in respect of the 3 types of damage proposed to be covered by the regime are very different, CIA urge the Commission to address the different kinds of environmental damage in specific ways. For traditional damage and contaminated land, many Member States are likely to have essentially satisfactory regimes and the challenge is to get similar regimes installed in all the Member States. Biodiversity on the other hand requires a different approach and a great deal of work will be required to define criteria, concepts and mechanisms before regulatory action can be proposed.

- Economic impact: The final proposals will need to be supported by a convincing assessment of the balance between benefits and costs.

- Confederation of UK Coal Producers

- General comments: COALPRO supports the aims and objectives of a regime that will enable the imposition of financial liabilities which will enable damage to biodiversity to be restored, rather than a system of arbitrary penalties. However, COALPRO considers that the proposed regime should only deal with damage to biodiversity since both civil and European law exists to ensure the correct remediation of “traditional damage”.

- Damage to be covered: The proposed regime should only deal with damage to biodiversity, rather than attempt to deal with personal injury and damage to property which are already covered by national laws.

- Activities to be covered: The proposed regime should not seek to deal with GMOs.
- Type and other features of liability: COALPRO supports the use of “strict liability” and considers that this is probably the only workable system. Nevertheless, there should be no liability if the releases comply with EU regulations.

- Burden of proof: The burden of proof should remain with the plaintiff.

- Environmental damage: COALPRO considers that the valuation of natural resources is difficult and that the “fixed values” suggestion would effectively be a system of penalties. COALPRO would object to such a system and would suggest that the proposed regime be based on the actual cost of restoration of the damaged natural resource or of creation of an equivalent.

- Contaminated sites: COALPRO seeks clarification on what is meant by “effective decontamination” and seeks the publication of EC guidelines indicating acceptable trigger levels for individual contaminants.

- Traditional damage: The proposed regime should only deal with damage to biodiversity, rather than attempt to deal with personal injury and damage to property which are already covered by national laws.

- Access to justice: Enforcement of EC legislation should be undertaken by public authorities and not directly by public interest groups. COALPRO considers that it may be dangerous and unlawful to encourage third parties to undertake direct action to correct polluting or potentially activities.

- Financial security: COALPRO supports the view that financial security should not be required and considers that the risks are not quantifiable and that damage and restoration costs are unpredictable. COALPRO supports the development of environmental insurance initiatives although it recognises that currently insurance may not be available to the majority of operators.

- Economic impact: COALPRO objects to the statement contained in paragraph 3.5 of the WP regarding the creation of a “level playing field”. COALPRO considers that this is not correct with regard to the coal sector, in respect of which the primary competition is from outside the EU. Therefore, increased compliance costs will disadvantage Member States in relation to third countries.

- Electricity Association

- General comments: The Association represents the collective interests of the major electricity generation, transmission, distribution and supply companies in the UK. The Association considers that the proposals set out in the WP raise a number of matters of serious concern to any organisation carrying out an industrial or commercial process in the EC. There is a particular concern in respect of the restoration of biodiversity since the exposure to liability cannot be quantified and will therefore be an uninsurable risk. In addition, the Association considers that it is difficult to evaluate the likely impact of the proposals because a number of terms which are fundamental to an understanding of the WP are not defined.

- No retroactivity: In practice it will be very difficult to differentiate between pollution which occurred before the proposals come into operation and pollution which occurred at a later date. Further, the WP does not deal with the problem of gradual pollution.
- Activities to be covered: The proposal to define dangerous activities by reference to specified categories of European Directives means that a specified range of activities would be subject to a separate code and would be inconsistent with the arrangements for enforcing obligations under other European Directives and for activities which are only regulated by UK legislation. The implementation of Directives should be a matter for national law and, in accordance with the principle of subsidiarity, remedies and enforcement of European Directives should be a matter for Member States.

- Type and other features of liability: The reference to joint and several liability which appeared in previous drafts of the WP have been dropped from the final version and so it is not clear what the Commission’s position is in respect of this.

- Defences: It should be permitted as a defence that an activity was not known to be dangerous in light of prevailing knowledge at the time the activity was carried out. A key issue for the electricity industry is that an operation carried out within the terms of an authorisation or permit issued by a public authority must be defence against an environmental liability claim.

- Burden of proof: What does “amelioration of burden of proof” mean? The Association believes that the burden of proof rest with a plaintiff if a defendant has complied with all necessary permits and consents.

- Liable party/parties: It is not clear whether the operator will be liable for the acts of its contractors and agents, how far an employer would be liable for the vicarious acts of his employees and whether a current operator would be liable for the acts of its predecessor. The Association does not support the proposal that there should be a transfer of liability to a public authority where the pollution is caused as a result of emissions which are authorised under a permit. This would merely encourage public authorities to take an excessively cautious approach when granting permits.

- Biodiversity damage: It is not clear how damage to biodiversity will be assessed or the value of the loss evaluated. Difficulties in calculating and evaluating damage could mean that insurance will not be available.

- Contaminated sites: Will private law remedies continue to be available to the occupiers of land which is contaminated by dangerous activities? The proposals for restoring contaminated land are not consistent with the regime which already applies in UK and there is concern that insurance may not be available for meeting claims for contamination on the basis which is being proposed. The concept of “contamination” should be better defined. Since a definition of this already exists under the UK contaminated land regime, there is a risk of confusion if the EC definition is different. The proposal that Community-wide clean up standards and objectives should be established would require a structure to be established for agreeing appropriate standards and objectives. Such standards are not currently available and the arrangements for agreeing such standards (as in other areas of activity where standards have been set) would have to involve interested parties, including industrial and commercial undertakings. Having said this, the Association is not convinced that the approach of establishing EC-wide numerical standards is the correct one - clean up a contaminated site should relate to the risks presented by the contamination on that particular site and should take into account both the use of that particular site and the particular geological, climatic and ecological circumstances of the site.
- Traditional damage: The proposals should not extend to personal injury claims arising from defined categories of dangerous activities and such claims should not be distinguished from the procedures for claims for personal injury arising from other causes. It is not clear why death and personal injury arising from dangerous activities should be distinguished from other classes of personal injury.

- Ensuring effective restoration: The proposals in the WP for carrying out restoration of land are not practicable and need to be considered further. Any proposal to clean up a contaminated site must relate to the risk presented by the contamination and must taken into account both the use of the site and the particular geological, climatic and ecological circumstances of the site.

- Access to justice: Interest groups should not have any special status for bringing legal actions. Where land in unowned responsibility for remedying any contamination should be a matter for a public authority and not for an interest group.

- Relation with international conventions: Liability obligations imposed under international conventions should be specifically excluded from the regime proposed by the WP. Two areas which are of particular interest to the electricity industry are the arrangements set out in English law under the Nuclear Installations Act 1965 (which implement the conventions relating to nuclear liability) and under the Merchant Shipping Act 1995 (which implement the IMO Convention on the carriage of oil by sea).

- Financial security: A robust insurance market is a prerequisite of any proposals. The proposal for a regime of strict liability with no clear cap on liability and changes to the traditional approach to the burden of proof will lead to a significant increase in the exposure to liability.

- Environmental Services Association

- General comments: ESA represent the UK’s waste management and secondary resource industry. Although ESA support the concept of a liability regime and agree that responsibility for environmental damage should lie with the polluter, they are nonetheless concerned as to how the regime, as outlined in the WP, will operate in practice and are unpersuaded that it will strengthen the existing robust environmental protection measures in the UK. The following elements are of particular concern to ESA – burden of proof, public interest groups and their role in conducting improvement works with the proceeds of any successful action and the concept of strict liability.

- No retroactivity: ESA welcome the decision to exclude retroactivity and understand the difficulties associated in differentiating between “old” (pre-Directive) and “new” (post-Directive) pollution. If the proposals are to be framed in terms of events (rather than consequences) then great care will be needed in defining “event”. For example, where there has been a deposit of waste in a landfill which took place prior to the entry into force of the proposed regime and there is subsequently a failure in the lining of the landfill which results in pollution, which one would be the relevant event for the purposes of the regime? And what if the failure in the lining were due to such factors as natural ageing of the lining? In ESA’s view, for the concept of non-retroactivity to be meaningful, the determining event should be the original activity and care should be taken to ensure that a liability regime does not use current standards to judge business activities from an earlier period. In addition, the onus should be on
the claimant to establish beyond reasonable doubt that pollution was caused after the implementation of the Directive.

- Activities to be covered: ESA support the Commission’s decision not to include “pollution of a widespread diffuse character” into a liability regime. ESA recommend that waste management be excluded from the definition of “hazardous activities”.

- Type and other features of liability: Strict liability would seem to be based on a premise that environmental damage results from a lack of rigour and foresight by the operator. However, pollution could still arise whilst operating according to the scientific standards of the day and in full compliance with legislative requirements. Companies would therefore be left exposed even when best scientific practice was incorporated into regulations and their own activities. Therefore, ESA urge caution in applying the principle of strict liability.

- Defences: ESA consider it alarming that WP is advocating strict and fault based liability while simultaneously proposing to undermine the range of defences currently available to businesses. A liability regime and a robust judicial system with sensible defences are not mutually exclusive. ESA are gravely concerned by the lack of credence given in the WP to compliance with regulations. ESA consider that state of the art and development risk should be allowed as defences - otherwise innovation could be seriously stifled.

- Burden of proof: ESA are concerned by the proposal to alleviate the burden of proof in favour of the claimant. WP does not provide sufficient information on how this would work in practice and so ESA remain to be convinced that this would not significantly weaken the rights of the defendant by convicting on guilt by association rather than guilt through causality. Justice is not served by enabling a claimant to succeed in an action against a defendant when it has not been adequately proved that the defendant was responsible.

- Liable party/parties: With respect to contamination of sites, the liability regime should not apply to owners of land that has been contaminated. ESA are concerned that permitting authorities – in order to avoid liability to themselves – could feel obliged to impose tighter standards than they would otherwise have done. The owner and operator of a site often differ. For example, if the owner of a chemical company commissions a waste management company to manage its waste, with whom would liability rest if pollution occurred whilst the operator was fulfilling contractual obligations and meeting permit requirements? Situation is further complicated if an outside contractor uses machinery belonging to the owner in order to deliver an “on-site” service. If maintenance of the machinery is the owner’s responsibility, who would be liable if pollution were to occur as a result of the machinery’s malfunction? ESA are pleased that the concept of joint and several liability appears to have been removed from the proposals. The task of apportioning liability may seem cumbersome but it flows from the polluter pays principle.

- Biodiversity damage: WP is unclear as to how damage to biodiversity would be assessed and quantified. Commission would need to consult widely if it decided to issue indicative figures.

- Contaminated sites: Since the UK already has in place a robust contaminated land regime, ESA doubt whether an EU liability regime would strengthen protection in this respect in the UK.

- Access to justice: ESA fear that the WP places too much faith in public
interest groups to act in an objective and consistent manner without sufficient checks and balances. The Aarhus Convention does not require giving public interest groups a right to bring direct action against companies and endowing public interest groups with the status of guardians or watchdogs of the State represents a wholly disproportionate grant of power. The established – and in the opinion of ESA, correct – jurisprudence in the UK suggests that actions for environmental damage should be permitted only by the party sustaining the damage or the governmental authorities responsible for the environment. With respect to the criteria public interest groups might need to fulfil in order to be able to bring claims, would a group be “struck off” if they were deemed to misuse their powers and would there be some mechanism for ensuring that a group continued to meet the necessary criteria?

- Financial security: ESA agree with the Commission’s decision not to require compulsory financial security in light of the difficulties in requiring such security when the necessary market has not yet been developed.

- Different options: A Framework Directive would be the most appropriate and practicable mechanism since the Directive would set out the scope and content and enable Member States to meet specified standards through national mechanisms compatible with their national jurisprudence.

- Subsidiarity and proportionality: Since the UK already has in place a robust contaminated land regime, ESA doubt whether an EU liability regime would strengthen protection in this respect in the UK.

- Miscellaneous: It is important for the Framework Directive to include clear procedures for addressing transboundary claims.

- Society of Motor Manufacturers & Traders Ltd

- General comments: SMMT is in full agreement with the European Automobile Association’s (ACEA) response to the WP and so SMMT’s response is limited to a summary of the issues considered to be of greatest importance to SMMT as a national association. In light of the existing environmental liability systems in Member States, SMMT considers that EU legislative action in this domain would introduce unnecessary duplication. In addition, harmonisation of rules related to the basic concepts of Member States’ civil laws - such as the burden of proof, causation and defences – would exceed the Commission’s legislative competence.

- No retroactivity: SMMT strongly supports the principle of non-retroactivity which is commensurate with basic principles within EU law and in accordance with the Convention of Human Rights. Application of the principle of non-retroactivity will require a precise definition of “past pollution”, which SMMT believe should refer to the action causing the damage, rather than the damage itself. Liability should accrue solely from activities that occur after the implementation of the regime and not from activities which occurred earlier but whose effects are discovered only after implementation of the regime.

- Damage to be covered: Since traditional damage is already covered by existing Member States’ legislation, there appears to be no rationale behind its inclusion in the proposed regime. SMMT is of the opinion that such a move would open the floodgates to personal injury claims and that claims for latent damage would be particularly problematic.
- Defences: Since the prescriptive nature of EU environmental legislative regimes (e.g., the IPPC regime) restricts the freedom of manufacturers to choose the appropriate pollution prevention technology, SMMT recommends that compliance with discharge permits and authorisations and utilisation of licensed/permitted waste disposal facilities be included as defences.

- Environmental damage: Any environmental liability regime is dependent upon an accurate assessment of environmental damage caused and so SMMT considers that prior to the introduction of an EU liability regime, detailed guidelines should be drawn up in order to provide industry, government, NGOs and those responsible for remediation with unambiguous advice on the level of action to be taken. SMMT is of the opinion that minimum and maximum time limits should be set in relation to remediation.

- Traditional damage: Since traditional damage is already covered by existing Member States’ legislation, there appears to be no rationale behind its inclusion in the proposed regime. SMMT is of the opinion that such a move would open the floodgates to personal injury claims and that claims for latent damage would be particularly problematic.

- Ensuring effective restoration: Any environmental liability regime is dependent upon an accurate assessment of environmental damage caused and so SMMT considers that prior to the introduction of an EU liability regime, detailed guidelines should be drawn up in order to provide industry, government, NGOs and those responsible for remediation with unambiguous advice on the level of action to be taken. SMMT is of the opinion that minimum and maximum time limits should be set in relation to remediation.

- Access to justice: The possibility of giving public interest groups the right to challenge a decision of a public authority before a court as contained in Article 9 of the ?rhus Convention is very different from the WP’s proposal to allow such groups to bring direct claims against private parties. SMMT considers that public interest groups should only be allowed to act against public authorities in cases where those authorities have failed to apply the law. Where public interest groups seek injunctive relief, they must be required to give cross undertaking in damages, as is the case in the legislation of a number of Member States (such as UK, Spain and Portugal). Further consideration must be given to the extent of and mechanism for granting locus standi to NGOs and to the interpretation of the relevant parts of the ?rhus Convention – namely, Article 9(2)(a) on “having sufficient interest” and Article 9(2)(b) on “maintaining impairment of a right”.

- Subsidiarity and proportionality: In light of the existing environmental liability systems in Member States, SMMT considers that EU legislative action in this domain would introduce unnecessary duplication. In addition, harmonisation of rules related to the basic concepts of Member States’ civil laws - such as the burden of proof, causation and defences – would exceed the Commission’s legislative competence.

- National Professional NGOs

- Association of Chartered Certified Accountants

- General comments: ACCA welcomes in principle the WP and the Commission's attempts to apply the polluter pays principle through the EU. However, ACCA considers that the WP is somewhat underdeveloped in places and that further explanations are required.
- No retroactivity: Although ACCA agrees that the regime should only work prospectively, it considers that further thought needs to be given to the problem of what exactly is "past pollution". Further clarification is also needed in respect of who would be responsible for the clean-up of "past pollution".

- Activities to be covered: A more detailed definition of the term "dangerous activity" is required in order to provide certainty. ACCA advises the Commission to consider the definitions used in the UK contaminated land legislation (i.e. Part IIA of the Environmental Protection Act 1990). It is unclear from the WP whether "non-permit activities" are categorised as dangerous activities. WP focuses on so-called "significant issues" but ACCA believes that an additional regime is also necessary to determine who should be responsible for remedying traditional damage and contaminated land where this results from non-significant activities and how this should be done.

- Defences: WP proposes that acting in accordance with a permit should not be allowed as a defence but that regulators may be partly liable if the damage was caused exclusively by an emission in compliance with a permit. This possible contradiction must be resolved.

- Liable party/parties: WP proposes that acting in accordance with a permit should not be allowed as a defence but that regulators may be partly liable if the damage was caused exclusively by an emission in compliance with a permit. This possible contradiction must be resolved. ACCA is also concerned that imposing liability on the permit-issuing authority could lead to the authority including a "denial of responsibility" clause in the permits it issues and could lead to the authority issuing stricter consents than it would otherwise have issued. It should be made clear that any external professionals working for an organisation (e.g. accountants in advisory and consultancy roles) are exempt from liability. ACCA suggests that the exclusion of liability for insolvency practitioners contained in the UK's contaminated land legislation be used as a model.

- Environmental damage: It has not yet been made clear exactly what type of damage should be categorised as "significant". Given that Natura 2000 sites are defined as protecting fragile and rare ecosystems, ACCA considers that any damage to a Natura 2000 site should be considered significant.

- Biodiversity damage: Given that Natura 2000 sites are defined as protecting fragile and rare ecosystems, ACCA considers that any damage to a Natura 2000 site should be considered significant.

- Traditional damage: The question of whether or not to include economic loss in the definition of "traditional damage" should not be left to the discretion of Member States since this would defeat the harmonising objective of the proposed regime. Therefore, it is vital for the regime to take a position in this respect.

- Ensuring effective restoration: A scientifically determined or influenced timescale for remedying damage should be included, particularly in the case of biodiversity damage where timing is critical for the successful restoration of ecosystems.

- Access to justice: The term "urgent" should be defined and examples given of urgent cases in order to prevent unwarranted and unnecessary litigation.
Different options: ACCA believes that an EU directive would be the best policy option to achieve the Commission's goals. However, any such directive must be properly and uniformly enforced.

Chartered Institution of Water and Environmental Management

General comments: CIWEM is an independent professional body representing managers and other professions responsible for the stewardship of environmental assets in the UK. CIWEM welcomes the initiative provided it is applied in a manner that enables and does not stifle activity that could have an environmental impact. CIWEM hopes that environmental liability will encourage operators to exercise due diligence and be proactive in controlling emerging hazards to tolerable levels of risk. CIWEM considers that an environmental liability directive can act as a safety-net catching any risks that were not apparent to those who wrote specific environmental protection legislation and can provide the resources to cure adverse impacts of any who transgress environmental protection legislation.

No retroactivity: Even though there will be a problem with demarcation of historic pollution, the non-retroactive approach is more practicable. CIWEM is confident that operators will try to find solutions to the question of establishing a cut-off between the effects of historic activities and those that impact after the legislation has been implemented.

Activities to be covered: CIWEM recommends changing the phrase “activities that are dangerous to the environment”, which it considers to be emotive and prejudicial, to “regulated activities” and “non-regulated activities”. CIWEM considers that the purpose of regulating hazardous activities is to limit the risks to tolerable levels and although the notion of “risk” is a difficult one to explain, the concept of a safety-net that ensures that operators have ultimate responsibility for their activities should generally be welcomed. In light of this, CIWEM questions the basic approach of distinguishing between activities which have been regulated by the EC and those which have not since it considers that this distinction undermines the concept of environmental liability as a safety-net to catch risks which have not bee adequately controlled.

Liable party/parties: Proposal in the WP that permitting authorities share liability in cases where the damage is caused by permitted emissions may result in those authorities being overly precautionary when issuing permits thereby stifling economic activity.

Biodiversity damage: The concept of “damage to biodiversity” could be come very contentious in areas where we do not yet understand natural fluctuations in populations. CIWEM recommends that if damage to biodiversity is to be included, its meaning should be defined very clearly and limited to those aspects that are adequately understood. Restoration of biodiversity damage should be approached pragmatically and on a case-by-case basis rather than by any prescriptive framework.

Contaminated sites: Liability should only be triggered when a site is causing demonstrable harm or when there is a real threat of such harm if action is not taken. It should not be triggered merely by some limit value being exceeded. Since the EU spans a wide climatic range with different types of geology, soils, water courses, etc, it would be inappropriate to attempt to establish a universal set of limits for this wide diversity. CIWEM considers that a criterion of restoration of a site to its pre-existing condition may be more appropriate than a criterion of “fit for actual and plausible future use of the land”.

Restoration of biodiversity damage should be approached pragmatically and on a case-by-case basis rather than by any prescriptive framework.
- Ensuring effective restoration: It is difficult to envisage situations where restoration would be impossible and so CIWEM recommends that the proposal in paragraph 4.6 of the WP be deleted unless there are concrete examples of where that paragraph might be applied legitimately.

- Financial security: Since it is important that operators have adequate financial resources to cover their environmental liability, CIWEM recommends that, after an appropriate phase-in period, insurance should become a necessity. The areas of gradual pollution and environmental liability are new for the insurance industry. Since insurance solutions to environmental risks have employed quality assurance and good-practice auditing of their insureds’ activities, CIWEM considers that an environmental liability directive would have the effect of raising the standards of activities, products and operations that have a potential for environmental damage.

- Different options: CIWEM favours an EC directive.

- Economic impact: Although CIWEM considers that an environmental liability directive will reduce obstacles to competitiveness within the EC, it is of the view that the WP underestimates the risk of negative impacts for European industry by disadvantaging it compared to competitors in other parts of the world that do not require industries to take such a responsible attitude towards the environment. However, CIWEM recognises that this is hardly an argument for the alternative which is the application of the lowest common standards.

- Miscellaneous: CIWEM welcomes the Communication on the precautionary principle and agrees that the time and place for applying the precautionary principle are where our understanding is so limited that a risk-based approach is unsound.

- Institute of Chartered Accountants of Scotland

- General comments: The Institute believes the WP is a well-written document which covers a lot of difficult issues in a very comprehensive manner. The Institute welcomes this document as a first attempt to enshrine key environmental principles within European legislation. However, the Institute is dismayed at the likely time-frame before the proposals set out in the WP are likely to become part of European law (i.e. in 3-4 years' time).

- Type and other features of liability: The Institute is in favour of the introduction of a system for the capping of liability.

- Liable party/parties: The Institute considers that the notion of "control" should be specifically defined.

- Biodiversity damage: The Institute believes that the Commission should carry out more research with regard to the quantification of the valuation of natural resources and that it would be sensible if this work were undertaken prior to any legislation coming into force.

- Ensuring effective restoration: The Institute believes that the Commission should carry out more research with regard to the quantification of the valuation of natural resources and that it would be sensible if this work were undertaken prior to any legislation coming into force. The Institute would be willing to undertake work in this respect on a paid
basis on behalf of the Commission.

- **Financial security**: The Institute is in favour of the introduction of a system for the capping of liability. The Institute also believes that, since ultimately someone would have to pick up the difference, compulsory insurance is essential.

- **Different options**: The Institute believes that a Directive is the most appropriate means of introducing the concept of "environmental liability" since this is the only way to achieve a binding agreement between the Member States. The option of a Directive would also allow new Member States to join the Community without the need for a change to the legislation in place.

- **Economic impact**: The Institute is doubtful as to whether the operation of the internal market will be improved by harmonisation of the legal rules across Europe. The introduction of such a penalisation system may in fact, in economic terms, work disproportionately against regions with fragile infrastructures and may have implications for other aspects of development funding. The Institute agrees with the proposals in the WP in respect of SMEs and it welcomes the fact that emphasis is being given to these enterprises.

- **National Society for Clean Air and Environmental Protection**

- **General comments**: The Society draws together lay environmental interests and specialists from a variety of academic, regulatory and business sectors in the UK. Its membership includes the majority of local authorities in the UK. The Society’s principle interest in environmental liability is in respect of land contamination.

- **Different options**: Many of the Member States already have well-developed and sophisticated regimes related to environmental quality (particularly land quality) and environmental damage. Although these national regimes are far from perfect, in many cases the nature of these regimes are well-tuned to the circumstances of the individual Member States and to the particular legal and policy context within which they fit. Therefore, the Society believes that a directive, even a framework directive, at this time could be untimely and unhelpful. It considers that the right course of action would be for the Commission to issue a policy statement on the pollution pays, preventive and precautionary principles – a policy statement to which all Member States would subscribe. The Commission should then be given the possibility to review how far systems in place in the Member States were properly reflecting and delivering those principles, and if they were not, then a harmonising directive should be considered. The Society would not wish it to be inferred from this that it considers the overall position on land quality, contamination and liabilities in the UK as fully satisfactory. However, it considers it preferable to address any defects in the existing UK regime at the national level rather than attempt to harmonise these topics at the EC level.

- **Economic impact**: The Committee is of the general view that for the UK at this stage, the costs of uncertainties generated by a new directive would significantly outweigh any benefit likely to accrue from it over a realistic timescale.

- **Royal Institution of Chartered Surveyors**

- **General comments**: RICS welcome the WP’s proposals to improve the environment but have concerns about the bureaucracy which could arise as a result of the proposed regime and the possible costs involved. In particular, RICS are very concerned that
much of the WP is dependent on proposals to be brought forward at a later date so that it is impossible to arrive at any realistic assessment about the real cost/benefits of the proposals.

- No retroactivity: Although RICS point out that in this respect the proposed regime does not go as far as the UK’s contaminated land regime, they welcome the lack of retroactivity in the proposed EU regime. The UK Government has set strict targets to promote the development of housing on “brownfield land” - much of this land consists of old industrial sites. The WP’s proposals for strict liability should not put at a disadvantage those wishing to invest in a historically polluted area. Therefore, a clear distinction between past pollution and pollution occurring after the entry into force of the regime should be established in order to avoid ramifications for historically polluted areas. Is commencement of the regime to be based on the date on which pollution started to occur or the date on which the damage was noticed? And in respect of biodiversity damage, is commencement to be based on the date of issue of the Directive or the date on which Natura 2000 sites are designated.

- Damage to be covered: Although the differentiation between traditional damage and environmental damage is valid, there is a danger that such a distinction would give rise to a two-tier system. Care will have to be taken to provide an appropriate definition of “significant damage”.

- Activities to be covered: RICS are concerned that the distinction between “dangerous” and “non-dangerous” activities could lead to confusion. Guidelines will need to be provided to establish which activities are deemed to be dangerous. RICS do not consider it appropriate to limit the regime to activities regulated by EU laws. The UK already has a number of regimes in place which cover environmental liability for non-EC regulated activities and so RICS would argue that other Member States should be expected to meet similar standards.

- Type and other features of liability: A two-tier system (strict and fault-based liability) could cause confusion. The proposal to apply strict liability to personal injury and property damage would alter UK law.

- Defences: Force majeure cannot be a defence according to UK law which is based on the concept that “he who keeps on his land a dangerous thing is absolutely liable to contain it”. The legality of this approach should be clarified. The defence that the activity was in accord with a permit should be allowed.

- Liable party/parties: Difficulties could arise if the regulator could be held liable in cases where damage is caused by an operator complying with his permit. As is the case under UK law, company directors should be liable if they are personally responsible.

- Biodiversity damage: RICS do not consider it logical to restrict biodiversity damage to Natura 2000 sites. There are numerous other sites which are of higher biodiversity damage and which deserve equal protection. In addition, biodiversity records are only just being compiled in the UK while some Member States are at a more advanced stage. Quantifying the value of biodiversity and its loss is difficult. RICS are concerned that the proposed regime might only apply after a certain number of species have been exterminated or driven away. A simplistic cost/benefit analysis should not be used. Damage caused to biodiversity cannot simply be replaced to a state “as before”. Therefore, restoration options are limited. Land available for the working of minerals is most likely to be found in undeveloped areas, which in turn are the most likely to be designated as Natura 2000. Therefore, until definitive guidelines can be agreed on what constitutes an impact on valuable biodiversity, areas such as the
RICS have developed (with the Environment Agency) a methodology to produce a “Comprehensive Project Evaluation” that has a more holistic approach to comparing the social, environmental and economic impacts of a proposal and would be very pleased to discuss the applicability of this work to the WP proposals.

- Contaminated sites: The concept of “significant” in the WP may differ from the concept of significant present in the UK legislation. How does “serious” (as in, “serious threat to man and the environment”) differ from “significant”? It should be made clear that “a plausible future use of land” does not mean a multifunctional approach to clean-up. In addition, the word “plausible” should not be taken to mean the same as “potential” or “possible”. Uniform numerical standards across Europe may be idealistic more than realistic. Such standards would be hard to set and what would be acceptable for one area would not necessarily be so for another. RICS believe that the approach currently used in the UK – that of “fit for use” – is more appropriate.

- Traditional damage: The proposal to apply strict liability to personal injury and property damage would alter UK law.

- Ensuring effective restoration: The proposal in the WP that “a valuation of the asset loss could provide an upper limit” demonstrates a lack of understanding of valuation. There is no relationship between asset valuation and the economic impact of damage. The cost of restoration does not relate to the valuation of asset loss - in fact, in some cases the valuation of asset loss would not be sufficient to restore the environmental damage.

- Access to justice: It is not clear in the proposals which parties may bring forward a case for damage. Consideration should be had to the Human Rights Act soon to be enforced across the EU.

- Relation with international conventions: The new regime should be used to strengthen existing international regimes, e.g. the international agreements on pollution of the sea from hazardous cargoes. Liability should be unlimited in respect of both the carrier and the owner of the cargo. Insurance should be available to cover damage to the environment and ships should be arrested in they are considered unseaworthy or do not carry proof of insurance cover.

- Financial security: Where the perceived risk is high, cover could be prohibitively expensive. In terms of equity, reliance on insurance could result in the costs being spread between a number of parties, thus undermining the polluter pays principle. RICS consider that ultimately, it may be more reasonable to require adequate security in respect of potentially dangerous operations rather than simply to encourage adequate insurance. RICS also believe that the insurance market may be unable to provide cover for the gradual release of potentially damaging pollutants and may be unwilling to agree on adequate terms for sudden emissions. Companies and operators will therefore be left in a state of increasing exposure. It is reasonable that damages for liability in respect of natural resources be capped - but at what level should they be capped and who should be liable for costs in excess of the cap?

- Economic impact: The reference to “assessment of clean up and restoration standards in the light of the costs that they are likely to generate” - does this mean that scope will be offered to individual countries where clean up costs are too great to exercise discretion, enabling costs to be avoided or a lower standard of clean up achieved? If so, that would negate the attainment of a level playing field between countries. This is particularly relevant to the
position of the potential new members of the EU, whose clean up costs may be very high but whose ability to pay them would presumably be very low. Small enterprises will almost certainly be more affected by environmental costs, making a case for more targeted use of national and EC support mechanisms.

- **National and Regional Environmental NGOs**

  - **English Heritage**

    - **General comments**: English Heritage supports the thrust of the WP that polluters must be held liable for environmental damage and also supports the suggestion that a Framework Directive should be drawn up to implement a liability scheme. However, English Heritage regrets that the terms “heritage” or “historic environment” do not currently feature in the WP and hopes that this will be remedied in the proposed Directive. It is a fundamental misconception to define “environment” primarily as the natural environment.

    - **No retroactivity**: There should be a mechanism which takes account of pollution or damage which accumulates gradually. There is no precise dividing line between past and present pollution and this requires clarification.

    - **Damage to be covered**: The scope of the proposed regime should not be restricted to dangerous activities or areas covered by Natura 2000 – perhaps the regime could include nationally designated areas/sites and non-dangerous activities causing cumulative damage. The proposed regime should also embrace the concept of damage to the fabric of the historic environment. English Heritage points out that EU environmental impact legislation itself requires heritage to be taken into account.

    - **Activities to be covered**: The scope of the proposed regime should not be restricted to dangerous activities – perhaps the regime could include non-dangerous activities causing cumulative damage. SME producers of heritage building materials are by definition small and undercapitalised, use old-fashioned plant and cannot afford the fume chimney stack washers required of major modern producers. The characteristics and appearance of traditional materials are essential to the repair and maintenance of historic buildings. The liability regime should take account small specialist producers and SMEs should be given help in order to develop clean production techniques.

    - **Burden of proof**: The burden of proof should not rest on the plaintiff.

    - **Environmental damage**: Linking liability for environmental damage to the existing nature protection legislation means highly limiting the scope of the proposed regime. Pollution is not neatly consigned to designated areas and so a liability regime should not set restrictions on specific areas of eligibility. It should also protect landscape, coastal resources and cultural heritage such as buildings, monuments, historic infrastructure, parks, gardens, archaeology and industrial landscapes. The full requirement should extend to assets which are owned but whose value may be the concern of other stakeholders rather than the owner. This would require a duty of maintenance of valuable environmental assets (which should include historic assets) to be included in the regime.

    - **Biodiversity damage**: The scope of the proposed regime should not be restricted to areas covered by Natura 2000 – perhaps the regime could include nationally designated areas/sites.
- Traditional damage: Human health and culture are closely linked. Stakeholders may value the historic environment even more than owners.

- Ensuring effective restoration: Remediation operations and clear ups should be undertaken so as to ensure that rich archaeology and industrial heritage aspects of a site are not lost.

- Financial security: The precautionary principle is particularly important as regards historic heritage, which is irreplaceable. Therefore, any insurance package relevant to an environmental liability regime should include adequate inspection and monitoring of the practices of policy-holders.

- Different options: English Heritage supports the option of a framework Directive in order to implement an environmental liability regime.

- Economic impact: SME producers of heritage building materials are by definition small and undercapitalised, use old-fashioned plant and cannot afford the fume chimney stack washers required of major modern producers. The characteristics and appearance of traditional materials are essential to the repair and maintenance of historic buildings. The liability regime should take account small specialist producers and SMEs should be given help in order to develop clean production techniques.

- Friends of the Earth - England, Wales and Northern Ireland

- General comments: Friends of the Earth welcome the publication of the WP and strongly believe that a liability regime for environmental damage will greatly assist in discouraging environmentally damaging activities and help further enshrine the polluter pays principle in law. However, they are very disappointed with the proposed regime which they believe has been influenced by industry lobbying since the publication of the Green Paper.

- No retroactivity: Liability should be retrospective in order to ensure that the polluter pays for the damage he has caused and to avoid any confusion in distinguishing between past and future damage.

- Damage to be covered: Biodiversity damage should not be limited to habitats and species protected under the Habitats and Birds Directives. Damage resulting from diffuse sources should not be excluded. Analytical techniques are improving all the time making it easier to identify diffuse pollution and its origins and it is well established that diffuse sources are the major source of many chemical pollutants.

- Type and other features of liability: Damage caused by non-hazardous activities should be covered by strict liability. Liability should be joint and several.

- Burden of proof: The burden of proof should be on the defendant. Reversals of the burden of proof are not uncommon in both civil liability regimes and in public health, safety and environmental legislation. One of the pre-requisites for an effective civil liability regime for environmental damage is the reversal of the burden of proof after an initial evidentiary hurdle has been surmounted by the plaintiff.

- Liable party/parties: Friends of the Earth oppose any call to make
permitting authorities partly responsible where the damage is caused by an authorised emission. Not only does this concept not exist in UK law but it would be a major departure from the polluter pays principle.

- Environmental damage: Friends of the Earth strongly oppose any cost-benefit analysis. Friends of the Earth are aware of the difficulties in assessing the value of biodiversity and encourage the Commission to take into account the work being carried out by the UK Government on assessment of damage to biodiversity by means of identification of their “critical natural capital”.

- Biodiversity damage: Friends of the Earth believe that the scope of the proposed regime should be extended to cover any environmental damage – not just habitats and species which are protected under the Habitats and Birds Directives. They fear that if the regime is limited to designated habitats and species then many polluters will not be caught by the regime. Friends of the Earth see no need for there to be a threshold of “significant damage” and call on the Commission to take into account the criteria being established for the Habitats Directive.

- Contaminated sites: Clean up standards must be based on a need to return the land to a standard common in uncontaminated sites. The suggestion that it is possible to accurately define “any serious threat to man and the environment” is misplaced.

- Access to justice: Friends of the Earth strongly oppose suggestions that public interest groups only be given legal standing if a Member State refuses to act. Any citizen or public interest organisation should be allowed to sue for damage to the environment regardless of whether their person or property has been affected and without having to wait for action from the Member State.

- Financial security: Friends of the Earth strongly support the need for compulsory insurance in order to ensure the polluter can and will pay.

- Miscellaneous: There is a need for some sort of compensation fund to cover instances where the polluter cannot cover the costs of restoration and rehabilitation.

- Mersey Basin Campaign

- General comments: The polluter pays principle has focused primarily on emissions from industrial processes and end-of-pipe solutions. By focusing on the production process, the polluter pays principle does not influence the producer’s sourcing of raw materials or product design – this can lead to the shift of pollution to another stage of the product chain. The WP does not appear to deal with this issue. Similarly, the polluter pays principle is not easily applied to situations where the product itself becomes the pollutant in a subsequent lifecycle stage (litter). Extended Producer Responsibility may be one way of providing consensus for pollution prevention policies.

- Damage to be covered: The WP’s definition of environmental damage is too narrow. Any new legislation should include damage to appearance and amenity as well as damage to landscape. Damage related with litter should be also taken into account. It is not clear how the WP will address small-scale and non-point source pollution. The proposed regime should also take into account: EC Shellfish Directive; EC Bathing Directive; fisheries protection zones; groundwater protection zones; heritage coast; areas of outstanding natural beauty;
national parks; sites of special scientific interest; salmonid fisheries.

- Type and other features of liability: The WP might be used to influence Government and EU funding regimes to deal with contaminated, disused, unused or derelict sites where the polluter can not be identified or where the sites are in private ownership, but the original polluter has long-gone. Furthermore, it could be used to lobby for indemnity against liability where contaminated land is being transferred to a new owner who is prepared to put a derelict site into productive, not-for-profit use, but does not have the financial resources to decontaminate the land in question.

- Defences: Campaign suggests that there be indemnity against liability where contaminated land is being transferred to a new owner who is prepared to put a derelict site into productive, not-for-profit use, but does not have the financial resources to decontaminate the land in question. The WP does not make it clear whether the Commission will allow any exemptions from liability for emergency works or Ministry of Defence activities.

- Liable party/parties: Operators should not be held solely responsible for environmental damage. For example, where a sub-contractor is deemed to be at fault, the parent company and/or client should take some responsibility.

- Environmental damage: The WP’s definition of environmental damage is too narrow. Any new legislation should include damage to appearance and amenity as well as damage to landscape. Damage related with litter should be also taken into account.

- Biodiversity damage: The proposed regime should also take into account: EC Shellfish Directive; EC Bathing Directive; fisheries protection zones; groundwater protection zones; heritage coast; areas of outstanding natural beauty; national parks; sites of special scientific interest; salmonid fisheries.

- Contaminated sites: The WP might be used to influence Government and EU funding regimes to deal with contaminated, disused, unused or derelict sites where the polluter can not be identified or where the sites are in private ownership, but the original polluter has long-gone. Furthermore, it could be used to lobby for indemnity against liability where contaminated land is being transferred to a new owner who is prepared to put a derelict site into productive, not-for-profit use, but does not have the financial resources to decontaminate the land in question.

- Ensuring effective restoration: A number of methodologies for quantifying environmental quality have been developed over the years but these techniques are often criticised. How exactly would contamination or damage be quantified?

- Access to justice: Community or voluntary groups are unlikely to take significant cases to court as they can not take the risk of having to pay court costs should they fail in their legal battle.

- Relation with international conventions: The UK has not subscribed to the Lugano Convention.

- Subsidiarity and proportionality: As it stands, the WP is likely to add to the UK’s position.
- Economic impact: The WP could have a huge impact on the North West’s economy.

- Miscellaneous: If a system such as the US Superfund Tax were to be set up by the EC, the shortfall and criticism of its approach would need to be taken on board.

- National Trust

- General comments: The National Trust is a charity whose objective is the protection of both the built and natural heritage in England, Wales and Northern Ireland. Much of the land owned by the National Trust is protected under the Habitats Directive. The National Trust welcomes the WP as a tool to enforce the polluter pays principle and although it takes the view that prevention of pollution is the best way to reduce risks to the natural and human environment, it agrees that those who cause pollution must be held liable and made to rectify that damage.

- No retroactivity: The National Trust believes that retroactivity should not be ruled out of an environmental liability regime and it points out that it is very difficult to distinguish between past and present pollution.

- Damage to be covered: The National Trust considers that liability is suitable for diffuse pollution because cumulative impacts stem from individual polluters who can be traced if investigative technology is applied properly. For example, pollution of waters caused by soil erosion can be traced back to the source on a farm by use of soil labelling techniques. The regime should not be limited to coverage of biodiversity damage in Natural 2000 sites. It should include protection of natural resources (air, water, soil), biodiversity wherever it occurs, natural processes (landform evolution, soil processes, coastal processes), cultural landscapes (buildings, monuments, historic infrastructures, parks and gardens, archaeology, industrial landscapes) and human welfare.

- Type and other features of liability: Liability for biodiversity damage should be strict, albeit with possible defences as mentioned in the WP.

- Defences: The National Trust would welcome a clearer definition of “contribution to the damage or consent by the plaintiff” and seeks clarification as to whether the contributor should be jointly, or solely, liable for any clear-up operation.

- Burden of proof: The National Trust welcomes the Commission’s pledge to add a more precise definition of “alleviation” of the burden of proof to a draft directive.

- Environmental damage: The National Trust awaits the definition of “significant damage” and would welcome the inclusion of “measures of irreplaceability of biodiversity” and “measures of irreversibility of damage”.

- Contaminated sites: The National Trust points out that the Commission’s vision of remediation of contaminated land as set out in the WP would have a considerable impact on the UK’s private liability regime. The National Trust agrees that removal of pollution from contaminated sites is clearly a benefit to society but considers that this needs to be undertaken sensitively so as to take into account the surrounding environment and needs of the community. For example, remediation of a contaminated site can often remove its cultural heritage, often without recording its significance.
- Financial security: Insurance packages should include adequate inspection and monitoring of a policy holder’s practices to ensure that there is sufficient incentives for firms to desist from pollution. If this were not done then insurance could provide a way for individuals and organisations to escape accountability for their actions.

- Other Industrial NGOs

  - Institute of Directors

    - General comments: Institute supports the idea of use of economic instruments to reward environmentally friendly businesses and penalise the polluters but at the same time it urges caution.

    - No retroactivity: Institute agrees with proposal in the WP that a liability regime not be retroactive.

    - Activities to be covered: Institute agrees that liability provisions should not focus on specific sectors, such as biotechnology.

    - Burden of proof: Institute is concerned about the possibility of too much relaxation of the burden of proof in favour of the plaintiff. It will not always be possible to define either environmental damage nor will it be possible to establish causes. Assessment of environmental damage should be based on sound science, including a thorough assessment of possible causes linked to effects, before any judgement is made.

    - Environmental damage: It will not always be possible to define either environmental damage nor will it be possible to establish causes. Assessment of environmental damage should be based on sound science, including a thorough assessment of possible causes linked to effects.

    - Access to justice: Seeing as some environmental pressure groups can hardly be described as having a democratic mandate, the definition of “objective qualitative criteria” will be extremely important. Institute does not wish to see a system develop whereby self-appointed guardians of the environment are able to take the law into their own hands against whatever particular concern they may have about some development.

    - Economic impact: Institute would support actions that encouraged SMEs to take any necessary improvement actions and consider that SMEs may need practical guidance in coping with increasingly complex legislation and regulations.

    - Miscellaneous: Institute is aware that the precautionary principle is a key part of EU policy but it does not wish to see this principle used in a way which would stifle many kinds of innovation which might otherwise bring greater net benefits to society and business.

- Other Public bodies

  - Local Government Association of England and Wales

    - General comments: LGA represents all the local authorities in England and
Wales. LGA supports the proposals to establish an EU-wide system, thereby ensuring that Member States operate at a common level of performance. Traditionally, national environmental liability schemes have focused on responsibility for damage to other people’s health or property but not on damage to the wider environment. The introduction of liability for damage to nature is therefore supported by the LGA even though it raises issues regarding implementation and enforcement which could adversely impact on local authorities. The proposed EU regime should be comprehensive and help improve implementation of key environmental principles such as the polluter pays, the prevention and the precautionary principles. Such a holistic approach is long overdue and may help create a level playing field in the Single European Market. In addition, a European liability regime may also provide some solutions for transboundary damage as many habitats and waterways straddle frontiers between Member States.

- No retroactivity : WP specifies that the trigger for the applicability of the proposed regime is the date of knowledge. This means that damage to the environment could have been caused many years ago and that there would be no funds or insurance to cover such liabilities for public bodies. This is a critical issue for local authorities whose budgets are already under considerable strain and are unable to afford the financial burden of environmental clean-up.

- Damage to be covered : A European-wide liability regime may provide some solutions for transboundary damage as many habitats and waterways straddle frontiers between Member States.

- Type and other features of liability : LGA fully supports the Commission’s intention that the costs of prevention and restoring environmental damage will be paid by the parties responsible for the damage and not the taxpayer. The obligation to spend compensation paid by the polluter on environmental restoration is also welcome, though details of enforcement procedures will need careful consideration.

- Liable party/parties : Commission is proposing that permitting authorities be held liable where damage to the environment is caused explicitly by emissions authorised by a permit. LGA considers that this is likely to have serious consequences for local authorities. This proposal is likely to lead to local authorities (when acting as permitting authorities) imposing extremely onerous conditions on permits with a view to minimising their own liability. This would mean that vital enterprise and economic growth would be restricted due to more stringent standards being imposed by regulatory authorities. LGA therefore suggests that such a provision not be introduced into the regime until a later date when some form of insurance or financial bonding can be set in place with the insurance or financial industry.

- Contaminated sites : LGA notes that, depending on the final outcome of the WP proposals, it may be necessary for the UK to amend the contaminated land regime which it has introduced recently.

- Ensuring effective restoration : LGA welcomes the proposal that criteria should be set for dealing with and restoring environmental damage and assessing damage to biodiversity. LGA fully supports the Commission’s intention that the costs of prevention and restoring environmental damage will be paid by the parties responsible for the damage and not the taxpayer. The obligation to spend compensation paid by the polluter on environmental restoration is also welcome, though details of enforcement procedures will need careful consideration.
- Financial security: UK experience suggests that there are many examples of local authorities and other public bodies having to clean up after companies have gone into liquidation in order to avoid their responsibilities. Therefore, LGA would wish to press for the inclusion of a financial security clause to ensure that the costs of future environmental remediation are not borne by the public purse.

- Different options: An EU framework should fix broad overall objectives leaving the Member States to agree the ways and instruments to achieve them.

- Economic impact: LGA supports the wisdom of further studies on the economic and environmental impact of environmental liability at the European level and its impact on external competitiveness.

- **UNITED STATES**

  - *International Industrial NGOs; sectorwise*

    - **Battery Council International**

    - General comments: BCI is a world-wide trade association representing commercial entities involved in the manufacture, distribution, sale and reclamation of lead batteries. BCI is particularly concerned that the adoption of an EC liability regime will harm the ability of its members to collect and recycle lead batteries throughout the EC. BCI points out that through the efforts of the battery industry, a substantial portion of the lead used in batteries is recycled annually in Europe.

    - No retroactivity: BCI supports the adoption of prospective liability regime. Many of BCI’s members have manufacturing and smelting operations in the US and so are familiar with the Superfund programme. Their experience of the Superfund programme is that the application of strict retroactive liability is unfair and poses serious problems for the competitiveness of domestic industries. This is because entities are often held liable for environmental damage that occurred as a result of activities that were socially acceptable and lawful at the time at which they were carried out. Moreover, holding entities strictly liable for past activities can result in the last owner or operator of the facility being held accountable for the entire environmental harm. However, BCI points out that care must be taken in establishing a clear cut-off between past and present pollution and encourages the Commission to develop a definition of "past pollution" as soon as possible in order to give interested parties a full opportunity to comment on it.

    - Type and other features of liability: BCI believes that the inclusion of recycling activities in the proposed liability regime will serve as a disincentive to the increased collection and recycling of batteries and of other recoverable materials within the EC. Therefore, BCI believe that the proposed regime should not apply to recycling activities. Collection and recycling of lead batteries throughout the EC is done by retailers selling new batteries, local communities, scrap dealers and others who collect used batteries. Those used batteries are then shipped to secondary smelters for reclamation. The risk of liability to parties collecting batteries may cause many of them to drop the collection programmes. This is precisely what happened when the US Superfund programme was adopted in 1980. Eventually US Congress enacted legislation exempting from liability persons recycling batteries and other recyclable materials. BCI points out that in order to ensure that an equivalent exemption under the proposed EC regime is applied fairly, the exemption would have to be applied both to
domestic and foreign entities shipping materials into Europe for recycling.

- Defences : BCI believes that it would be inequitable for the proposed regime not to contain a "permitted release" exemption. Such an exemption would apply where an owner or operator could prove that the environmental damage in question was a result of emissions released in accordance with a valid permit. The exemption would relieve the relevant party from liability (either in full or in part depending on the nature of the damage) and it would then be up to the State to assume that portion of the relieved liability.

- Liable party/parties : BCI believes that where the damage results in full or in part from an emission permitted under a permit, the permitting authority should bear the relevant portion of liability.

- Access to justice : The giving of citizen groups and other organisations the right to take direct action against polluters is likely to harm severely the well-being of industries in the EC because some organisations could misuse this right to bring unjustified actions. In addition, the ability of citizen groups to receive compensation for bringing these type of actions could create an industry of "bounty-hunter attorneys" who do nothing else but bring actions against susceptible industries and facilities. Therefore, BCI encourage the Commission either to drop this proposal or, at the very least, substantially modify it to protect industry in the EC from unjustified litigation. For example, this could be done by allowing citizen organisations to sue the State instead of a particular facility and a court could then order the State to take action.

- Economic impact : BCI is particularly concerned that the adoption of an EC liability regime will harm the ability of its members to collect and recycle lead batteries throughout the EC. BCI points out that through the efforts of the battery industry, a substantial portion of the lead used in batteries is recycled annually in Europe.