This working paper has been prepared in the context of the preparation of a legislative proposal dealing with environmental liability for the purpose of consulting Member States and other interested persons and bodies with respect to the main features of the forthcoming proposal for a Directive on prevention and restoration of significant environmental damage.

The proposal would be based on the following elements:

1. **The purpose** would be to establish a Community framework in respect of professional/commercial activities causing Significant Environmental Damage (“SED”), addressing both its **prevention and restoration**.

2. **Liable party** would be the **operator**, who is the natural or legal person who **controls** the activity concerned. Where the activity is subject to authorisation, the **authorisation holder** would also be considered as the operator.

3. **SED means:**
   - Damage that adversely affects the favourable conservation status\(^1\) of biodiversity (habitats and species protected under Community legislation – Habitats Directive and Annex I to Wild Birds Directive – and natural sites protected national legislation). Damage authorised under Article 6(3) and (4) of the Habitats Directive would be excluded.
   - **Pollution of water** covered by the Community Water Framework Directive (“WFD”) when this pollution causes water quality to deteriorate from one quality status to a worse one\(^2\). Damage covered by Article 4(7) of the WFD would be excluded.
   - Damage that creates **serious harm to human health** as a result of either of the foregoing categories or land (soil and subsoil) contamination.

4. **Liability would not be retrospective.** In case of doubt, the operator would have to establish that the cause of the damage occurred before the entry into force of the regime. There is a **thirty year limitation period** on liability under the Directive.

5. The liability scheme would depend on the type of activity and of the type of damage in question:

   (a) **Strict Liability** - for SED caused by activities defined in an Annex by reference to environmental legislation (see below).

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\(^1\) As defined in the Habitats Directive.

\(^2\) Quality statuses are those defined in the Water Framework Directive.
(b) **Fault based liability** - for Biodiversity damage caused by activities other than those covered under (a).

6. The regime would create a **general duty on operators to prevent** an imminent threat of SED.

7. **Where SED has occurred** there would be a **duty on Member States to ensure that operators will comply with their obligations**:

   • In the case of **strict liability activities**, they would require the operator to take restorative measures, regardless of fault.

   • In the case of **fault based liability activities**, they would require the operator to take restorative measures, if he is at fault.

   **If the operator fails to respond to a request**, the Member States would take the appropriate action themselves and recover the costs of so doing.

8. **Where the SED has not yet occurred but there is an imminent threat**, Member States would have to request action by the operator, or take the appropriate action themselves, and recover the costs of so doing. **If the operator fails to respond to a request**, Member States would have to take the appropriate action themselves and recover the costs of so doing.

9. **Defences to liability to the benefit of operators** would apply where the SED was wholly the result of armed conflict; acts of God; intentional acts by third parties to cause damage which succeeded in spite of appropriate safety measures; and in the case of compliance with a compulsory order from a public authority.

10. **Member States would have to ensure that restoration/prevention occurs**:

    • In circumstances **when someone is liable** but cannot be identified or doesn’t have sufficient fund to do some/any of the work necessary.

    • In circumstances **when no one is liable**.

    If the proposed regime would be setting the objective (i.e. that Member States take the necessary steps to ensure that environmental damage is rectified when the polluter cannot be found or is insolvent), Member States would be free to decide how best to achieve that objective (requiring operators to be covered by a kind of financial security, setting up of a fund system fed through contributions from the industry, imposing liability on other categories of persons, such as the owner of the polluted site, etc.).

11. **Criteria for carrying out restoration** would be set out in an Annex to the Directive. The duty to determine the appropriate measures to be taken in accordance with the Annex would rest solely with the competent authorities designated by Member States (see below).

12. **Multiple parties would be liable** where two or more operators caused SED. Each operator who is able to establish the extent to which the damage results from its activities, would only be liable for that part of the damage. Those operators who
could not so demonstrate would be jointly and severally liable for the remainder of the SED.

13. Natural persons who control a liable legal person under the Directive could be jointly and severally liable in certain circumstances (if they are at fault).

14. Legal persons controlling other legal persons could be jointly and severally liable in certain circumstances (if they have had knowledge or ought to have knowledge of the damaging factor).

15. Persons providing financial security to a liable person and insolvency practitioners would not be liable unless they could be deemed as controlling the liable party at the relevant time.

16. **Qualified entities in the field of environmental protection** would be entitled to submit observations on incidents of SED to national authorities responsible for the enforcement of the Directive, and would be entitled to request that action be taken. The competent authorities would be under a duty to consider such requests and observations. Within four months the competent authorities would be under a duty to inform the qualified entity of its decision in respect of the observations and requests for action.

17. **Qualified entities in the field of environmental protection** would be entitled to bring legal proceedings to review a competent authority’s response to their observations and request for action. There would have been a failure by a competent authority to act only when it received a prior request to do so by the qualified entity that seeks judicial review.

A “**qualified entity**” would mean any body or organisation which, according to the criteria, if any, laid down in national law, has an interest in ensuring that significant environmental damage is restored. Bodies and organisations whose purpose, as is shown by the articles of incorporation thereof, is to protect the environment should be deemed to have such an interest.

18. The regime would not require any compulsory insurance but Member States retain the right to require it.

19. Court orders could be sought by competent authorities to secure funds for prevention/restoration where there is a serious danger that these would be dissipated by the liable party.

20. An Annex would list the activities subject to strict liability. Those activities would be defined by reference to Directives: activities subject to the “Integrated Pollution Prevention and Control”; discharge of dangerous substances into air and water/groundwater; waste management operations; contained use of genetically modified micro-organisms and deliberate use of genetically modified organisms; manufacture, use, storage, transport or release into the environment of biocidal products, plant protection products or dangerous chemicals and preparations; practices covered by Euratom Basic Safety Standards Directive 96/29.

The proposed regime would be without prejudice to the international arrangements concerning the compensation of damage caused by oil pollution.
21. Another Annex would set out: the objectives of restoration; how to identify restorative options; and how the final restorative option would be selected.

21.1. Objectives

For SED in terms of:

(1) biodiversity damage; and (2) water pollution, restoration would be achieved by returning damaged habitats and polluted water to baseline condition. It would also require that serious harm to human health be removed;

(3) land (soil and subsoil) contamination, restoration would be achieved by ensuring that serious harm or potential harm to humans is removed, this being assessed having regard to present and plausible future land uses as resulting from the land use regulations in force at the time of the damage.

Compensation for interim losses from the date of damage until restoration is completed would be required.

21.2. Identifying reasonable restorative options

The competent authority would have to consider:

- a natural recovery option i.e. where no direct human intervention is taken in order to restore damaged resources to baseline condition;

- direct intervention in order to restore damaged resources to baseline condition on an accelerated time frame; and

- compensation for interim losses of natural resources and their services.

The competent authority would ensure that compensation is assessed with regard to the time dimension, i.e. discounting the value attributable to natural resources and/or services concerned.

The competent authority would, in so far as is possible, favour the provision of natural resources and/or services of the same type and quality and therefore of comparative value as those actually damaged. In the rare circumstances where this is not possible, monetary valuation techniques based on observed behaviour would be used.

21.3. Choice of restorative options

After the competent authority had developed a reasonable range of restorative options, it would evaluate these based upon:

- cost;

- likelihood of success;

- avoidance of future damage and collateral damage;

- benefits to each component of the damaged resource/service;
• effects on public health and safety.

Where several options are likely to deliver the same value, the least costly would be preferred.

An invitation to the liable operator to co-operate would always be made to ensure effective implementation.

A restoration scheme that does not restore the damaged site fully to baseline condition would be chosen only where the competent authority ensures that additional restorative actions are taken. These additional restorative actions - taken at other sites - should provide comparable value to the natural resources and/or services lost because the damaged resource has not been fully restored to its baseline condition.