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REPORT

on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the ‘ELD’)
(2016/2251(INI))

Committee on Legal Affairs

Rapporteur: Laura Ferrara

Rapporteur for the opinion (*):
Benedek Jávor, Committee on the Environment, Public Health and Food Safety

(*) Associated committee – Rule 54 of the Rules of Procedure

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EXPLANATORY STATEMENT – SUMMARY OF FACTS AND FINDINGS

I. Aim

The aim of Directive 2004/35/EC (hereinafter the ‘ELD’) was to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society, based on the ‘polluter pays’ principle laid down in Article 191(2) TFEU.

To achieve this aim, the ELD sets out a general definition of ‘damage’ as a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

It also specifies a further category of damage (defined ‘environmental damage’), and in particular:

- a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in the same directive;
- b) water damage, which is any damage that significantly adversely affects the ecological, chemical or quantitative status, or the ecological potential, of inland waters (both surface water and groundwater), as well as the environmental status of marine waters;
- c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

II. Sources of information

This own-initiative report on the application of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage is based on information gathered from different sources, including:

- a study drawn up for the European Commission on ‘ELD Effectiveness: Scope and Exceptions’¹;
- a study drawn up for the European Commission on ‘The feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents’²;
- a study drawn up for the European Commission entitled ‘Experience gained in the application of ELD biodiversity damage’³;
- a report from the Commission to the Council and the European Parliament under

¹ BIO Intelligence Service (2014), ‘Study on ELD Effectiveness: Scope and Exceptions’, Final Report drawn up for the European Commission – DG Environment.

² BIO Intelligence Service et al. (2012) ‘Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents’, Final report drawn up for the European Commission, DG Environment.

³ Milieu Ltd., IUCN (2014), ‘Experience gained in the application of ELD biodiversity damage’, final report drawn up for the European Commission, DG Environment.

Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage¹;

- a Commission Staff Working Document – REFIT Evaluation of the Environmental Liability Directive²;
- a briefing of the European Parliamentary Research Service of 15 June 2016 entitled ‘The implementation of the Environmental Liability Directive: a survey of the assessment process carried out by the Commission’³.

III. State of play of the implementation of the ELD

The ELD applies strictly to all ‘operators’ who, through their activities, cause or could cause ‘environmental damage’ based on a strict list set out in Annex III to the directive.

Over and beyond these activities, it has to be proven that the operator who pursues the occupational activity – defined as being ‘any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character’ – is at fault or negligent.

The application of this strict liability regime is, therefore, very limited, as it can be applied only to a given type of environmental damage (water, land, biodiversity) and only in the context of certain activities that are considered to be dangerous and are included on a restricted list.

In addition, the scope of the ELD is further limited by the total uncertainty regarding the concept of the ‘significance threshold’ of environmental damage and the exceptions to the liability regime set out in Article 4.

The consequences of this framework of rules, which is extremely vague and incomplete, have been examined in a number of studies carried out by the Commission and in the report drawn up under Article 18(2) of the ELD: throughout the EU the directive has been transposed in a patchy and piecemeal manner, often with rules that have ultimately proven to be ineffective.

IV. Limits to the effectiveness of the ELD

The main shortcomings, in addition to the above-mentioned approximation of the terms used, have been found to be related to the lack of a specific administrative procedure to be adopted by all governments in order to meet the requirement to take action, laid down in the directive, in the event of environmental damage.

Moreover, it has emerged from the Commission’s studies that many Member States, precisely because of the difficulty in applying and implementing the ELD, continue to use their own domestic law to deal with cases of environmental damage on their territory.

This has led also to contradictory and incomplete results in the recording of cases of

¹ COM(2016)0204.

² SWD(2016)0121.

³ PE 556.943.

environmental damage, making it difficult to identify a possible harmonised system of financial security.

A problem that is keenly felt by several Member States is the total lack of provision, by the ELD, for cases in which it is impossible to trace the operator responsible for the damage, or in which the operator is insolvent. In these cases, the ‘polluter pays’ principle is disregarded and the costs of repairing the environmental damage are borne in full by the government sector and, hence, by EU citizens.

V. Suggestions to improve harmonisation of the ELD

Even though the ELD does not prevent Member States from adopting stricter rules, if they wish, it would be advisable to include a provision in the directive concerning the establishment of a secondary liability regime, based on the experience of various systems already adopted in several Member States such as France, Hungary, Poland and the United Kingdom.

Furthermore, in order to ensure greater coverage in cases of environmental damage that are not covered by the current ELD rules, or which cannot be covered by normal financial guarantees (such as major disasters), it would be appropriate to consider establishing a European fund for the remedying of environmental damage.

New technological and medical findings, moreover, show that pollution from industrial activities can affect the human body in hitherto unsuspected ways. Indeed, pollutants released into the environment endanger highly complex biological and bio-evolutionary balances, as, in just a few decades, a range of once non-existent factors, which can interfere with the human body in a complex manner, are being introduced into the environment.

For all these reasons, the legislator should take the opportunity to reword the definition of environmental damage so that it is effective, uniform and consistent with the rapid evolution of pollutants from industrial activities, also by considering extending the scope of the directive to damage to the air, fauna and flora and the landscape, and by trying to identify the new dangerous activities that should be included on the list of activities for which operators are strictly liable, as set out in Annex III.

It has emerged from the Commission’s investigations and from the numerous testimonies of stakeholders, that most of the industries which carry out the activities for which the ELD framework can be adopted, have already adopted financial security systems and that therefore the market tends to self-regulate. Insurance company representatives have confirmed this trend by stressing that the supply of financial guarantees could be improved both by increasing the volume of data on cases of environmental damage occurring within the EU and by making the legal framework for the implementation of the directive clearer.

Taking into account these considerations, the legislator could consider introducing legislation to assist operators and insurance companies in order to make the use of insurance schemes for cases of environmental damage more widespread, by examining also the option of making financial security mandatory for operators affected by the ELD.

In addition to the latter option, additional elements can be identified that might be useful for the purpose of improving the framework of environmental damage guarantees: the

establishment of a European register for ELD cases, the establishment of a national and European register for operators who engage in the dangerous activities listed in Annex III to the directive and/or the establishment of a financial control scheme regarding operators who engage in dangerous activities.

The obstacles to the full implementation of the ELD also depend on the lack of preparation and training in national government departments that are not always able to implement effective procedures to deal with cases of environmental damage. That is why the Commission should enhance and improve its training programme for the implementation of the ELD by increasing and improving its regular meetings with various groups of national experts.

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the ‘ELD’)
(2016/2251(INI))**

The European Parliament,

- having regard to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (hereinafter the ‘ELD’)¹,
- having regard to the report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (COM(2016)0204),
- having regard to Articles 4 and 191 of the Treaty on the Functioning of the European Union (TFEU),
- having regard to Article 37 of the Charter of Fundamental Rights of the European Union,
- having regard to Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC²,
- having regard to the amendment of Directive 2004/35/EC through Directive 2006/21/EC³ on the management of waste from the extractive industries, Directive 2009/31/EC⁴ on the geological storage of carbon dioxide and Directive 2013/30/EU⁵ on safety of offshore oil and gas operations,
- having regard to the Commission Staff Working Document – REFIT Evaluation of the Environmental Liability Directive, which accompanies the report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (SWD(2016)0121),
- having regard to the briefing of the European Parliamentary Research Service of 15 June 2016 entitled ‘The implementation of the Environmental Liability Directive: a survey of the assessment process carried out by the Commission’⁶,
- having regard to Rule 52 of its Rules of Procedure, as well as Article 1(1)(e) of, and Annex 3 to, the decision of the Conference of Presidents of 12 December 2002 on the

¹ OJ L 143, 30.4.2004, p. 56.

² OJ L 106, 17.04.2001, p. 1.

³ OJ L 102, 11.4.2006, p. 15.

⁴ OJ L 140, 5.6.2009, p. 114.

⁵ OJ L 178, 28.6.2013, p. 66.

⁶ PE 556.943.

procedure for granting authorisation to draw up own-initiative reports,

- having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on the Environment, Public Health and Food Safety (A8-0297/2017),
- A. whereas, according to Article 191(1) of the TFEU, Union policy on the environment must contribute to the pursuit of objectives, such as protecting the health of its citizens, protecting and improving the quality of the environment, promoting the prudent and rational utilisation of natural resources, and promoting measures at international level to address global or regional environmental problems;
- B. whereas Article 191(2) of the TFEU stipulates that Union policy on the environment must aim at a high level of protection and must be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay;
- C. whereas Article 11 of the TFEU stipulates that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development;
- D. whereas Article 192 of the TFEU entrusts to the European Parliament and the Council the task of identifying the measures to be taken in order to achieve the general objectives of the Union relating to the environment¹;
- E. whereas Article 37 of the Charter of Fundamental Rights requires that a high level of environmental protection and the improvement of the quality of the environment be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development;
- F. whereas a coordinated environmental strategy across the Union is a way of encouraging cooperation and ensuring that Union policies are consistent with each other;
- G. whereas the current scope of the ELD concerns solely environmental damage to biodiversity (protected species and natural habitats), water and the land, caused by operators;
- H. whereas in order to cover liability for environmental damage, a financial security market has grown up spontaneously, which nevertheless might be insufficient to cover specific cases, such as SMEs or particular types of operations (offshore platforms, nuclear facilities, etc.);
- I. whereas the uneven implementation of the ELD is due primarily, among other issues, to difficulties in ascertaining if the damage to a natural resource has exceeded the set threshold, and to the fact that many Member States have no procedure for examining comments or criticism from environmental NGOs and other stakeholder bodies;

¹ Judgment of the Court of Justice of 9 March 2010, *ERG and Others*, C-378/08, ECLI:EU:C:2010:126, paragraph 45; Judgment of the Court of Justice of 9 March 2010, *ERG and Others*, C-379/08 and C-380/08, ECLI:EU:C:2010:127, paragraph 38; Judgment of the Court of Justice of 9 March 2010, *Buzzi Unicem SpA and Others*, C-478/08 and C-479/08, ECLI:EU:C:2010:129, paragraph 35.

- J. whereas in many Member States large numbers of stakeholders (environmental NGOs, insurance companies, operators, and, above all, the authorities concerned) know little – or in some cases nothing – about the details of the ELD, a situation due not least to the fact that there are no guidance documents to help in transposing the legislation;
 - K. whereas many Member States have made progress in effectively achieving the main objectives of preventing and remedying environmental damage; whereas, however, in a few Member States the enforcement of the ELD is still inadequate;
 - L. whereas new scientific findings show that pollution from industrial activities can affect both the environment and humans in hitherto unsuspected ways and that this endangers human health, sustainability, and the balance of biological and bio-evolutionary processes;
1. Acknowledges the importance of the Commission's studies and reports regarding the assessment of the implementation of the ELD and its impact on the Member States as well as of its recommendations for the effective and coherent implementation of the directive by giving priority to harmonisation of national solutions and practices in a wider legal liability framework; welcomes in that context the development of the Multi-Annual ELD Work Programme (MAWP) for the period 2017-2020;
 2. Observes with concern that the findings of those reports give an alarming picture of the actual implementation of the ELD and notes that the directive has been transposed in a patchy and superficial way in many Member States;

State of play of the implementation of the ELD

3. Notes that several Member States failed to comply with the deadline for transposing the ELD and that only by mid-2010 had it been transposed by all 27 Member States;
4. Considers that, owing to the discretionary powers awarded in the ELD and to the significant lack of clarity and uniform application of key concepts as well as to underdeveloped capacities and expertise, the transposition of the ELD into national liability systems has not resulted in a level playing field and that, as confirmed in the Commission report, it is currently totally disparate in both legal and practical terms, with great variability in the amount of cases between Member States; is therefore of the opinion that additional efforts are required to enable regulatory standardisation to take place across the EU;
5. Notes that this lack of uniformity is also due to the generic nature of the ELD, which was drawn up along the lines of the framework directive model;
6. Regrets that, in spite of the action taken by the Commission concerning late transposition and issues relating to non-conformity, and that, in spite of the ELD's extreme flexibility, seven Member States have yet to resolve a number of non-compliance issues;
7. Notes that inconsistencies among Member States in how they report cases of

environmental damage that triggered the application of the ELD¹ can be attributed to the application of their national legislation instead of the ELD;

Limits to the effectiveness of the ELD

8. Observes that the effectiveness of the ELD varies significantly from Member State to Member State;
9. Points out that the different interpretations and application of the ‘significance threshold’ for environmental damage are one of the main barriers to an effective and uniform application of the ELD, while precise data on administrative costs for public authorities, including data on the application of complementary and compensatory remediation, are limited, quite divergent, and for businesses, not available at all;
10. Deplores the fact that under the ELD, incidents are defined as ‘serious’ only if they give rise to deaths or serious injuries, with no reference to the consequences for the environment; highlights therefore that even if it does not give rise to deaths or serious injuries, an incident may have a serious impact on the environment, by virtue of its scale or because it affects, for example, protected areas, protected species or particularly vulnerable habitats;
11. Regrets that there are activities with potential negative impacts on biodiversity and the environment, such as the pipeline transport of dangerous substances, mining, and the introduction of invasive alien species, that are currently not covered by the requirement for strict liability; notes that in particular for biodiversity damage, the activities listed in Annex III do not sufficiently cover the sectors that could potentially give rise to damage;
12. Considers that in Article 1 the framework of environmental liability should be broadened to include environmental rehabilitation and ecological restoration to the baseline condition after occupational activities have ended, even when environmental damage is caused by activities or emissions expressly authorised by the competent authorities;
13. Stresses that all stakeholders have reported problems in holding operators strictly liable for dangerous activities referred to in Annex III to the ELD, in relation to successors of liable parties²;
14. Recalls the experiences in the implementation of the current financial securities, which have shown to be lacking as regards ensuring that operators have effective cover for

¹ According to the Commission report to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, between April 2007 and April 2013, Member States reported around 1 245 confirmed cases of environmental damage which triggered the application of the ELD. Moreover, according to the same report, the number of cases varies considerably from one Member State to another. Two Member States account for over 86 % of all reported cases (Hungary: 563, Poland: 506 cases), most of the remaining cases having been reported by six Member States (60 by Germany, 40 by Greece, 17 by Italy and 8 by Latvia, Spain and the United Kingdom). 11 Member States reported no such incidents in 2007, possibly because they deal with them exclusively under their national system.

² Judgment of the Court of Justice of the European Union of 4 March 2015, *Ministero dell’Ambiente e della Tutela del Territorio e del Mare and others v Fipa Group Srl and others*, Case C-534/13, ECLI:EU:C:2015:140.

financial obligations where they are liable for environmental damage, and is concerned at the cases where operators have not been in a position to bear the costs of environmental remediation;

15. Stresses that problems persist regarding the application of the directive to large-scale incidents, especially when it is not possible to identify the liable polluter and/or the polluter becomes insolvent or bankrupt;
16. Notes that the cost of environmental damage for the operators responsible can be reduced through the use of financial security instruments (covering insurance and alternative instruments, such as bank guarantees, bonds, funds or securities); believes that demand is low within the ELD financial security market due to the small number of cases occurring in many Member States, the lack of clarity regarding certain concepts set out in the directive and the fact that in many Member States, depending on the level of maturity of the market for such instruments, insurance models are generally proving slow to emerge;
17. Notes that the opportunity to improve the provision of financial guarantees is being hampered by the scarcity and contradictory nature of the data on ELD cases in the EU's possession;
18. Encourages the Member States to take measures to accelerate the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities;
19. Draws attention to the Commission's feasibility study on the concept of an EU-wide industrial disaster risk-sharing facility¹ and emphasises the need to carry out further analysis and a more in-depth feasibility study on the key legal and financial issues;
20. Welcomes the fact that, as regards the application of the ELD in relation to protected species and natural habitats, half the Member States apply a broader scope (Belgium, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovenia, Spain, Sweden, and the United Kingdom);
21. Takes the view that among the various causes of the insufficient harmonisation of the ELD is also the failure to provide for the application of a standard administrative procedure for notifying competent authorities of imminent threat of, or actual, environmental damage; regrets therefore that there is no obligation to publish such notifications or information about how the cases were dealt with; notes that some Member States have identified this limitation in their national legislation and thus set up databases about the notifications/incidents/cases; points out, however, that the practice varies broadly from Member State to Member State and is rather limited;
22. Emphasises that compensatory regimes must be able to address transboundary claims effectively, rapidly, within a reasonable timeframe and without discrimination among

¹ Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents, Final Report, European Commission, DG ENV, 17 April 2013.

claimants from different European Economic Area countries; recommends that they should cover both primary and secondary damage caused in all affected areas, given that such incidents affect wider areas and may have a long-term impact; stresses the need especially for neighbouring countries, which are not members of the European Economic Area, to respect international law regarding environmental protection and liability;

23. Reiterates that according to Article 4(5) of the ELD, the directive only applies to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators; also reiterates that the Intergovernmental Panel on Climate Change (IPCC) had, in its 2013 report, already established a rigorous causal relationship between gas emissions and damage related to climate change and the environment¹;

Suggestions to improve harmonisation of the ELD

24. Calls for the ELD to be reviewed as soon as possible and the definition of ‘environmental damage’ laid down in Article 2(1) of the directive, specifically with regard to the criteria relating to determining adverse effects on protected species and habitats (Annex I), and to risks of water damage and land damage, to be revised with a view to making it sufficiently effective, consistent and coherent to keep pace with the rapid evolution of pollutants from industrial activities;
25. Calls on the Commission to clarify, define and set out in detail the concept of ‘significance threshold’ and to assess differentiated maximum liability thresholds for activities, in order to standardise the application of the ELD, making it uniform in all Member States;
26. Calls on the Commission to provide a clear and coherent interpretation of the geographical scope of ELD ‘favourable conservation status’ (EU territory, national territory, natural landscape area); considers, in this respect, that a site-specific approach is necessary to ensure correct and effective implementation;
27. Calls on the Commission to determine what rules are necessary to establish a clear and irrefutable distinction between those cases in which the ELD is applicable and those in which the national standard should apply, where this is more stringent;
28. Notes that air pollution harms human health and the environment and according to Eurostat, nitrogen dioxide and particulate matter pollution pose serious health risks; calls in that context for the inclusion of ‘ecosystems’ in the definitions of ‘environmental damage’ and ‘natural resource’ in Article 2; calls, furthermore, on the Commission to consider the possibility of extending the scope of the ELD and imposing

¹ IPCC, 2013: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Stocker, T.F. et al. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp, doi:10.1017/CBO9781107415324.

liability for damage to human health and the environment, including damage to the air¹;

29. Calls on the Commission to introduce mandatory financial security, e.g. a mandatory environmental liability insurance for operators and to develop a harmonised EU methodology for calculating the maximum liability thresholds, taking account of the characteristics of each activity and its surrounding area; calls, in addition, on the Commission to consider the possibility of establishing a European fund for the protection of the environment from damage caused by industrial activity governed by the ELD², without undermining the polluter-pays principle, for insolvency risks and only in cases where financial security markets fail; considers that the same should apply to cases of large-scale accidents, when it is impossible to trace the operator responsible for the damage;
30. Calls for any operator benefiting from the carrying-out of activities to be also liable for any environmental damage or pollution caused by those activities;
31. Is of the view that considering the relevance and potential impacts of industry-related disasters and the risks posed to human health, the natural environment and property, further safeguards need to be added in order to provide European citizens with a safe and sound disaster prevention and management system based on risk-sharing, stepped-up responsibility of industrial operators and the polluter-pays principle; calls for an assessment of whether it is necessary to include in the ELD a third-party liability regime for damage caused to human health and the environment³;
32. Calls for the adoption of a regime for the secondary liability of successors of liable parties;
33. Recommends that the option of requiring subsidiary state liability be made mandatory in order to ensure effective and proactive implementation of the legislation;
34. Calls furthermore for the removal of the options for granting permit defence and state-of-the-art defence in order to create a level playing field, promote the polluter-pays principle and improve the effectiveness of the legislation;
35. Calls on the Commission to come forward with a proposal for environmental inspections at the European level without further delay;
36. Considers that in the context of a review of the ELD, it should be a priority to extend strict liability to non-Annex III activities for all environmental damage with adverse effects, so as to improve the effectiveness of the legislation in implementing the polluter-pays principle and to provide an incentive for operators to undertake proper risk management for their activities; calls in that context on the Commission to establish a register for operators who engage in dangerous activities and a financial monitoring

1 This option was considered in the Commission document of 19 February 2014 ‘Study on ELD Effectiveness: Scope and Exceptions’ p. 84.

2 As regards this option please refer to the document published by the Commission on 17 April 2013 entitled ‘Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents’.

3 As already provided for in Portugal and as assessed in the Commission study of 16 May 2013 entitled ‘Implementation challenges and obstacles of the Environmental Liability Directive (ELD)’ p. 75.

scheme to ensure that operators are solvent;

37. Calls on the Commission to ensure the application of the ELD to environmental damage caused by any occupational activity and to ensure strict producer liability;
38. Calls for the establishment of a publicly available European database of cases of environmental damage governed by the ELD modelled on, for example, the Irish reporting system whereby cases of environmental damage can be notified online, in order to create greater trust in the ELD system and to ensure better implementation; considers that such a public database would enable stakeholders, operators and citizens to become more aware of the existence of the ELD regime and its enforcement and would thus contribute to better prevention and remediation of environmental damages;
39. Recommends that, in order for public databases of ELD cases to be easily accessible and effective, they should be set up in accordance with the following criteria:
 - they should be available online and additional information pertaining to the cases should be granted upon request,
 - each country should have a centralised database rather than separate databases for every region,
 - notifications about new incidents should be immediately published online,
 - each case registered in the database should include information about the name of the polluter, nature and extent of the damage caused, prevention/remediation action measures taken or to be taken, proceedings carried out by/and or with the authorities;
40. Calls for the categories of dangerous activities set out in Annex III to be expanded to include all activities that are potentially harmful to the environment and human health;
41. Stresses the importance of a culture of environmental damage prevention, through a systematic information campaign in which Member States ensure that potential polluters and potential victims are informed of the risks to which they are exposed, of the availability of insurance or other financial and legal means that could protect them from those risks, and of the benefits they could gain from them;
42. Considers that all cases of proven liability as well as the details of penalties imposed should be made public in order to make the true cost of environmental damage transparent to all;
43. Proposes that a channel be set up to encourage environmentalist NGOs and other stakeholder bodies to put forward their comments and criticisms;
44. Suggests that tax relief or other favourable arrangements be introduced for companies which successfully endeavour to prevent environmental damage;
45. Recommends the establishment of specific independent authorities to be vested with management and monitoring powers as well as the power to impose penalties laid down in the ELD, including the possibility of requiring financial guarantees of potentially

liable parties, taking into account the specific situation of the individual potential polluter, for example, with regard to environmental permits;

46. Calls on the Commission and the Member States to ensure that the ELD adequately supports efforts to achieve the objectives of the EU's Birds and Habitats Directives; insists that the authorities responsible for environmental inspections must be involved in the implementation and enforcement of environmental liability law;
47. Calls on the Commission to step up its training programme for the application of the ELD in the Member States and to set up helpdesks for practitioners providing information, assistance and assessment support for risk and damage evaluations; recommends in addition that guidance documents be adopted to help Member States transpose the legislation correctly;
48. Reiterates that, in accordance with the ELD, persons adversely affected by environmental damage are entitled to ask the competent authorities to take action; also notes that Union law stipulates that European citizens should be guaranteed effective and timely access to justice (Article 9(3) of the Aarhus Convention, Article 6 of the TEU and the relevant provisions of the European Convention for the Protection of Human Rights) and that the costs of the environmental harm should be borne by the polluter (Article 191 of the TFEU); calls therefore on the Commission to come up with a legislative proposal on minimum standards for implementing the Aarhus Convention's access to justice pillar; asks the Commission to assess the possibility of introducing collective redress mechanisms for breaches of the Union's environmental law;
49. Calls on the Commission, in the context of a review of the ELD, to consider whether it might impose an obligation on Member States to submit reports every two years on the application of the directive;
50. Considers criminal sanctions to be another important deterrent against environmental damage, and notes with regret that Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law is not up to date; calls on the Commission to take action, without further delay, to review that directive's scope so that it covers all applicable Union environmental legislation;
51. Instructs its President to forward this resolution to the Council and the Commission, and to the parliaments and governments of the Member States.

20.6.2017

OPINION OF THE COMMITTEE ON THE ENVIRONMENT, PUBLIC HEALTH AND FOOD SAFETY

for the Committee on Legal Affairs

on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the ‘ELD’)
(2016/2251(INI))

Rapporteur (*): Benedek Jávor

(*) Associated committee – Rule 54 of the Rules of Procedure

SUGGESTIONS

The Committee on the Environment, Public Health and Food Safety calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following suggestions into its motion for a resolution:

1. Notes that owing to the discretionary powers awarded in the Environmental Liability Directive (ELD), its implementation in the Member States has not been coordinated and has lacked harmonisation and effectiveness, leading to implementation deficiencies, considerable variability in the number of cases between Member States, and an unlevel playing field for operators;
2. Calls for the ELD to be revised as soon as possible;
3. Calls, in the context of a review of the ELD, for greater clarity of the definition of ‘environmental damage’ in Article 2(1), specifically with regard to the criteria relating to determining adverse effects on protected species and habitats (Annex I), and to risks of water damage and land damage (Article 2(1)); calls for a redefinition so as to cover all damages to the environment;
4. Calls on the Commission, furthermore, to include ‘ecosystems’ in the definitions of ‘environmental damage’ and ‘natural resource’ in Article 2;
5. Notes that a few Member States appear to make use of the ELD relatively frequently for environmental damage incidents, while others appear to apply national legislation for environmental damage incidents instead of the ELD;

6. Welcomes the Commission's efforts to assess and bridge gaps in the implementation of the ELD across Member States;
7. Welcomes the development of the Multi-Annual ELD Work Programme (MAWP) for the period 2017-2020;
8. Recalls the experiences in the implementation of the current financial securities which have shown challenges as regards ensuring the liability of operators for environmental damage, and is concerned at the cases where operators have not been in a position to bear the costs of environmental remediation;
9. Recalls that a lack of obligation for operators to have financial security regarding environmental liability may prevent full compensation for costs in the event of a serious incident;
10. Calls for any operator benefiting from the carrying-out of activities to be also liable for any environmental damage or pollution caused by those activities;
11. Considers that in Article 1 the framework of environmental liability should be broadened to include environmental rehabilitation and ecological restoration to the baseline condition after occupational activities have ended, even when environmental damage is caused by activities or emissions expressly authorised by the competent authorities;
12. Regrets that there are activities with potential negative impacts on biodiversity and the environment, such as the pipeline transport of dangerous substances, mining, and the introduction of invasive alien species, that are currently not covered by the requirement for strict liability; notes that in particular for biodiversity damage, the activities listed in Annex III do not sufficiently cover the sectors that could potentially give rise to damage;
13. Considers that in the context of a review of the ELD it should be a priority to extend strict liability to non-Annex III activities for all environmental damage with adverse effects, so as to improve the effectiveness of the legislation in implementing the 'polluter pays' principle and to provide an incentive for operators to undertake proper risk management for their activities;
14. Calls on the Commission, in the context of a review of the ELD, to extend the directive's scope and also to impose liability for damage to human health and the environment, e.g. air or wetlands; considers that this would streamline the ELD with other EU legislation on protecting human health and the environment and would facilitate adding provisions to the ELD, such as including a requirement to carry out preventive measures and emergency remedial action, either in the directive itself or in national law implementing it;
15. Calls on the Commission to ensure the application of the ELD to environmental damage caused by any occupational activity and to ensure strict producer liability;
16. Calls on the Commission to include in the next review of the ELD damage to human health and the environment caused by air pollution emitted by cars violating the EU car emissions legislation, as this could increase levels of prevention and precaution;
17. Calls furthermore for the removal of the options for granting permit defence and state-of-

the art defences in order to create a level playing field and promote the ‘polluter pays’ principle, while also improving the effectiveness of the legislation;

18. Recommends that the option of requiring subsidiary state liability be made mandatory in order to ensure effective and proactive implementation of the legislation;
19. Is of the view that considering the relevance and potential impacts of industry-related disasters and the risks posed to human health, the natural environment and property, further safeguards need to be added in order to provide European citizens with a safe and sound disaster prevention and management system based on risk-sharing, the stepped-up responsibility of industrial operators and the ‘polluter pays’ principle;
20. Calls on the Commission, in the context of a review of the ELD, to consider whether it might impose an obligation on Member States to submit reports every two years on the application of the directive;
21. Restates, in the context of a review of the ELD, its call for mandatory financial security, e.g. a mandatory environmental liability insurance for operators; calls on the Commission to develop a harmonised EU methodology for calculating the maximum liability thresholds, taking account of the characteristics of each activity and its surrounding area, and to assess the option to supplement this with an EU-wide fund or an insurance-based risk sharing facility designed to address remediation costs beyond the mandatory financial security, in coordination with any existing international environmental liability funds;
22. Calls on the Commission to establish a compulsory environmental liability insurance policy to cover all operators in the EU, and to oblige each Member State to take all measures necessary to ensure the environmental liability of all operators in its territory;
23. Encourages the Member States to take measures to accelerate the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities;
24. Draws attention to the Commission’s feasibility study on the concept of an EU-wide industrial disaster risk-sharing facility¹ and emphasises the need to carry out further analysis and a deeper feasibility study on the key legal and financial issues;
25. Calls on the Commission and the Member States to ensure that the ELD adequately supports efforts to attain the objectives of the EU’s Birds and Habitats Directives; insists that the authorities responsible for environmental inspections must be involved in the implementation and enforcement of environmental liability law;
26. Considers criminal sanctions to be another important deterrent against environmental damage, and notes with regret that Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law is not up to date; calls on the Commission to take action, without further delay, to review that directive’s scope so that

¹ Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents, Final Report, European Commission, DG ENV, 17 April 2013.

it covers all applicable Union environmental legislation;

27. Stresses the urgency of establishing European legislation on minimum standards for implementing the access to justice pillar of the Aarhus Convention;
28. Reiterates its call on the Commission to come forward without further delay with a proposal for environmental inspections at European level.

INFORMATION ON ADOPTION IN COMMITTEE ASKED FOR OPINION

Date adopted	8.6.2017
Result of final vote	+: 46 -: 4 0: 3
Members present for the final vote	Margrete Auken, Pilar Ayuso, Zoltán Balczó, Ivo Belet, Biljana Borzan, Lynn Boylan, Soledad Cabezón Ruiz, Nessa Childers, Birgit Collin-Langen, Mireille D'Ornano, Miriam Dalli, Mark Demesmaeker, Bas Eickhout, Karl-Heinz Florenz, Francesc Gambús, Elisabetta Gardini, Arne Gericke, Jens Gieseke, Julie Girling, Françoise Grossetête, Jytte Guteland, György Hölvényi, Jean-François Jalkh, Benedek Jávor, Jo Leinen, Peter Liese, Norbert Lins, Valentinas Mazuronis, Susanne Melior, Bolesław G. Piecha, Pavel Poc, Frédérique Ries, Davor Škrlec, Renate Sommer, Ivica Tolić, Adina-Ioana Vălean, Jadwiga Wiśniewska
Substitutes present for the final vote	Jørn Dohrmann, Ismail Ertug, Eleonora Evi, Jan Huitema, Urszula Krupa, Gesine Meissner, Ulrike Müller, Younous Omarjee, Sirpa Pietikäinen, Carolina Punset, Bart Staes, Tiemo Wölken, Carlos Zorrinho
Substitutes under Rule 200(2) present for the final vote	Arnaud Danjean, Wim van de Camp

FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

46	+
ALDE	Jan Huitema, Valentinas Mazuronis, Gesine Meissner, Ulrike Müller, Carolina Punset, Frédérique Ries
ECR	Jørn Dohrmann, Arne Gericke
EFDD	Eleonora Evi
GUE/NGL	Lynn Boylan, Younous Omarjee
NI	Zoltán Balczó
PPE	Pilar Ayuso, Ivo Belet, Birgit Collin-Langen, Arnaud Danjean, Karl-Heinz Florenz, Francesc Gambús, Elisabetta Gardini, Jens Gieseke, Françoise Grossetête, György Hölvényi, Peter Liese, Norbert Lins, Sirpa Pietikäinen, Renate Sommer, Ivica Tolić, Adina-Ioana Vălean, Wim van de Camp
S&D	Biljana Borzan, Soledad Cabezón Ruiz, Nessa Childers, Miriam Dalli, Ismail Ertug, Jytte Guteland, Jo Leinen, Susanne Melior, Pavel Poc Tiemo Wölken, Flavio Zanonato, Carlos Zorrinho
VERTS/ALE	Margrete Auken, Bas Eickhout, Benedek Jávor, Davor Škrlec, Bart Staes

4	-
ECR	Julie Girling, Urszula Krupa, Bolesław G. Piecha, Jadwiga Wiśniewska

3	0
ECR	Mark Demesmaeker
ENF	Mireille D'Ornano, Jean-François Jalkh

INFORMATION ON ADOPTION IN COMMITTEE RESPONSIBLE

Date adopted	2.10.2017
Result of final vote	+: 21 -: 1 0: 2
Members present for the final vote	Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Jean-Marie Cavada, Rosa Estaràs Ferragut, Laura Ferrara, Mary Honeyball, Sylvia-Yvonne Kaufmann, Gilles Lebreton, Jiří Maštálka, Emil Radev, Julia Reda, Evelyn Regner, Pavel Svoboda, József Szájer, Axel Voss, Tadeusz Zwiefka
Substitutes present for the final vote	Isabella Adinolfi, Angel Dzhambazki, Jens Rohde, Virginie Rozière, Tiemo Wölken
Substitutes under Rule 200(2) present for the final vote	Kateřina Konečná, Jens Nilsson

FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE

21	+
ALDE	Jean-Marie Cavada, Jens Rohde
EFDD	Joëlle Bergeron, Laura Ferrara
GUE/NGL	Kateřina Konečná, Jiří Maštálka
PPE	Rosa Estaràs Ferragut, Emil Radev, Pavel Svoboda, József Szájer, Axel Voss, Francis Zammit Dimech, Tadeusz Zwiefka
S&D	Mary Honeyball, Sylvia-Yvonne Kaufmann, Jens Nilsson, Evelyn Regner, Virginie Rozière, Tiemo Wölken
Verts/ALE	Max Andersson, Julia Reda

1	-
ECR	Angel Dzhambazki

2	0
ENF	Marie-Christine Boutonnet, Gilles Lebreton

Key to symbols:

+ : in favour

- : against

0 : abstention