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DRAFT 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 ‘Environmental Liability Directive’ or ‘ELD’)
(2016/2251(INI))

Committee on Legal Affairs

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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;

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.

- a 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 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 ‘Environmental Liability Directive’ or ‘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 (A8-0000/2017),
 - A. whereas the EU seeks to ensure its citizens have a high level of health protection and improvement of environmental quality;
 - B. whereas Article 191(2) TFEU stipulates that Union policy on the environment shall aim at a high level of protection and is based on the ‘polluter pays’ principle;
 - C. whereas Article 192 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;
 - D. 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;
 - E. whereas the current scope of the ELD concerns solely environmental damage caused by operators to biodiversity (protected species and natural habitats), water and the land;
 - F. whereas new scientific findings show that pollution from industrial activities can affect the human body in hitherto unsuspected ways and that this endangers biological and bio-evolutionary balances;
- 1. Acknowledges the importance of the Commission’s studies and reports on the implementation of the ELD;
- 2. Observes with concern that the findings of those reports give an alarming picture of the actual implementation of the ELD;

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, according to the Commission report, the transposition of the ELD is currently totally disparate in both legal and practical terms and that further measures are required to enable regulatory standardisation to take place across the EU;
- 5. Notes that this lack of uniformity is due also to the generic nature of the ELD, which was drawn up along the lines of the framework directive model;
- 6. Points out that, in spite of the ELD’s extreme flexibility, seven Member States have yet

¹ See judgments *ERG et al*, ECLI:EU:C:2010:126, paragraph 45; *ERG et al*, EU:C:2010:127, paragraph 38, and the *Buzzi Unicem and Others* order in Joined Cases C-478/08 and C-479/08, ECLI:EU:C:2010:129, paragraph 35.

to resolve a number of non-compliance issues;

7. Notes the abnormal inconsistency in the reporting of cases of environmental damage by the Member States, which is probably due to the habit of applying 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;
10. 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 parties¹;
11. Notes that the cost of environmental damage for the operators responsible can be reduced through the use of financial security instruments, but also that demand is low due to the insufficient number of cases detected in many Member States, in addition to the lack of clarity regarding certain concepts set out in the directive;
12. 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;
13. Stresses that problems persist regarding the application of the directive to large-scale accidents and the insolvency of economic operators responsible for damage;
14. 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;
15. 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 the reporting of environmental damage;

Suggestions to improve harmonisation of the ELD

16. Calls for the ELD to be reviewed as soon as possible and the definition of ‘environmental damage’ laid down in Article 2 of the directive to be revised;
17. Calls for the Commission to clarify and specify the concept of ‘significance threshold’, in order to standardise the application of the ELD, making it uniform in all Member States;
18. Calls on the Commission to check whether it is possible to extend the scope of the ELD

¹ Judgment of the Court of Justice of the EU 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.

also to damage to the air¹, which can have significant health risks, and to damage caused by electromagnetic pollution²;

19. Calls for the establishment of a European fund for the protection of the environment from damage caused by industrial activity governed by the ELD³, for insolvency risks and only in cases where financial security markets fail;
20. Calls for consideration to be given to the option of including in the ELD a third-party liability regime for damage caused to human health and the environment⁴;
21. Calls for the adoption of a regime for the secondary liability of successors of liable parties;
22. Calls on the Commission to establish a mandatory register for operators who engage in the dangerous activities listed in Annex III and a financial monitoring scheme to ensure the operators are solvent;
23. Calls for the establishment of a European register of cases of environmental damage governed by the ELD;
24. Calls for the extension of the categories of dangerous activities set out in Annex III in order to include all activities that are potentially harmful to the environment and human health;
25. Stresses the importance of a culture of environmental damage prevention, through a systematic information campaign in which Member States should 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 means that could protect them from those risks and of the benefits they could gain from them;
26. Suggests that tax relief or other favourable arrangements be introduced for companies which successfully endeavour to prevent environmental damage;
27. Recommends the establishment of specific independent authorities to be vested with the powers of management and control, including powers 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;
28. Calls on the Commission to step up its training programme for the application of the

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

2 The effects of continuous exposure to electromagnetic fields were considered in a study by STOA, ‘The Physiological and Environmental Effects of Non-Ionising Electromagnetic Radiation - 03-2001’; furthermore, there are still no data available on the effects of long-term exposure to intense electromagnetic fields.

3 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’.

4 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.

ELD for the Member States;

29. Instructs its President to forward this resolution to the Council and the Commission, and to the parliaments and governments of the Member States.