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DRAFT REPORT

on the liability of companies for environmental damage
(2020/2027(INI))

Committee on Legal Affairs

Rapporteur: Antonius Manders

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the liability of companies for environmental damage (2020/2027(INI))

The European Parliament,

- having regard to Directive 2004/35/CE¹ 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’),
- having regard to Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law² (hereinafter the ‘ECD’),
- having regard to the report from the Commission to the Council and the European Parliament of 14 April 2016 under Article 18(2) of Directive 2004/35/CE 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,
- having regard to Article 37 of the Charter of Fundamental Rights of the European Union,
- having regard to the amendment of Directive 2004/35/CE through Directive 2006/21/EC of 15 March 2006 on the management of waste from the extractive industries³, Directive 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide⁴ and Directive 2013/30/EU of 12 June 2013 on safety of offshore oil and gas operations⁵,
- having regard to the Commission Staff Working Document entitled ‘REFIT Evaluation of the Environmental Liability Directive’, which accompanies the report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage,
- 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 the study of its Policy Department for Citizens’ Rights and

¹ OJ L 143, 30.4.2004, p. 56.

² OJ L 328, 6.12.2008, p. 28.

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.

- Constitutional Affairs of May 2020 entitled ‘Environmental liability of companies’⁷,
- having regard to the European Commission study of May 2020 entitled ‘Improving financial security in the context of the Environmental Liability Directive’⁸,
 - having regard to Rule 54 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Development, the Committee on the Environment, Public Health and Food Safety and the Committee on Civil Liberties, Justice and Home Affairs (A9-0000/2020),
- A. whereas the EU’s coordinated environmental strategy encourages cooperation and ensures that EU policies are consistent with each other;
- B. whereas the ELD coexists with other liability instruments and provisions, both at EU and Member State level; whereas incidents that give rise to ELD liabilities may trigger criminal, civil or administrative proceedings in parallel;
- C. whereas the ELD complements main pieces of EU environmental legislation, to which it is directly or indirectly linked, in particular the Habitat Directive⁹, the Birds Directive¹⁰, the Water Framework Directive¹¹, the Marine Strategy Framework Directive¹² and the Offshore Safety Directive¹³;
- D. whereas the Commission’s 2016 report on environmental liability advised all Member States to undertake to ‘record data on ELD incidents and publish ELD registers if they have not done so already’¹⁴; whereas, despite this, only seven Member States have a register for ELD cases that is publicly available, while four other Member States have a register that is not public; whereas several Member States collect information covered by other pieces of EU legislation, but not specifically by the ELD, or have registers with a broader or different scope, and whereas several Member States collect data at regional level; whereas 14 Member States have no database of environmental incidents or ELD cases;
- E. whereas it appears that the majority of Member States do not provide for mandatory financial security instruments in their legislation, but several countries do require

⁷ PE 651.698.

⁸ Improving financial security in the context of the Environmental Liability Directive (No 07.0203/2018/789239/SER/ENV.E.4), May 2020.

⁹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

¹⁰ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010, p. 7.

¹¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.

¹² Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy, OJ L 164, 25.6.2008, p. 19.

¹³ Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations, OJ L 178, 28.6.2013, p. 66.

¹⁴ COM(2016)0204, p.10.

them¹⁵;

- F. whereas although sufficient insurance cover is available in most markets, including for complementary and compensatory remediation, demand is generally low due to a lack of reported incidents, sub-optimal enforcement and slower developments in emerging markets¹⁶;
- G. whereas operator insolvency as a consequence of major accidents remains a problem in the EU;
- H. whereas in some cases, corporate board members are aware of activities with a high risk of causing environmental damage, but put profit above responsible behaviour;

General

1. Welcomes the Commission's efforts to assess and bridge gaps in the implementation of the ELD across the Member States;
2. Observes that the discretionary powers set out in the ELD and the weak mechanisms for securing compliance and effective governance at national, regional and local level have led to implementation deficiencies, considerable variability between Member States in the number of cases, and an uneven playing field for operators; is therefore of the opinion that additional efforts are required to ensure regulatory standardisation in the EU and increased public confidence in the effectiveness of EU laws;
3. Welcomes the setting up of the Environmental Compliance and Governance Forum, which brings together professionals with responsibilities in the field of environmental compliance assurance, as a follow up to the 2018 Commission action plan¹⁷ and the 2020-2022 work programme to improve environmental compliance and governance that the forum endorsed in February 2020¹⁸;
4. Regrets that in many Member States, the budgets of environmental inspectorates have stagnated or decreased due to the financial crisis and that even large, well-resourced authorities can find it difficult to independently develop knowledge of the best ways to ensure compliance; is thus of the opinion that stronger support at EU level is needed, for example through accessible information portals, commonly used networks (EU networks for practitioners), best practice information and guidance, additional training programmes, training materials and guidance on skills, as this could increase the pressure on 'black sheep' companies and benefit companies that respect the law;
5. Takes the view that one of the various causes of the insufficient harmonisation of the ELD is the failure to provide for the application of a standard administrative procedure for notifying competent authorities of imminent threats of or actual environmental damage; regrets therefore that there is no obligation to publish such notifications or

¹⁵ Directorate-General for Environment, *Outcome of the Specific Contract 'Support for the REFIT actions for the ELD – phase 2'*, European Commission, Brussels, 2019, p. 17.

¹⁶ REFIT Evaluation of the Environmental Liability Directive, p. 47.

¹⁷ Commission communication of 18 January 2018 on EU actions to improve environmental compliance and governance, COM(2018)0010.

¹⁸ Environmental Compliance and Governance Forum, Endorsed work programme 2020-2022 to improve environmental compliance and governance, European Commission, Brussels, 2020.

information about how cases are dealt with; notes that some Member States have identified this limitation in their national legislation and have consequently set up databases for notifications, incidents and cases; points out, however, that the practice varies greatly from Member State to Member State and is rather limited;

6. Points out that reliable data on environmental incidents giving rise to the application of the ELD or other administrative, civil or criminal instruments should be collected in order to establish whether a combination of different legal instruments could adequately respond to environmental harm, or whether serious gaps still exist that need to be remedied;
7. Underlines that in almost all ELD cases, operators cooperate with administrative authorities to work towards remediation; notes, however, that the average cost of remedial action is EUR 42 000¹⁹, but that costs were substantially higher in a few significant cases; regrets therefore that in those cases, cost recovery was impossible due to the operator's insolvency, and that as a result, costs had to be covered by the state, and indirectly the taxpayer, a phenomenon that has to be avoided in the future;

Recommendations

8. Calls for the ELD to be revised as soon as possible and to be transformed into a fully harmonised regulation in order to achieve a level playing field for EU industry;
9. Is of the opinion that enforcement should be harmonised and that an EU ELD task force made up of highly qualified experts and Commission officials should be created to support the Member States, upon request, with the implementation and enforcement of the directive on the one hand, and to support and advise victims of environmental damage on the available options for legal action at EU level on the other (comparable to SOLVIT);
10. Believes that most definitions in the ELD should be further clarified to make the directive fair and clear to all stakeholders and to keep pace with the rapid evolution of pollutants; welcomes therefore the current efforts to develop a common understanding document (CUD) on key ELD definitions and concepts; regrets, however, that the Commission and the ELD government expert groups did not reach an agreement on its format, meaning that the CUD remains a document produced by the consultancy which was hired by the Commission to support the implementation of the 2017-2020 Multi-annual ELD Work Programme;
11. Asks the Commission to undertake a study to establish whether extending the scope of the ELD to align it with other pieces of EU legislation, including the ECD, could limit short- and long-term damage to the environment, human health and air quality; asks the Commission, furthermore, to assess whether the precautionary principle approach properly presupposes potentially dangerous risks or effects;
12. Calls on the Commission to assess whether it would be appropriate to introduce parental

¹⁹ Policy Department for Citizens' Rights and Constitutional Affairs, Environmental liability of companies, European Parliament, Brussels, 2020, p. 110.

and chain liability for damage caused to human health and the environment²⁰;

13. Is of the opinion that the optional permit and state-of-the art defences should only be maintained when a company can prove that it could not have known about the danger of its activity (reversed burden of proof);
14. Calls on the Commission to align the ELD with civil liability legislation for corporate boards in cases where a corporate board has taken irresponsible decisions causing environmental damage or when it was aware of, but did nothing to prevent, polluting activities carried out to maximise the profit of the company and increase the bonuses of its members²¹;
15. Asks the Commission to look into the possibility of introducing a mandatory financial security system (covering insurance, bank guarantees, company pools and bonds or funds) with a maximum threshold per case, aiming to prevent taxpayers from having to bear the costs resulting from remediation of environmental damage; asks the Commission, in addition, to develop a harmonised EU methodology for calculating the maximum liability threshold, taking into account the activity and the impact on the environment;
16. Considers that, given the purpose of the ELD is to prevent and remedy environmental damage, a future regulation (Environmental Liability Regulation) should be applicable to all companies that operate in the EU, regardless of where they have been incorporated or where they are based, and that a holistic approach and reciprocity are necessary to meet the needs of companies in a global economy;
17. Is of the opinion that in cases of extremely widespread pollution, not just environmental liability instruments, but a multitude of instruments, including administrative measures, financial penalties and in some cases criminal prosecution, should be applied to remedy the problem;
18. Calls on the Commission to come forward with a proposal for environmental inspections at the EU level without further delay, as proposed by the Environmental Compliance and Governance Forum in action nine of its work programme, but is of the opinion that a recommendation to establish minimum criteria for environmental inspections is not enough;

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19. Instructs its President to forward this resolution to the Council and the Commission.

²⁰ See, for instance, Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel NV and Others v Commission of the European Communities*, C-97/08 B, ECLI:EU:C:2009:536.

²¹ E.g. the 'dieselgate' scandal and the case of the CEO of Volkswagen.

EXPLANATORY STATEMENT

With the ELD dating back to 2004, the European Parliament aims with this own initiative report to identify areas of possible improvement and to make specific recommendations to be taken up by the European Commission in its future legislative proposals. These proposals should among others aspects, be aimed at the prevention of environmental damage by reducing risks, strengthening the precautionary principle and the polluter pays principle, creating a level playing field for businesses and ensuring tax payers do not bear the cost for environmental damage. Overall, the ambition should be to balance environmental and business interests.

Position of the Rapporteur

Significant differences exist in the Member States when it comes to the implementation and the enforcement of the ELD. This prevents a level playing field in the Internal Market, makes it unnecessarily hard and costly to navigate for businesses and limits the effective prevention and reversal of environmental damage. Therefore, the rapporteur is of the opinion that the ELD should be transformed into a fully harmonised regulation. During a workshop on the ELD in the JURI Committee on 27 October 2020, multiple experts on the topic confirmed this as a viable option.¹

To support the Member States, upon their request, with the implementation and enforcement of the ELD, the Commission should consider creating an *EU ELD-taskforce* consisting of highly qualified experts. The *EU ELD-taskforce* could also offer support and advice to harmed individuals (comparable to SOLVIT) on the available options for legal action at EU-level in case of environmental damage.

The Commission should also assess the need for the potential introduction of a mandatory financial security system with the aim of ensuring that tax payers do not bear the cost of environmental damage in case of company insolvency.

For the same reason, the Commission should assess the appropriateness of introducing parental company and supply chain liabilities aimed at reducing risks.

Additionally, the ELD should apply to all companies operating in the Internal Market, regardless of where they have been incorporated or of where they are actually based. Reciprocity is necessary to prevent unfair competition and meet the needs of companies in a global economy. Combined with creating a level playing field in the Internal Market, these were the most frequent demands from the industry representatives to whom the rapporteur spoke.

The Commission should examine if it is necessary and possible to extend the scope of the ELD to align it with other EU-legislation and to have a holistic approach in avoiding long and short-term damage to environment, human health and air quality, and to assess whether the precautionary principle approach properly presupposes potentially dangerous risks or effects.

¹ <https://www.europarl.europa.eu/committees/en/workshop-on-liability-of-companies-for-e/product-details/20201023WKS03021>.

Furthermore, the rapporteur believes that the definitions of the ELD should be clarified to make the ELD fair and clear to all stakeholders and to keep pace with the rapid evolution of pollutants.

What is more, as far as the optional permit and state-of-the art defences are concerned, the rapporteur is of the opinion that in cases of foreseeability, or if company scientists should have known better, that these defences should only remain if the company can prove that they could not have known the danger of their activity (reversed burden of proof).

The ELD should be aligned with civil liability legislation for company board members, who cause environmental damage through irresponsible decisions, as in the Volkswagen case (the so-called “Dieselgate scandal”).

Finally, in cases of extremely large pollution, not just environmental liability instruments, but a multitude of instruments including administrative measures, financial penalties and in some cases criminal prosecution should be possible to be applied as remedies.