Proposals for text changes in some articles of the proposed soil framework directive

Fifth DRAFT

COMMON FORUM on Contaminated land in the European Union

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About this document

The COMMON FORUM decided in its recent meeting in Stuttgart, April 24 & 25, to propose some changes in the articles of the European Commission s proposal for a Soil Framework Directive (SFD). The background of the proposed changes is the wish to bring the directive more in line with contaminated land management practices based on common experience in the EU member states. The current document (fourth draft, based on comments from COMMON FORUM members on earlier drafts) proposes changes in the articles and simplifies the overall structure of the contamination part in the directive without sacrificing the general goal. Articles 10, 12 and 14 are deleted and essential elements of these articles are introduced in the remaining articles. A new article 14 (still needing some discussion) intends to clarify the relation between the Soil Framework Directive and the Liability Directive concerning “new contaminated sites” (contamination took place after the date that the liabitity directive came into force in the EU Member States). The simplification of the contamination part of the proposed directive may even lead to a little more ambition concerning prevention of soil contamination compared to the proposals from the commission.

Before introducing the main objectives of the proposed changes one should realize the following:

A] The SFD is a framework directive and that should remain the case. Technical additions like that “monitored natural attenuation should be monitored” should not be a part of the directive but should be described in technical documents.

B] According to the EU treaty member states have the right to have more complete or more stringent national policies. So if for instance soil contamination with non-dangerous substances is important in some countries (the remediation of agricultural soils overloaded with phosphates in view of nature developments may be an example) there is freedom to put these substances (like phosphates) on the national list of soil contaminating substances. An other important example where national regimes may go beyond EU directives is the Liability Directive. If the national regime covers more land damages than the ones mentioned in the EU directive the national regime will prevail.

C] If some requirement in the directive implies another requirement, like the fact that a contaminated sites inventory does require an inventory of potentially contaminated sites, the latter need is not to be described in the directive. Writing directives is a difficult matter and the less is put in the directive the better it is, in view of misunderstandings and debates before the ECJ

The main objectives for the proposed changes are:

1] To create room for national priorities in setting up the contaminated land inventory, to take into account the very different soil and socio-economic conditions in the EU member states. Some member states have already more than 25 years experience with contaminated land policies and practices, while some (especially new) member states are just starting. As can be shown by experience in a number of member states, a complete inventory of contaminated land is very hard to achieve in a few years, so priorities have to be set in order to be as effective as possible. These priorities may be different from member state to member state, but it may be a good idea to link the priorities for the inventory not only to the probability that certain activities have lead to contamination but also to the risk for human health and the environment if contamination is indeed present, This means that the prioritisation referred to in article 14 (COM proposal) needs somehow to be linked to Article 11 (COM proposal) where there is up till now little provision for prioritisation. Otherwise we run the risk that "high risk" sites could end up belonging to the last 30% category of the inventory, which currently have a 25-year deadline.

2] To make Annex 2 (soil contaminating activities) much less prominent. (This is also necessary to achieve objective 1). A (black) list of activities in a juridical framework at the EU

level creates more problems than it solves. However some mechanism to assess and compare the risk that certain activities lead to soil contamination (the risk that significant amounts of dangerous substances enter the soil system by hazardous handling, technical failure of storage devices and pipelines ect.,) is necessary for prioritising and targeting preventive measures. This risk assessment of activities can be useful for the identification of sites that may be contaminated by past activities as well. This may result in lists of potential soil contaminating activities at the level of local competent authorities but this should be avoided at the national and EU level. Assessment of the risk that certain activities lead to soil contamination should be the focus of policy making at national and EU level.

3] To reduce the emphasis on “measurement of concentration” levels. Measuring concentrations in soil is to be considered as a part of contaminated land risk assessment but making decisions based on concentrations alone is misleading in quite a number of situations.

4] Soil status reports can be justified for changes ownership of the land to protect the new users of the land and to help building up the contaminated land inventory. The SFD should also allow for other existing approaches achieving the same goal. For instance if owners are obliged (based on civil law) to inform prospective buyers of land about the condition of the land in view of risks, responsibilities for remediation and liabilities, and this obligation is combined with a legal obligation to inform competent authorities if the site being sold is contaminated (according to SFD definition of contaminated sites). Another situation where a land status report may be important is in situations where “groundworks” and construction is planned on a potentially contaminated site. These activities may mobilize pollution and may create or increase risks for human health and the environment.

5] Decisions concerning priorities for remediation should be left to the member states.

6] To make the relation between the SFD, the Liability Directive and the Groundwater Directive transparent. Monitoring data coming from the implementation of the Groundwater Directive may indicate the presence of a contaminated site. If this is confirmed the site should be added to the inventory. The Liability Directive has to be implemented this year. It contains remediation obligations for contaminated soils. The scope of the soil damages covered by the Liability Directive is less broad than the SFD, only damages to human health, water resources, “habitats” and “protected species” are covered by the Liability Directive. Human health and Environment addressed in the SFD is likely to be a broader scope. Moreover the Liability Directive considers only activities mentioned in Annex III of that directive, in the SFD nothing is excluded beforehand. However the Liability Directive also addresses “imminent damages” and seems to imply fast action once the damage has happened. So it seems logical to use the Liability Directive first if one is confronted with new contamination. Hence, if soil contamination can be addressed by the Liability Directive, the legal regime of the Liability directive should be used instead of the regime of the SFD. New contamination that cannot be addressed by using the Liability Directive is subject to the legal regime of the SFD.

7] Member states should be allowed to use their existing national approaches if they achieve the same or more ambitious goals than the proposed SFD.

Article 2

Definitions

For the purpose of this Directive, the following definitions shall apply:

1. 'sealing' means the permanent covering of the soil with an impermeable material
2. ‘dangerous substances’ means substances or preparations within the meaning of Council Directive 67/548/EC[1] and Directive 1999/45/EC of the European Parliament and of the Council[2].
3. 'contaminated site' means a site where there is a confirmed presence, caused by man, of substances of such a level that Member States consider they pose an unacceptable risk to human health or the environment, taking the current and approved future use of the site into account.

Motivation:
Adding the definition of contaminated site to the definitions sections obviate the need to define this in an other article. As it is proposed to delete article 10 (inventory) the definition of a contaminated site needs a new place.

To be discussed:

As we use the term “soil contamination in art 9, it could be proposed have a definition of “soil contamination” in article 2. However, one must be very careful with this. If one defines contamination as: “presence of substances, caused by human activities, on or in the soil that – directly or indirectly – pose or may pose an unacceptable risk to human health or the environment” , prevention of contamination becomes : “Prevention of the situation that substances are present , caused by human activities, on or in the soil that – directly or indirectly – pose or may pose an unacceptable risk to human health or the environment”. Which means that accumulation of dangerous substances in soil is allowed till the unacceptable risk level is reached, and this room for pollution is even bigger is we state that unacceptable risks are related to the current use or approved future use of the land. (Which we may have to do to be “consistent” with the contaminated site part of the directive). Please remind that we ar e now cleaning up many situations where contamination was more or less acceptable in view of the former industrial use but not acceptable in view of a new use. Most of us would like to have prevented this kind of situation. Another example of a consequence of this “unacceptable risk’ based definition is that sewage sludge can be dumped on a piece of land till toxic levels are reached, after that a new piece of land is used for sewage sludge dumping. This is exactly the basis of the US sewage sludge regulation, which most Europeans consider unsustainable.

The problem with the term “contamination” is that it refers to an activity (someone is contaminating) and to a situation (a contaminated site) and this is confusing because we want to be precautionary concerning contamination as an activity , especially because many impacts on soils are very hard to reverse or restore. As stated as a motto in chapter 9 of the CLARINET report : “*we complain today about the neglect of past generations in preserving the land quality,tomorrow we should not create the same problems again for future generations”.* On the other hand that does not imply that we are obliged to solve all problems caused byall past generations within the current generation at any(economic , environmental and social) price. We want be as lenient as possible(avoiding unacceptable risks) for historically contaminated land in view of the”high clean-up costs (economic, environmental and social).

In theory this distinction between contamination created in the past and contamination by current or future activities would lead to two definitions of contamination, which I think will not be easily accepted in a text with has a legal status. The COM proposal is quite practical and

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1 OJ L 196, 16.8.1967, p. l.
2 OJ L 200, 30.7.1999, p. 1.

very cleverly avoids these complicated discussions. The term contamination is not used on its own, but always in combination. Like “prevention of contamination” or “contaminated site”. These combinations are easily defined and the intentions of the articles dealing with prevention and with contaminated sites are quite clear .

Article 9

Prevention of soil contamination

For the purposes of preserving the soil functions referred to in Article 1(1), Member States shall take appropriate and proportionate measures that:

a) Aim to prevent the intentional or unintentional introduction of dangerous substances on or in the soil by dumping, leaking or spilling.

b) Limit the intentional or unintentional introduction of dangerous substances on or in the soil, excluding those due to air deposition and those due to a natural phenomenon of exceptional, inevitable and irresistible character, in order to avoid accumulation that would hamper soil functions or give rise to significant risks to human health or the environment.”

Motivation:
The working group on soil contamination identifies two classes of potential soil polluting activities.
1] Mainly industrial activities were introduction of dangerous substances is not necessary in view of the activity. Dangerous substances may enter the soil through accidents (leakages , spills) or negligence and poor soil protection. A preventive policy for these activities should “aim to prevent” introductions of dangerous substances to soil.
2] Application of products to soil to enhance soil fertility or plant and animal protection. If application of these products and substances on soil is necessary they should not lead to accumulation of dangerous substances. The preventive policy for these application is to limit the introduction in order to avoid accumulation.

The current proposal uses “dangerous substances” throughout the directive. Because according to the definition (article 2) also “preparations” are included, most soil contaminating substances are included, except perhaps nutrients (phosphate), radioactive substances(??) and biological agents (pathogens). Including these in the national soil protection regime will not be seen as an infringement of the soil framework directive.

ARTICLE 10 (INVENTORIES) IS DELETED IN THIS PROPOSAL

Article 11
Identification of contaminated sites

1. Each Member State shall designate competent authorities to be responsible for the identification of contaminated sites.

2. Member States shall establish the methodology necessary to assess the risk that substances on a site pose to human health or the environment.

3. Within two years from [transposition date], the competent authorities shall have started with identifying the location of sites:

   a) Where information about the presence of dangerous substances in soil and groundwater originating from human activities indicate the presence of one or more contaminated sites

   b) Where the probability that activities on and in soil involving dangerous substances have lead to soil contamination is significant and where exposure of human beings or dispersion of contamination to other parts of the environment is likely, taking the current or approved future use of the site into account.

   The identification shall be reviewed at regular intervals.

4. In accordance with the following time-table the competent authorities shall ensure that the necessary investigations are carried out in the sites identified in accordance with paragraph 3 to verify whether the site a contaminated site as defined in article 2(3):

   a) within five years from [transposition date], for at least 10% of the sites;

   b) within 15 years from [transposition date], for at least 60% of the sites;

   c) within 25 years from [transposition date], for at least 90% of the sites sites.

5. The Member States shall ensure that the investigations according to (4) are carried out before a site identified according to (3):

   a) is sold in parts or entirely,

   b) is subject to groundworks and construction works

6. The reports of investigations according to 4 or 5 are made available to the competent authority.

Motivation:

Paragraph 3 no longer implies that competent authorities should have , within 5 years, located ALL sites which may be contaminated and therefore need further investigations. Practical experiences in Member States have shown that it is impossible to make a COMPLETE inventory of ALL suspect sites in a just few years. A realistic approach would be to see the whole identification , verification and inventory building operation as an ongoing process, which is now more or less implied by stating that the identification should start within 2 years. This "process" approach however makes the specification in the directive of milestones and deadlines more difficult.

In paragraph 3 there are two tracks leading to identification of contaminated sites:
The first one is based on information of the (surrounding) environment. There are huge monitoring programmes of surface water and groundwater. Some of this contamination can come from contaminated land and this article obliges the member states to take this seriously and find the polluting sites. Recognising this in paragraph 3 (a) will also clarify the relation between the Groundwater Directive and the SFD.

The second track (3(b)) leading to the identification of a contaminated site is based on information about past and present activities on soil. The sentence "sites where the probability that activities on and in soil involving dangerous substances have lead to soil contamination is significant" is replacing the mere "listing and labelling" approach used in Annex II of the proposed SFD. Some form of risk assessment is needed to assess and compare the probability that certain activities lead to soil contamination (the probability that significant amounts of dangerous substances enter the soil system by hazardous handling, technical failure of storage devices and pipelines ect.). It is of course more complex, but allows for different priorities in member states and regions and does not create the impression of unfair treatment of "soil conscious" enterprises. If we build the suspicion of pollution simply on a certain present or past activity means:

- that a new installation with an activity listed in annex II is immediately potentially polluted after beginning the activity,
- that the suspicion of potential pollution does not make a difference between careful and careless operation,
- that ongoing activity leads to ongoing suspicion, relevant during the review.

This paragraph also introduces an additional criterion that may help locating sites which may be contaminated as defined in article 2. The sites that need our attention first are those where contact with soil contamination is likely. For instance residential sites with gardens, vegetable gardens, childrens playgrounds, and sites close to groundwater and surface water. This way human health may be give priority without leading to strange situations following article 14 of the Commissions proposal

Paragraph 4 is shortened by a reference to the definition of contaminated site in article 2.

Paragraph 4 also mentions necessary investigations, which implies that if the authorities decide that measurements of concentrations and/or a detailed site specific risk assessment is necessary they can ask for one. As the definition of a contaminated site is referring to risk for human health and the environment in view of current or approved future use, necessary investigations do always implysome form of risk assessment by definition.

Paragraph 5 is about the soil status report. Apart from a change in ownership of the site a change in the site itself (constructions, excavations, groundworks that may change the risks of contamination is also proposed as a trigger for a soil status report.

Paragraph 6 states that competent authorities should receive the results of all investigations according to 4 and 5.

ARTICLE 12 SOIL STATUS REPORT IS DELETED (SEE 11 (5))

Article 13
National Remediation Strategy

1. Member States shall, within seven years from [transposition date], draw up a National Remediation Strategy, including at least a procedure for setting remediation targets, a procedure for prioritisation, a timetable for implementation of remediation measures for the sites identified according to article 11 (4) and the funding mechanism according to (5)

2. Member States shall ensure that the contaminated sites identified according to article 11 (4) are remediated.

3. Remediation shall consist of actions on or in the soil aimed at the removal, control, containment or reduction of contaminants so that the contaminated site, taking account of its current use and approved future use, no longer poses any significant risk to human health or the environment.

4. If the means required for remediation are not technically available, or represent a disproportionate cost with respect to expected environmental benefits, sites can be placed in a state that they do not harm environment or human health.

5. Member States shall set up appropriate mechanisms to fund the remediation of the contaminated sites for which, subject to the polluter pays principle, the person responsible for the pollution cannot be identified or cannot be held liable under Community or national legislation or may not be made to bear the costs of remediation.

6. The National Remediation Strategy shall be in application and be made public no later than eight years after [transposition date]. It shall be reviewed at least every five years.

Motivation:
As the way remediation targets are set and the way these are funded can be a part of a “programme of measures” based on a “national strategy “ article 13 and 14 are merged. The new article does not imply that the national strategy contains a list of numerical target values for dangerous substances in soil that may remain in place after remediation in view of current or approved future use of the sites. Also a priority ranking of sites is no longer implied. The strategy only describes procedures, time schedules and a funding mechanism for orphan sites. The strategy may also be the vehicle by which a list of identified contaminated sites are made public or may point to national regional or local sources where this information is available. As stated in paragraph 6 , the National Remediation strategy is public.

The relation between remediation and “ temporary safety” is clarified in pargraph 4 and also the balancing of costs and environmental benefits

The sentence about monitoring (originally in article 14 of the COM proposal) is skipped because this is only one element of sustainable long term remediation strategies. The technical details of remediation approaches should be described in technical guidance documents and not in a directive aiming to give a framework for national and EU soil protection policy.

The confusing priority (in article 14 of the COM proposal) to remediate human health risks first is deleted, but has in fact a new place in article 11(3). The priority in article 14 of the COM proposal was confusing because not yet existing risks for not yet existing future use in view of human health will have priority over existing risks for the environment related to existing current uses

ARTICLE14 IS DELETED SOME ELEMENTS ARE MERGED WITH ARTICLE 13

New Article 14

Soil contamination qualified as land damage

Discussion: The new article 14 aims to clarify the relation between land damage remediation (Liability Directive) and contaminated site remediation (this directive). Please do remember that national liability regimes do not expire this year due to the EU liability directive. So if a country has a regime for "new" pollution which is stricter than the "land damage remediation" obligations of the EU liability directive the national regime can still be operational. The same holds for remediation of (historical) contamination under the SFD.

Indeed for new contamination the repairing of land damages seems to imply a fast remediation, faster than the SFD mechanism, although with the changes in this draft the link between the discovery of a contaminated site and its remediation is much closer than in the COM proposal. The implication of the new article 14 should be: If the Liability Directive (or the national liability regime if this covers more damages and is stricter in its requirements for restoration) can be applied, the remediation obligations of the SFD do not apply. Because the application of stricter rules is allowed according to the EU treaty, it is not necessary to repeat this in the SFD. Mentioning in the SFD that the remediation of land-damages under the Liability Directive is the first choice would be enough support the different and stricter approaches for new compared to historical contamination in many Member States. This is not an ideal situation but to reach that we would have to reopen the discussion about land damage in the Liability Directive, which is too difficult. We have to live with the idea that the SFD is often stricter for old pollution than the Liability Directive is for new pollution. In order to clarify the relation between the proposed SFD and the Liability Directive two versions of a new article 14 are presented below.

> Version 1: In case a soil contamination on a contaminated site has to be qualified as land damage under the Directive 2004/35/EC, this directive prevails above the remediation obligations specified in the Soil Framework directive.

> Version 2: In case a contaminated site can be considered as land damage caused by any of the occupational activities listed in Annex II referred to in the Directive 2004/35/EC the obligations of that Directive prevail above this Directive.

Version 1 states that if a new contamination is created on a contaminated site the regime of the liability directive will apply to that contamination. This means for instance that a new oil spill on a contaminated site which creates (additional) human health risks has to be remediated as " land damage" . Other (historical) contamination at this site is not considered as land damage, although it may affect human health. The latter contamination has to be remediated according to the priorities and regime specified in the National Remediation Strategy, according to SFD. Because two different legal regimes apply to the same site (and maybe even for the same substance !), the local competent authorities will have to face a complex decision: either having two separate remediations or a single combined remediation. The latter may be practical but may imply a shift in priority (and difficult discussions with stakeholders about priorities)for remediation of the contamination which was already present at the site.

Version 2 seems to imply the following: Only if the whole site can be considered as land damage caused by any of the occupational activities listed in Annex II referred to in the Directive 2004/35/EC, the obligations from the liability directive will prevail. If only a part of the site can be considered as land damage than the regime of the Liability Directive will NOT prevail for the complete site, but of course only for the newly contaminated part. The SFD regime still applies for all other parts which could mean in practice that the "land damage" part

is remediated first, and the rest can be postponed as far as the National Remediation Strategy allows. However also version 2 may lead to similar complex situations for the competent authorities as version 1.

Analysis of version 1 and 2 presented above show that it is quite difficult to settle the relation between the Liability Directive regime for new pollution and the SFD regime for contaminated sites in a generic way. It seems more practical to solve this problem at the local , site specific level. This seems to imply that the proposals for this new article 14 should not be made. However , if it is considered necessary, than version 2 is slightly better than version 1 because version 1 needs to clarify what is (legally) meant by "soil contamination on a contaminated site" .(See also discussion about a definition of contamination in article 2)

Article 16
Reporting

1. Member States shall make the following information available to the Commission within eight years from [transposition date], and every five years thereafter:

   (a) a summary of the initiatives taken pursuant to Article 5;

   (b) the risk areas established pursuant to Article 6(1);

   (c) the methodology used for risk identification pursuant to Article 7;

   (d) the programmes of measures adopted pursuant to Article 8 as well as an assessment of the efficiency of the measures to reduce the risk and occurrence of soil degradation processes;

   (e) the outcome of the identification pursuant to Article 11(2) and (3) and the inventory of contaminated sites established pursuant to Article 10(2);

   (f) the National Remediation Strategy adopted pursuant to Article 14;

   (g) a summary of the initiatives taken pursuant to Article 15 as regards awareness raising.

2. The information referred to in paragraph 1(b) shall be accompanied by metadata and shall be made available as documented digital georeferenced data in a format that can be read by a geographic information system (GIS).

COMMENT:

THIS HAS TO BE ADOPTED ACCORDING THE OUTCOME OF THE DISCUSSION ON THE REFERENCED ARTICLES.

Article 17
Exchange of information

Within one year from [entry into force], the Commission shall set up platforms for the exchange of information between Member States and stakeholders:
a) On the risk area identification pursuant to Article 6,
b) On investigation and risk assessment methodologies for contaminated sites,
c) On assessment of the probability that activities on and in soil involving dangerous substances lead to soil contamination

Motivation:
"Investigation" is added to 17 b to be consistent with the text in other articles where "necessary investigations" are mentioned. The text from the COM proposal "currently in use or under development" has been deleted because no one would a priori restrict information exchange to methods currently in use only or to new methods only.
Skipping Annex II calls for another platform on risk assessment of (industrial) activities in view of their potential to lead to soil contamination through accidents or unawareness of adequate prevention measures.