



Letter of the Non-Energy Extractive Industry Panel (NEEIP) on the feasibility of creating a fund to cover environmental liability and losses

Brussels, 8 January 2013

Dear Mr Pellegrini,

The European Non-Energy Extractive Industry (NEEI) sector would like to share its concerns regarding the ongoing study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents.

As explained in a [background document](#) published shortly before the stakeholders' meeting organised on 7 November 2012, the possible creation of such a fund stems from a proposal of Hungary. This fund would aim at covering both environmental damages and traditional damages and should be called on above a certain threshold of damages with 100 million€ currently proposed. It would provide funding for an accident in the form of grants and loans. It is proposed, on the basis of the Hungarian proposal, to finance this fund by an annual levy imposed on industries and companies subject to the fund, the precise figure presented being a mandatory insurance premium of 0.2% of the annual net sales of companies.

The NEEI sector has significant concerns with respect to this possible fund which has the potential to result in additional costs and administrative burdens for the NEEI sector without increasing the uptake of preventive actions already taken by our industry.

In Europe, the NEEI sector has to comply with a set of complex and stringent regulatory instruments under EU law to ensure safe extractive operations, which comes in addition to numerous requirements enacted by Member States, at both national and local levels. The main instruments listed below aim at:

- Assessing environmental impacts before the permitting of a project in accordance with the Environmental Impact Assessment Directive [2011/92/EU](#) currently under review;
- Ensuring the protection of the environment and public health through, in particular, stringent requirements to ensure a safe management of extractive activities and the rehabilitation of the mine's site after its closure, in accordance with the Mining Waste Directive [2006/21/EC](#);
- Observing detailed rules for the prevention and the control of major industrial accidents involving dangerous substances, in accordance with the Seveso Directive [2012/12/EU](#);
- Establishing a common framework for the prevention and remediation of environmental damages, in accordance with the Environmental Liability Directive [2004/35/EC](#).

Both the **Mining Waste Directive** and the **Environmental Liability Directive** already contain provisions of a financial nature.

- The former requires operators to lodge a **financial guarantee** “prior to the commencement of any operations” – i.e. at a time when it does not generate any incomes out of the operation at stake – covering all planned obligations arising under the permit issued pursuant to the Mining Waste Directive as well as the rehabilitation of the land affected by the waste facility.
- The latter includes in its scope operators from the extractive sector active in the management of extractive waste which (i) are subject to a strict liability regime “by reason of [their] activities” for both environmental damage and any imminent threat of such damage, and (ii) “shall bear the costs for the preventive and remedial actions” taken pursuant to the liability directive.

It is not clear from the gap analysis in the background document which is exactly the gap to fill compared to existing legislation which already imposes a significant burden to our industries. It is further not clear to what extent this gap, if any, can be defined at EU level as many issues raised are of the competence of Member States under their national liability legislation. This legislation differs substantially amongst Member States and is also deeply rooted in national procedural laws.

Compliance with the above-mentioned requirements by the NEEI sector active in Europe bears a substantial cost, when compared to direct competitors’ operations active outside Europe. Requiring, as suggested, industrial sectors, including the NEEI sector, to pay a levy in order to finance this fund would represent a new financial burden undermining further its competitiveness at global level. In addition, the possible creation of such a fund raises a number of issues linked to:

- The nature of the fund, which seems to be in practice a mandatory insurance fund; it runs contrary to the fact that the market of financial instruments – in particular insurance policies as well as alternative suitable instruments – to cover environmental liabilities is mature and that its further development might be hampered by a mandatory funding scheme;
- The scope of the fund, which does not take into consideration the risk profile of different industrial activities as well as the existing sectorial EU regulatory framework in place. As outlined, the NEEI sector is already subject to strict requirements at EU level and its operators have made substantial investments to implement high Environmental and Health & Safety standards. Requiring companies to pay for a fund covering different industrial risks, irrespective of the legal framework in place, would be disproportionate and in breach of the principle of equality.

A fund may also have counterproductive effects by reducing incentives to take preventive/risk management measures. Companies should be responsible and accountable for their own risks. It would be inappropriate to accept risks from other operations where there is no control over the practices and where the risk profiles are substantially different. The concrete application of the polluter-pay principle must not result in obliging enterprises operating in legal compliance to be financially accountable for operations of other enterprises not complying with the law. **Consequently, the NEEI sector believes that industry and policy makers should focus on prevention and implementation of the current EU requirements aiming at preventing and managing environmental damages.**

- The management of the fund which may require for its functioning a complex administrative structure and result in additional hurdles for companies in contradiction with the recent [Conclusions](#) of the Competitiveness Council, adopted on 10 December 2012, highlighting its “concern over existing hurdles to industrial competitiveness”.
- The proposed financing of the fund via a tax paid by companies which would lead the concerned operator to pay twice, i.e. the tax and, if circumstances trigger the application of the superfund, reimbursement of the fund when the operator’s responsibility has been established by court”. The ability to use the residual amount of the fund at the end of each calendar year to finance safety and environmental protection measures remain also unclear (e.g.: basis to select potential beneficiaries/unavailability of funds if an accident occurs at the beginning of the calendar year). Using this amount to potentially finance installations having low operating standards would reward incompliant competitors while further increasing moral hazard.

- The suggestions expressed in the background document do not pay sufficient attention to the role played by the private insurance market and, whilst the document recognizes the “moral hazard” problem, it does not provide an in-depth analysis.
- The timing of the study to explore the creation of such a fund is brought forward at a critical moment for the industry. Predictability and legal certainty are crucial to enable EU’s NEEI sector to make the necessary investments in Europe and provide downstream industries minerals and metals that are crucial to society’s sustainable development. Consequently, proposed measures which impose additional requirements and/or costs must be avoided in order to:
 - ✓ prevent undermining EU policies, in particular the [Raw Materials Initiative](#), whose second pillar aims at fostering a sustainable supply of raw materials from European sources;
 - ✓ meet the target set by the recent communication on Industrial Policy ([COM \(2012\) 582 final](#)) according to which “the Commission seeks to reverse the declining role of industry in Europe from its current level of around 16% of GDP to as much as 20% by 2020.”

In conclusion, the NEEIP is of the opinion that a more thorough reflection is needed on (i) the usefulness of such a fund against the already existing legal framework and the current functioning of the insurance market; (ii) the impact on the competitiveness of European industry and the distortions of competition that may be created by the scope of a fund; (iii) the relationship between national liability regimes and possible EU actions in areas that are typically of the competence of Member States.

The European NEEI sector needs a coherent legal framework that provides predictability and fosters competitiveness.

We remain at your disposal should you require any additional information.

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