

Environment: liability with regard to the prevention and remedying of environmental damage

2002/0021(COD) - 12/10/2010 - Follow-up document

This report is based on Article 14(2) of Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage(ELD). It assesses the effectiveness of the Directive in terms of actual remediation of environmental damage and the availability at reasonable costs of, and conditions for, financial security for the activities listed in its Annex III.

The main objective of ELD is to prevent and remedy ‘environmental damage’. This is defined as damage to protected species and natural habitats (nature), damage to water and damage to land (soil). The liable party is in principle the ‘operator’ who carries out occupational activities. Operators who carry out certain dangerous activities are strictly liable (without fault) for environmental damage. Operators carrying out other occupational activities are liable for any fault-based damage they cause to nature.

Operators have to take preventive action if there is an imminent threat of environmental damage. They are likewise under an obligation to remedy environmental damage once it has occurred and to bear the costs (‘polluter pays’).

Transposition and implementation of the ELD: the ELD transposition was finalised on 1 July 2010. The three-year delay in transposing the Directive means that little practical experience is available yet on its implementation. Available information **does not yet allow for concrete conclusions to be drawn about the effectiveness of the Directive** in remedying environmental damage.

Measures to be taken to improve the application of the Directive: the results of the studies carried out for this report and the experience gained with the implementation of the ELD indicate that several measures can be undertaken to improve the implementation and effectiveness of the Directive:

- promote **information exchange and communication** between the key stakeholders (operators, competent authorities, financial security providers, industry associations, government experts, NGOs and the Commission);
- industry associations, financial security associations, and the competent authorities implementing the Directive should continue to **promote awareness** of individual operators and financial security providers through awareness-raising actions;
- develop further **interpretation guidance** on the application of the ELD, in particular possible **guidelines at EU level** on its Annex II. Key definitions and concepts, such as ‘environmental damage’, ‘significant damage’, ‘baseline condition’, where there is divergence in national implementation, will be discussed in the environmental liability group of government experts and should be clarified and evenly applied;
- Member States are advised to **establish records or registers** of ELD cases.

Financial security: the report looks at the issue of financial security. To do this, the response of the financial sector was analysed and alternative options for financial security were assessed, based on information provided by the insurance and re-insurance industry on available ELD insurance products and coverage in the EU market. The ELD leaves Member States to decide whether to introduce a system of mandatory financial security at national level.

Because of the lack of practical experience in the application of the ELD, the Commission concludes that there is **not sufficient justification at the present time for introducing a harmonised system of mandatory financial security**. Developments in those Member States that have opted for mandatory financial security, including the gradual approach, and in the Member States that have not introduced obligatory financial security, will have to be further monitored before reliable conclusions can be drawn. The Commission will also actively monitor recent developments such as the oil spill in the Gulf of Mexico, which may provide the justification for an initiative in this area.

The Commission will re-examine the option of mandatory financial security possibly even before the **review of the Directive planned for 2014**.

With regard to the **general review of the ELD** foreseen for 2013/2014, the evaluation on a continuous basis of the possible earlier introduction of the following corresponding measures will be launched without delay:

- **the scope of the Directive**: while the ELD covers specific environmental damage, mainly on land territory, the coverage of the marine environment is incomplete. Damage to the marine environment due to oil spills caused by oil drilling activities is therefore not fully addressed by the present ELD provisions;
- **the divergent national transposing rules** potentially create difficulties, for example, to financial security providers who have to modify generic products to fit the requirements of each Member State where they are provided. A mandatory harmonised EU system for financial security for the ELD would have a greater chance of success if there was less divergence in the different national implementation provisions;
- the uneven application of the **permit and state of the art defences** by Member States;
- the uneven extension of the scope to cover **damage to species and natural habitats** protected under domestic legislation.

The sufficiency of actual financial ceilings set for established financial security instruments with regard to potential large scale accidents. In this context, the review will aim at discovering the most efficient ways of ensuring sufficient financial resources in case of large scale incidents that involve responsible parties with mediocre or even low financial capacity.