# Environment: liability with regard to the prevention and remedying of environmental damage

2002/0021(COD) - 19/09/2003 - Commission communication on Council's position

The Common Position is inspired to a certain extent by the willingness of the Council to simplify the procedures and clarify the concepts necessary to the good functioning of an environmental liability regime. The addition of a new Annex I setting out criteria on the basis of which the significance of damage to protected species and habitats should be assessed illustrates this concern. Annex II in the framework of which remedial measures should be determined has also been restructured and reworded to make it more legible and understandable. If, in certain cases, the Common Position is leaving more discretion to Member States on certain issues, such as in Article 2, paragraphs 1 and 3 on the inclusion or not of habitats and species protected under national law or in Article 9 on multiple party causation, the Common Position goes further than the Commission proposal on other points: all migratory birds are now covered and Article 12 on requests for action now covers, at least in principle, cases of imminent threat of damage. It is now also clarified that international conventions on carrier's liability in the event, inter alia, of marine pollution do not prevail over the future Directive if they are not in force in the Member State concerned. The Commission is now required to include, in its reports reviewing the functioning of the regime, several questions specifically identified, including the issue of financial security, in order to place all the institutions involved in the decision-making process in a better position as to judge which amendment, if any, is needed to guarantee the effectiveness of the liability regime. Unlike the Commission proposal, the Common Position does not exclude, from the scope of the future Directive, damage caused by an emission or event expressly allowed and damage caused by emissions or activities which were not considered harmful according to the state of the art of scientific and technical knowledge at the time when the emission was released or the activity took place. However, in such cases, Member States may allow the operator not to bear the costs of remedial actions provided he demonstrates that the damaging event, emission or activity was covered by any of the above-mentioned circumstances and that he was not at fault or negligent (Article 8, paragraph 4). The point on which the Common Position is most departing from the Commission proposal concerns the issue of "orphan damage", that is those cases in which no operator will remedy environmental damage. The Commission proposal required Member States to find alternative sources of financing; the Common Position now leaves full discretion to Member States to decide to act or not. Although the Commission would have preferred that stricter conditions had been set regarding the subsidiary remedial action by Member States, it can accept the Common Position in the context of an overall agreement. The Commission supports therefore the Common Position. In addition, the Commission acknowledges that the definition of land damage offers less harmonised guidance to Member States than the definitions on water damage and damage to protected species and natural habitats. It recognises that the initiatives it intends to take on soil policy would contribute to a more commonapproach among Member States. The Commission has, therefore, issued the following statement regarding soil policy: The Commission reiterates its willingness to identify in the forthcoming Thematic Strategy for Soil Protection needs and deliverables related to protection and sustainable use of soil. It also recalls that a legislative initiative on soil monitoring has been scheduled for 2004. It should aim to ensure that a number of measurements on the identified threats in the relevant areas are carried out in a harmonised and coherent way.