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Thank you for forwarding us the English version of the "Expert Opinion on the Assessment of Administrative Burdens arising in connection with the Proposal of the European Commission for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil". I understand that the Expert Opinion (dated 7 June 2010) was carried out on behalf of the German Federal Ministry of Food, Agriculture and Consumer Protection.

I would like to make some general comments¹:

I understand that the range of contributing experts at the federal level has been limited to the Federal Ministry of Food, Agriculture and Consumer Protection (p. 9). It seems that neither the German Federal Environmental Ministry nor the Environmental Protection Agency have been consulted. For balance purposes, I think this is a drawback in the document. In addition, apparently not all the experts involved have been familiar with soil protection as the Expert Opinion makes many references to the Habitats Directive, which is a legal instrument quite different from the proposed Soil Framework Directive. It may be for this reason that – as we shall see – some of the assumptions and resulting estimates seem unrealistic and too speculative, even for this type of document. I nevertheless find remarkable that some of the soil experts consulted did have substantial reservations regarding this study (p. 10). Furthermore, I also note the desire of the interviewees for anonymity ("expressly requesting confidentiality", p. 10), which is a rather unusual approach in terms of transparency and comparability.

¹ In the text below reference is made, between brackets, to the page of the English version of the Expert Opinion.

Apparently, the Expert Opinion has been developed using the so-called Standard Cost Model, which is based on "interviews of individuals concerned" (p. 12). The SCM was initially developed to evaluate information requirements as part of an assessment of administrative burdens (p. 12 and 21). Contrary to its title, the Expert Opinion however evaluates compliance costs as well, at least insofar as contaminated sites on federal land are concerned. I take note of the fact that the Expert Opinion itself recognises that the SCM may not be the most adapted methodology for the assessment of compliance costs (p. 21-22). This may explain why some cost calculations appear to grossly exceed realistic assumptions. Finally, let me note that the Expert Opinion is partly estimating costs not in accordance with the obligations of the proposed Soil Framework Directive. This shows that there are still serious misconceptions on the approach of the proposed Directive and its consequences for Member States. It would be interesting to examine the specifications provided to the authors of the Expert Opinion to ascertain from where the misconceptions may have come.

Let me highlight some of those misconceptions in detail:

Priority areas

I would like to refer to the recent introduction of an erosion protection scheme in Germany in July of last year. By designating erosion prone fields and applying new farming provisions in order to tackle the problem of soil degradation, Germany anticipated one of the very objectives of the proposed Directive. The approach chosen – which seems to go well beyond what required by the proposed Directive in terms of geographical scale – was mainly based on a *Bund/Länder* working group, taking advantage of the existing wealth of data in the German soil and advisory services. This and the practical implementation of the scheme seem to contradict those problems and burdens envisaged by the Expert Opinion on Article 6 of the proposed Directive.

The fact that the German Federal Ministry of Food, Agriculture and Consumer Protection has evaluated at two million hectares the surface area in Germany at risk of soil erosion (p. 40) indicates that such an evaluation is indeed possible. I cannot comment on the other figures provided on p. 40 as to the number of priority areas: the reference to the Habitats Directive has nothing to do with the proposed Soil Framework Directive, and I have no elements to judge the claim made by Mr Weber.

Finally, while it would be necessary that the programme of measures adopted pursuant to Article 8 is subject to public participation as provided for by Article 15a, the proposed Directive would not require that the identification of priority areas is subject to public participation, contrary to what the Expert Opinion seems to say on p. 40.

Remediation of contaminated sites

A very large cost (present value over 30 years with a 4% discount rate) of up to €1 billion – to be borne by the local authorities – has been established in the Expert Opinion for an enhanced remediation schedule due to the adoption of the Directive (p. 79-85). In reality and contrary to the assumption of the Expert Opinion, the Directive sets no obligation to complete the *remediation* of identified sites within a given timeframe. In fact, the proposed Directive is aiming at a continuous *identification* process which is to be completed within 25 years – by the way a timeframe beyond some of the German *Länder* own aspirations – and to a risk oriented prioritisation approach for soil remediation. The corresponding remediation strategy demanded under Article 14 would

not impose a set date for remediation as assumed in the Expert Opinion, because the approach taken in the proposed Directive is to allow for a regular review in order to adapt the remediation strategy to the overall (evolving) situation.

The Expert Opinion states that the obligation in Art. 13(1) to remediate contaminated sites "would be incompatible with existing German provisions [because] remediation orders may be issued only in conjunction with discretionary powers" (p. 16). As you are surely aware, given that you followed in great detail the Council Working Party meetings on the proposed Directive, it is Article 13 itself which requires giving due consideration to economic impacts, cost-effectiveness and technical feasibility of actions envisaged. In addition, it allows for containment measures and – where appropriate – for natural recovery, following the principle of proportionality. "Remediation" in the sense of the proposed Directive is not limited to "clean up". To put it in a nutshell: the Soil Framework Directive is compatible with an approach to remediation to be "decided at the respective authority's discretion" (p. 80), provided that *all* contaminated sites in a national territory are (eventually) remediated. It would for the first time introduce such a general obligation at EU level now absent from the *acquis*.

Soil status report

Concerning the soil status report, it is up to each Member State to decide on an appropriate format. An estimated amount of €2.6 million simply for developing such a format (p. 61, 69 and 78) is not in line with my perception of the expertise, efficiency and pragmatism of German authorities. In addition, the Expert Opinion completely neglects the benefits that such a report would provide in terms of speeding up the identification of contaminated sites and increasing transparency for investors. It appears that the experts have not all understood the purpose of the soil status report and its contribution to reducing costs for the public purse.

Military sites

Military sites are repeatedly mentioned in the Expert Opinion (e.g. on p. 7) as a possible cost driver on the federal side. Please note that the Council Working Party has proposed making the list of potentially polluting activities in Annex II to the proposed Directive indicative only. In any event, Annex II includes *former* military sites, not *active* military sites, and this is a distinction of huge importance both politically and economically.

German Advisory Council on the Environment

The Expert Opinion quotes the 2008 Report of the German Advisory Council on the Environment concerning hypothetical needs for a sectoral adaptation of German soil legislation (p. 25). I would like to complement that quote by noting that the Advisory Council in its Report also rejected the German subsidiarity-based objections against the proposed Directive and justified a European approach, also because of the significant climate aspects of soil. It even actually welcomed the Soil Framework Directive as a stimulus to improved soil protection. It would have been helpful and more objective had this opinion been included.

Committee of the Regions

As to the reservation of the Committee of the Regions on the cost for cleaning-up of contaminated sites, explicitly quoted in the Expert Opinion (p. 18), I would like to bring

to your attention that this has been fully acknowledged in the evolution of the proposed Directive. Indeed, the Committee's appreciation is reflected in its very recent call in support of the Soil Framework Directive².

In summary, while recognising the importance of evaluating the added value of new legislation and the bureaucratic burdens it causes, this Expert Opinion appears to be one-sided, aiming at cost maximisation rather providing a fair picture of the possible cost implications due to the proposed Soil Framework Directive. It not only disregards the possible benefits and savings that legislation on soil protection at EU level could bring, it also neglects the German achievements in the field thus failing to recognise that German soil legislation would possibly require what could be considered relatively minor adaptations to the proposed Directive. In fact, as correctly mentioned in the Expert Opinion (p. 24-25), the German Environment Protection Agency goes even so far as to say that the proposed Directive would not lead to significant changes in the existing German soil protection law and would not entail major additional administrative burden.

As to any provisions that are perceived by German soil experts as administrative burdens without a corresponding gain for their own work, I would like to reassure you that the Commission is open to find a mutual solution for all parties involved, while ensuring a high level of environmental protection across the whole of the EU.

Please note that a copy of this letter is being sent to the attention of Mr Reinhard Kaiser at the Federal Ministry of Environment, Nature Protection and Nuclear Safety for his information.

Yours sincerely,

Signed
Michael HAMELL
Head of Unit

² Committee of the Regions, Outlook opinion on the role of local and regional authorities in future environmental policy, CdR 164/2010, 5.10.2010, paragraph 69.