

Position paper on the Environmental Liability Directive

July 2022

The Environmental Liability Directive (ELD) has not achieved its intended effect of preventing and remediating environmental damage by holding operators responsible and implementing the 'Polluter Pays Principle'. The EEB supports the steps the Commission is taking towards revising the outdated and ineffective wording of the ELD. This position paper has the aim of addressing the main shortcomings of the current text and setting forth some recommendations for improvement of this legal instrument, to make it fit for purpose.

The Polluter Pays Principle and Article 8(4)(a) - the "permit defence"

The Polluter Pays Principle has been a largely disregarded and inconsistently applied legal duty, and polluters have been found to not pay for the damage they cause. It is also concerning that despite the Polluter Pays Principle being one of the key principles underlying the EU's environmental policy and enshrined in the TFEU, the EU budget is sometimes used to fund clean-up actions that should have been borne by polluters, as shown by a recent report of the European Court of Auditors. A proper enforcement of the Polluter Pays Principle is crucial to, namely, ensure the best value of public funds used in the common interest.

To implement the Polluter Pays Principle and to make operators responsible for environmental damage they cause on the basis of strict liability, as well as creating strong incentives to prevent such damage from occurring in the first place, the threat of liability must be a real one. However, the current wording of the ELD creates damage thresholds that are excessively high and unclear - the different interpretations and the application of the 'significance threshold' for environmental damage has been identified as main reason for the uneven application of the Directive.¹ **More plainly, the present formulation of the Polluter Pays Principle in the ELD excludes the real damages of environmental pollution caused by the operators/ polluters.**

The human cost of damages caused by air pollution has been well established since the development of the impact pathway approach framework (under ExternE) and the subsequent adoption of the damage costs under the European commission's CAFE programme in 2005. In 2021 the EEA estimated the societal cost of air pollution to be at least € 277 billion.

All these assessments are made from data available from the reporting under the EPRT and other relevant sectoral reporting mechanisms, indicating the fact that most of these emissions are '*permitted emissions*' allowed under an operating permit.

Article 8(4) of the ELD exempts the polluter from most of the damages caused to the environment, through such permits. In the case of air pollution, because the environmental damages caused by '*permitted pollution*' is far larger than accidental pollution, most of the environmental damage is in effect exempted under the ELD. By allowing Member States to exempt the polluter from liability when causing damage to health or the environment, the ELD transfers the cost of this damage onto the bearer, taxpayers and wider society. In this sense the ELD is not in line with the objectives of the Zero pollution action plan which requires a better implementation of the Polluter Pays Principle.

¹ [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 \(COM/2016/0204 final\)](#), p 5

While this approach to exempt permitted pollution from the ELD could have been acceptable at a time when there were no viable technologies for climate compliant and pollution free industrial production, it no longer holds in a wide range of sectors, specifically power generation and transportation.

- Therefore, the existence of an exemption from 'permitted pollution' under the ELD significantly affects the growth of climate and environmentally friendly industrial production processes by continuing to incentivise environmentally and socially damaging industrial processes. This is in conflict with the objectives of the [European Green Deal](#), which also aims to implement the Paris Agreement, and the defence in Article 8(4)(a) should be removed from the Directive.

Precautionary Principle, preventive action and Article 8(4)(b) – the “state-of-the-art defence”

The Precautionary Principle and the principle that preventive action are core principles of EU environmental law (Article 191(2) TFEU) are not properly incorporated in the current text of the ELD.

- The ELD should reiterate the importance of applying the Precautionary Principle in relation to any uncertainties surrounding the determination of whether or not damage meets the required 'significance' thresholds, as the need to meet 'significance' thresholds is a major obstacle to the ELD's effective implementation in relation to all types of environmental damage²;

- The application of liability should be further extended by imposing a duty on competent authorities to identify cases of environmental damage and to require operators to take preventive and remedial measures;

- The current Article 8(4)(b) of the ELD shields companies from liability if they can demonstrate that their conduct was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time. **This defence has limited the effectiveness of the ELD and inherently limited accountability³. It has undermined the implementation of the Precautionary Principle and amounts to the introduction of a fault-based liability regime through the back door, in relation to the obligation to pay for the costs of preventive and remedial measures. A revised Directive should extend the application of liability by removing the defences in Article 8(4)(b) too.**

Financial guarantees and Article 14

The ELD does not require Member States to make financial security instruments mandatory, even though these may be one of the most effective ways to encourage stakeholders to apply the ELD rules⁴. The use of mandatory financial security instruments incentivises the operators to reduce environmental damage by forcing a precautionary approach while also providing a safety net when environmental damages occur. The risk that companies go bankrupt before they can be held accountable for the damage they have inflicted is high, and a [study](#) referenced by the [European Parliament](#) concluded that the problem of insolvency can be addressed through mandatory financial security instruments.

The study also raises a valid argument for mandatory financial guarantees for fully or partially state-owned operators since the financial security mechanisms for such operators are usually less stringent

² Ibid.

³ WWF and BirdLife (July 2004) The European Directive on Environmental Liability – “Polluter Pays”: from principle to practice? An Environmental NGO commentary on the Environmental Liability Directive: its adoption at EU level and what it means for the future, p. 7, paragraph b) and p.8

⁴ improving implementation and the evidence base for the ELD https://ec.europa.eu/environment/legal/liability/pdf/Main_Report.pdf, p. 198

than private businesses. This is especially true for coal mining companies, which are largely state owned in many member states.

- The ELD should recommend mandatory financial guarantees to reduce the vulnerability of an operator's insolvency and to prevent parent companies from escaping liability. The present [trend](#) of including the cost of pending liabilities into the closure aid for coal companies sends the wrong signal that implementing a Paris compliant sectoral transition always includes public financing of private liabilities. A mandatory financial guarantee stemming from the ELD can at least prevent or reduce the cost of such actions while phasing out carbon intensive industrial sectors in the future.

Scope of liability and the burden of proof

The under-usage of the ELD can be partly attributed to its narrowly defined scope⁵. Under the ELD, liability (except for biodiversity damage in certain circumstances) only affects operators of activities listed in Annex III of the Directive. The list does not cover fracking or oil pipelines, coal mining, aquaculture or agriculture, for example, or operators of all of the activities/projects listed in the annexes of the EIA Directive. This necessarily restricts the scope of the ELD, thereby potentially making it less effective in meeting its stated objectives.

Another deep procedural legal problem is that, while the burden of proof keeps resting on the shoulders of the national environmental authorities, instead of being shifted to the side of the responsible operators, the tremendous burden of financial and other resources constitutes a big handicap⁶.

- A revision of the Directive should impose strict liability for all environmental damage and biodiversity damage caused by any occupational activity (abolishing Annex III) in order for the ELD to be fit for purpose and keep up with the pervasive and prevalent reality of environmental destruction;

- A liability regime should be extended to include public authorities, as well as parental and chain liability for damage caused to human health and the environment, so as to also include subsidiaries active outside the EU and the environmental damage they may cause.

Harmonisation

It is more favourable for operators to report environmental pollution under other laws than under the national laws transposing the ELD⁷, because under other laws they have a chance to pay only a fine for the pollution, and will not have to take remedial action, or not as thoroughly as under the ELD. This issue underlines the necessity of better harmonisation of national ELD laws with the whole environmental law acquis, as well as into the relevant other fields of administrative law, as the [European Parliament](#) recommended.

- A revision should update and align the ELD with other pieces of EU legislation designed to protect the environment, so as to provide legal certainty and to ensure policy convergence and

⁵ Faure, M. G. (2022). [Environmental Liability of Companies in Europe. Arizona Journal of International and Comparative Law](#), 39(1), 1-152

⁶ Justice and Environment, [Observations on the Implementation of the Environmental Liability Directive. Environmental Liability](#), p. 7

⁷ In Slovakia, for example, if environmental pollution or damage occurs, the operators almost always submit notifications to authorities that aren't the competent ones under the ELD (district authorities) and according to other laws – they submit notifications to, for example, the police or the Slovak Environmental Inspectorate. The [study](#) on implementation commissioned by the Commission (p. 131) found that while the reason for this may also be the vagueness and ambiguity of the definition of "environmental damage.", another factor in the reluctance to report an ELD case is that it is less costly for the operator to report environmental pollution under other laws according to which they will only be obliged to pay a fine for the pollution and not to take remedial action.

coherence with sectoral legislation with liability implications, such as the proposed Deforestation Regulation, the Industrial Emissions Directive review, the Zero Pollution Action Plan, as well as the revision of the CEEAG, as well as ongoing files such as the revision of the Environmental Crimes Directive and the Corporate Sustainable Due Diligence Directive (proposal).

Access to information, public participation and access to justice

Competent authorities are not required to identify instances of environmental damage or take action against operators of their own accord. This entails a reliance on either operators or environmental organisations being sufficiently informed and resourced to apply and enforce the Directive, creating a danger of a complete lack of application and enforcement of the Directive due to a governance vacuum. Therefore, **the public rights of access to information guaranteed to EU citizens under the Aarhus Convention must be expressly incorporated into the ELD. Moreover, although there is already a right for the public to access justice in the current Directive, the poor implementation of this right across the EU generally has meant that access to justice under the ELD is not always guaranteed.**