

# Procedure file

Basic information	
COD - Ordinary legislative procedure (ex-codecision procedure) Directive	2002/0021(COD) Procedure completed
Environment: liability with regard to the prevention and remedying of environmental damage	
Amended by <a href="#">2003/0107(COD)</a> Amended by <a href="#">2008/0015(COD)</a> Amended by <a href="#">2011/0309(COD)</a> See also <a href="#">2016/2251(INI)</a> Amended by <a href="#">2018/0205(COD)</a>	
Subject 3.70.16 Law and environment, liability	

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	<b>DELE</b> EP Delegation to Conciliation Committee		15/01/2004
		ELDR <a href="#">MANDERS Antonius</a>	
	Former committee responsible		
	<b>JURI</b> Legal Affairs and Internal Market		29/02/2000
		ELDR <a href="#">MANDERS Antonius</a>	
	<b>JURI</b> Legal Affairs and Internal Market		29/02/2000
		ELDR <a href="#">MANDERS Antonius</a>	
	Former committee for opinion		
	<b>ENVI</b> Environment, Public Health, Consumer Policy (Associated committee)		27/03/2002
	GUE/NGL <a href="#">PAPAYANNAKIS Mihail</a>		
<b>ECON</b> Economic and Monetary Affairs		15/04/2002	
	V/ALE <a href="#">LIPIETZ Alain</a>		
<b>ITRE</b> Industry, External Trade, Research, Energy		25/03/2003	
	PSE <a href="#">WESTENDORP Y CABEZA Carlos</a>		
<b>PETI</b> Petitions		21/03/2002	
	PPE-DE <a href="#">GEMELLI Vitaliano</a>		
Council of the European Union	Council configuration	Meeting	Date
	<a href="#">Justice and Home Affairs (JHA)</a>	<a href="#">2574</a>	30/03/2004
	<a href="#">Economic and Financial Affairs ECOFIN</a>	<a href="#">2557</a>	20/01/2004
	<a href="#">Economic and Financial Affairs ECOFIN</a>	<a href="#">2513</a>	03/06/2003

European Commission	<a href="#">Competitiveness (Internal Market, Industry, Research and Space)</a>	<a href="#">2510</a>	19/05/2003
	<a href="#">Environment</a>	<a href="#">2491</a>	04/03/2003
	<a href="#">Environment</a>	<a href="#">2473</a>	09/12/2002
	<a href="#">Environment</a>	<a href="#">2457</a>	17/10/2002
	<a href="#">Environment</a>	<a href="#">2439</a>	25/06/2002
	<a href="#">Environment</a>	<a href="#">2413</a>	04/03/2002
	Commission DG	Commissioner	
	<a href="#">Environment</a>		

## Key events

23/01/2002	Legislative proposal published	<a href="#">COM(2002)0017</a>	Summary
04/03/2002	Debate in Council	<a href="#">2413</a>	
04/03/2002	Debate in Council	<a href="#">2413</a>	Summary
11/03/2002	Committee referral announced in Parliament, 1st reading		
25/06/2002	Debate in Council	<a href="#">2439</a>	Summary
17/10/2002	Debate in Council	<a href="#">2457</a>	
09/12/2002	Debate in Council	<a href="#">2473</a>	
04/03/2003	Debate in Council	<a href="#">2491</a>	Summary
29/04/2003	Vote in committee, 1st reading		Summary
29/04/2003	Committee report tabled for plenary, 1st reading	<a href="#">A5-0145/2003</a>	
13/05/2003	Debate in Parliament		
14/05/2003	Decision by Parliament, 1st reading	<a href="#">T5-0211/2003</a>	Summary
19/05/2003	Debate in Council	<a href="#">2510</a>	Summary
03/06/2003	Debate in Council	<a href="#">2513</a>	
18/09/2003	Council position published	<a href="#">10933/5/2003</a>	Summary
24/09/2003	Committee referral announced in Parliament, 2nd reading		
02/12/2003	Vote in committee, 2nd reading		Summary
02/12/2003	Committee recommendation tabled for plenary, 2nd reading	<a href="#">A5-0461/2003</a>	
15/12/2003	Debate in Parliament		
17/12/2003	Decision by Parliament, 2nd reading	<a href="#">T5-0575/2003</a>	Summary
20/01/2004	Parliament's amendments rejected by Council		
19/02/2004	Report tabled for plenary, 3rd reading	<a href="#">A5-0139/2004</a>	
23/02/2004	Formal meeting of Conciliation Committee		

23/02/2004	Final decision by Conciliation Committee		Summary
10/03/2004	Joint text approved by Conciliation Committee co-chairs	<a href="#">3622/2004</a>	
30/03/2004	Debate in Parliament		
30/03/2004	Decision by Council, 3rd reading		
31/03/2004	Decision by Parliament, 3rd reading	<a href="#">T5-0233/2004</a>	Summary
21/04/2004	Final act signed		
21/04/2004	End of procedure in Parliament		
30/04/2004	Final act published in Official Journal		

### Technical information

Procedure reference	2002/0021(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
	Amended by <a href="#">2003/0107(COD)</a> Amended by <a href="#">2008/0015(COD)</a> Amended by <a href="#">2011/0309(COD)</a> See also <a href="#">2016/2251(INI)</a> Amended by <a href="#">2018/0205(COD)</a>
Legal basis	EC Treaty (after Amsterdam) EC 175-p1; Rules of Procedure EP 57
Stage reached in procedure	Procedure completed
Committee dossier	CODE/5/20613

### Documentation gateway

Legislative proposal	<a href="#">COM(2002)0017</a> , <a href="#">OJ C 151 25.06.2002, p. 0132 E</a>	23/01/2002	EC	Summary
Economic and Social Committee: opinion, report	<a href="#">CES0868/2002</a> <a href="#">OJ C 241 07.10.2002, p. 0162</a>	17/07/2002	ESC	
Committee report tabled for plenary, 1st reading/single reading	<a href="#">A5-0145/2003</a>	29/04/2003	EP	
Text adopted by Parliament, 1st reading/single reading	<a href="#">T5-0211/2003</a> OJ C 067 17.03.2004, p. 0137-0185 E	14/05/2003	EP	Summary
Council statement on its position	<a href="#">11548/2003</a>	25/07/2003	CSL	
Council position	<a href="#">10933/5/2003</a> <a href="#">OJ C 277 18.11.2003, p. 0010-0030 E</a>	18/09/2003	CSL	Summary
Commission communication on Council's position	<a href="#">SEC(2003)1027</a>	19/09/2003	EC	Summary
Committee recommendation tabled for plenary, 2nd reading	<a href="#">A5-0461/2003</a>	02/12/2003	EP	

Text adopted by Parliament, 2nd reading	<a href="#">T5-0575/2003</a> OJ C 091 15.04.2004, p. 0132-0232 E	17/12/2003	EP	Summary
Commission opinion on Parliament's position at 2nd reading	<a href="#">COM(2004)0055</a>	26/01/2004	EC	Summary
Report tabled for plenary by Parliament delegation to Conciliation Committee, 3rd reading	<a href="#">A5-0139/2004</a>	19/02/2004	EP	
Joint text approved by Conciliation Committee co-chairs	<a href="#">3622/2004</a>	10/03/2004	CSL/EP	
Text adopted by Parliament, 3rd reading	<a href="#">T5-0233/2004</a> OJ C 103 29.04.2004, p. 0449-0555 E	31/03/2004	EP	Summary
Follow-up document	<a href="#">COM(2010)0581</a>	12/10/2010	EC	Summary
Follow-up document	<a href="#">COM(2016)0204</a>	14/04/2016	EC	
Follow-up document	SWD(2016)0121	14/04/2016	EC	
Follow-up document	SWD(2016)0122	14/04/2016	EC	

#### Additional information

European Commission

[EUR-Lex](#)

#### Final act

[Directive 2004/35](#)  
[OJ L 143 30.04.2004, p. 0056-0075](#) Summary

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

**PURPOSE:** to create a regulatory framework establishing environmental liability with regard to the prevention and remedying of environmental damage. **CONTENT:** the principle, according to which the polluter should pay, is at the root of Community environmental policy. The drafting of this Commission proposal to finally see this principle securely applied in the EU under strict legal conditions has been a long time in the making and dates back to the 1993 Green Paper on Environmental Liability, Parliamentary resolutions on this matter and the 2000 White Paper on Environmental Liability. Enhanced EU harmonisation and regulatory control in this field is justified on the grounds that: - Not all Member States have adopted legislation to address the problem. (Portugal and Greece have no specific legislation on contaminated sites). - Not all Member States' legislation adequately covers the primary objective of site clean-up. - Without a harmonised framework at Community level, economic actors could exploit differences in member states' approaches and engage in artificial legal constructions. For example, spin-off risky operation to exploit liability loop-holes. Essentially, the proposal aims to establish a framework whereby environmental damage would be prevented or remedied through forcing operators to consider the costs of cleaning up polluted sites where there is a clear case of negligence on their behalf. On the basis of the subsidiarity and proportionality principles, the Directive leaves it open to the member states to decide when measures should be taken by the relevant operator or by the competent authorities or by a third party on their behalf. The specific aim of the proposed Directive is to determine certain rules on restoring damaged sites and to identify appropriate restorative measures so that a minimum common basis is shared by all EU Member States. Whenever possible, and in accordance with the "polluter pays" principle, the operator, who has caused the damage or who is faced with an imminent threat of such damage occurring, must ultimately bear the cost associated with those measures. Had the measures been taken by the competent authorities or by a third party on their behalf, the cost of so doing must then be recovered from the operator. Significantly, the proposed Directive provides, in cases where proprietary rights can not be established, that qualified entities, or persons who have a sufficient interest (e.g. environmental NGOs), may request the competent authority to take appropriate action and possibly challenge their subsequent action or inaction. The proposed Directive hinges on two areas. Firstly, to ensure that site contamination is effectively and efficiently cleared up. Secondly, to arrest the continuing loss of biodiversity in the EU. Concerning the first area namely site contamination, the Commission estimates that some 300 000 sites in the Community have already been identified as definitely or potentially contaminated. The clean up cost alone has been estimated at between EUR 55 and 106 billion. Since many sites have been classified as "orphan sites" (i.e. where ownership is impossible to determine or else the owners are insolvent) the cost of cleaning it up will come from public finances. This proposal seeks to ensure that liability should, in the future at least, determine who is responsible for contamination. Once that has been determined they should be held liable for the clean-up costs. Concerning the loss of bio-diversity, the Commission notes that existing EU Directives (i.e. the Habitats and Wild Birds Directive) contain no liability provisions whereby the polluter pays principle applies. Currently, few, if any, of the member states fill this void by imposing liability for bio-diversity damage on private parties. Lastly, the Commission has conducted a number of studies to assess the economic impact of the proposal in terms of its benefits and costs. Based on these studies the Commission concludes that imposing liability on operators is an effective tool for the prevention of damage occurring in the first place. This, after all, is one of the main objectives of the Directive. The parties responsible for the

potential damage are encouraged to invest in prevention rather than pay for the higher restoration cost. Importantly, insurance costs are not being made compulsory under the initial proposal - but are strongly encouraged. In response to criticism that it would be impossible to insure clean-up costs, the Commission refers to a number of studies, which indicate unequivocally that insurers are both prepared, indeed already offer, insurance for this kind of legislation. Much of the studies are based on research in the United States where insurers have been offering comprehensive deals for the past twenty years.?

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

---

The Council held a public debate on the proposal for a Directive on environmental liability with regard to the prevention and remedying of environmental damage. The debate confirmed the interest of all the delegations for the scope of the directive to be defined with precision, its eventual extension to other types of damage (for example damage caused by persons and/or their possessions and damage caused by biological diversity by GMO) being envisaged on the basis of the environmental parameters. A majority of delegations believe that the derogations proposed concerning liability must be strictly defined, and that the establishment of joint rules concerning financial guarantees could contribute to the realisation of the objectives of the Directive in the area of environmental protection.?

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

---

The Council debated two key issues central to the proposal for a Directive on environmental liability and the prevention and remedying of environmental damage. The debate provided political guidance for future work on compromises proposed by the Presidency with regard to: - the voluntary or mandatory nature of financial guarantees for environmental risk. The Presidency compromise proposes that a minimum level (yet to be determined) of financial guarantees be made compulsory within five years from entry into force for all operators undertaking activities which are considered the most potentially dangerous, with some flexibility allowing Member States to exempt certain small low-risk operators. The debate on this question showed that a majority of delegations agree that some form of financial security should be made mandatory so as to ensure, in practice, that funds are available to undertake the prevention or remedying action required to achieve the objective of better environmental protection. Some concern was also expressed with regard to the availability and affordability of such financial security; - the question of whether the competent authorities of the Member States should bear the subsidiary responsibility for the prevention or remedying of damage when the polluter cannot be identified or is exempt from liability. The Presidency's compromise proposal provides for a "safety net" to cover any possible loopholes or exemptions of responsibility created by the liability regime established to ensure the prevention and remedying of damage. Whilst placing liability firmly on the operator causing the pollution - in accordance with the "polluter pays" principle - it would also require the competent authority to act when the operator cannot be identified or is for some reason exempt under the Directive. Some flexibility, which may have to be further refined, is provided to allow the authorities to choose not to act in certain instances when the costs are disproportionate to the potential environmental benefit and the damage is not serious. The debate showed that for some delegations such an obligation would be too broad, and that final views on this issue and the nature of the financial guarantee system cannot be fully expressed until the other outstanding issues of the proposal have been given further consideration and a complete package is proposed. Nevertheless, a majority of delegations considered that the proposed compromise constitutes an acceptable basis for further work, and that in order to achieve the maximum environmental benefit, some form of subsidiary liability would have to remain with the Member States.?

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

---

The Council held a policy debate on the proposal for a Directive concerning environmental liability with regard to the prevention and remedying of environmental damage. Key questions addressed by Ministers during the discussion concerned: - the envisaged harmonisation of financial security provisions (e.g. mandatory insurance for operators and phased implementation of the financial security system); - possible exemptions for operators (e.g. special permit for certain activities when carried out in a scientific and technically sound manner and mitigating factors); - the scope of the proposal (definition of protected species and natural habitats). Member States concentrated their interventions particularly on the nature of the financial provisions and on the definition of bio-diversity. Many delegations expressed their wish for a compulsory financial system to be considered in order to implement the "polluter should pay" principle which is at the base of Community policy in the environmental field. Some delegations were favourable to a voluntary financial system in order to take account, inter alia, the need for further analysis of the capacity of the insurance market to deliver appropriate and economically feasible products to operators. Concerning the scope of the proposal, most delegations expressed their wish to see included a broader definition of protected species and natural habitats. A few delegations wished to limit the scope of the proposal to current EU legislation in this field, i.e. Wild Birds and Habitats Directives only. The President concluded that this was a complex issue and that further analysis of the insurance market was needed. She expressed her intention to reach a political agreement on this issue by the end of the Presidency in June 2003.?

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

---

The committee adopted the report by Toine MANDERS (ELDR, NL) tabling a large number of amendments to the proposal under the 1st reading of the codecision procedure. The amendments, adopted in many cases by a narrow majority, sought to create a stricter legislative framework while also striking a better balance between the conflicting interests of industry and environmental actors. One amendment broadened the definitions of "European biodiversity" and "biodiversity damage". Another sought to extend the scope of the directive after a five-year transitional period to a large number of areas currently not included, for example nuclear and sea pollution, which are currently subject to specific international conventions, provided that these conventions have not been ratified by the end of the five-year period by the EC and/or the Member States. MEPs also wanted to make procedures speedier and more effective by requiring those responsible for environmentally harmful actions to take appropriate preventive or restorative measures without waiting for the authorities to request that they do so. A further amendment was aimed at reducing the number of exemptions enabling operators to avoid bearing the costs for any environmental damage they have caused. MEPs also voted to oblige, rather than simply "encourage", Member States to promote financial security systems to cover cases where an operator cannot be held responsible for environmental damage. ?

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

---

The European Parliament adopted a resolution drafted by Toine MANDERS (ELDR, NL) and made several amendments to the Commission's proposal on environmental liability. (Please see the summary dated 29/04/03.) In addition, it made the following principal changes: - the recitals emphasised that there are currently some 300, 000 sites in the Community, which have been identified as definitely or potentially contaminated; - the importance of local conditions must be stressed as far as remedying the damage is concerned. Parliament inserted definitions for "favourable" conservation status of a natural habitat and "favourable" conservation status of a species. Member States must establish and monitor the conservation status of the habitats and species listed in Annexes I, II, and IV of Directive 92/43/EEC; - the definition of "operator" is expanded to include a person who is effectively controlling the operator; - the polluter pays principle requires that a clear causal link is proven between the environmental damage or imminent threat of environmental damage and the act or failure to act of the operator from whom costs are to be recovered. The competent authority is empowered to recover certain costs from the operator where it can prove a clear causal link between the operator's acts or failure to act and the environmental damage or the imminent threat of it; - good agricultural and forestry practice is listed among the exceptions; - five years after the entry into force of the directive, the latter will apply to all environmental damage caused or likely to be caused by the operation of any occupational activity, not just those listed in Annex I; - the Commission must provide a gap analysis after five years, of the relevant conventions and Community legislation. It must then develop proposals to apply the directive to environmental damage caused by marine transport and nuclear pollution to the extent that the relevant conventions do not impose liability for that damage; - the competent authority may instruct operators to take certain actions where there is a threat of environmental damage; - operators have the right of appeal against decisions of the competent authority; - besides the obligation for operators to have insurance cover, Parliament inserted a clause stating that Member States may decide not to apply this provision to low risk activities, and may consider the establishment of thresholds in relation to any insurance requirements. The Commission must make proposals within six years on the thresholds to be set for the minimum financial required according to the different activities covered by Annex I; - the Commission must present proposals on liability for damage caused by GMOs.?

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

---

In accordance with the conclusions of the Brussels European Council, the United Kingdom and French delegations asked the Council to examine developments in the negotiation of the proposal for a Directive on environmental liability, and in particular those aspects which have an impact on European competitiveness from the point of view of the internal market and trade with third countries.?

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

---

The Common Position was adopted by qualified majority, the Austrian, German and Irish delegations in disagreement. The scope of the Directive covers environmental damage to land, water and biodiversity caused by occupational activities (a number of exceptions is foreseen). It does not cover economic loss. The Directive sets out the obligation for operators to take preventive action when there is an imminent threat of damage and to take remedial action in case the damage has occurred - at their own expenses. The Directive differentiates between on the one hand, certain high-risk occupational activities - listed in an Annex - for which all environmental damage is covered and where strict liability applies and, on the other hand, occupational activities other than those listed, for which only damage to protected species and habitats is covered, if the operator is at fault or negligent. Furthermore, the text foresees: the possibility for the interested public to request action, cooperation between Member States in case of transboundary pollution, and the encouragement to develop financial security instruments. The provisions of this Directive are not retroactive, i.e. do not cover damage caused before the date of its implementation. The Council's common position accepts in total or in part 26 out of the 48 amendments to the proposal adopted by the European Parliament at first reading. Concerning the major innovations introduced by the Council: - Definitions : Article 2 on definitions has been streamlined. Some definitions have been deleted, others have been merged and/or moved to the relevant Annex (Annex II on Remedying of environmental damage) without substantially changing the Commission proposal. In relation to the definition of "environmental damage", however, the Council elaborated a number of criteria, now in Annex I to the proposed Directive, to facilitate the assessment of what would constitute a "significant" damage to protected species and natural habitats; - Exceptions : the common position does not exempt damage caused by an emission or event allowed in applicable law, or in the permit or authorisation issued to the operator or damage caused by emissions or activities which were not considered harmful according to the state of the art of scientific and technical knowledge at the time when the emission was released or the activity took place. However, in such cases, Member States may allow the operator not to bear the costs of remedial actions taken pursuant to the Directive where he demonstrates that he was not at fault or negligent. A new paragraph was added taking into account two international instruments on liability for maritime and inland navigation, to allow ship owners to limit their liability under national legislation. - Subsidiary state liability : the obligation for Member States, when the operator can not be identified, does not comply with its obligations or is not required to bear the costs, to ensure that the necessary preventive or remedial measures are taken has been modified. In such cases, according to the common position, the competent authority may decide to take preventive or remedial actions itself. In addition, a differentiation is made between long-term remediation activity and immediate response. In the event of an incident, to limit or prevent further damage, the common position foresees the immediate containment and removal of contaminants. - Cost allocation in case of multiple party causation: Article 9 of the common position is simplified and leaves this subject entirely within the competence of Member States. - Request for action : the common position also covers, with possible adaptations, the cases of imminent threat of damage. - Temporal application: Article 17 of the common position clarifies these provisions. - Reports and review : a new paragraph has been added to Article 18 of the common position listing the points to be reviewed (among others) by the Commission on the basis of the experience gained applying the Directive. Part of Annex VI, on the information to be included in the national reports, has been made optional for Member States.?

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

---

The Common Position is inspired to a certain extent by the willingness of the Council to simplify the procedures and clarify the concepts necessary to the good functioning of an environmental liability regime. The addition of a new Annex I setting out criteria on the basis of which the significance of damage to protected species and habitats should be assessed illustrates this concern. Annex II in the framework of which

remedial measures should be determined has also been restructured and reworded to make it more legible and understandable. If, in certain cases, the Common Position is leaving more discretion to Member States on certain issues, such as in Article 2, paragraphs 1 and 3 on the inclusion or not of habitats and species protected under national law or in Article 9 on multiple party causation, the Common Position goes further than the Commission proposal on other points: all migratory birds are now covered and Article 12 on requests for action now covers, at least in principle, cases of imminent threat of damage. It is now also clarified that international conventions on carrier's liability in the event, inter alia, of marine pollution do not prevail over the future Directive if they are not in force in the Member State concerned. The Commission is now required to include, in its reports reviewing the functioning of the regime, several questions specifically identified, including the issue of financial security, in order to place all the institutions involved in the decision-making process in a better position as to judge which amendment, if any, is needed to guarantee the effectiveness of the liability regime. Unlike the Commission proposal, the Common Position does not exclude, from the scope of the future Directive, damage caused by an emission or event expressly allowed and damage caused by emissions or activities which were not considered harmful according to the state of the art of scientific and technical knowledge at the time when the emission was released or the activity took place. However, in such cases, Member States may allow the operator not to bear the costs of remedial actions provided he demonstrates that the damaging event, emission or activity was covered by any of the above-mentioned circumstances and that he was not at fault or negligent (Article 8, paragraph 4). The point on which the Common Position is most departing from the Commission proposal concerns the issue of "orphan damage", that is those cases in which no operator will remedy environmental damage. The Commission proposal required Member States to find alternative sources of financing; the Common Position now leaves full discretion to Member States to decide to act or not. Although the Commission would have preferred that stricter conditions had been set regarding the subsidiary remedial action by Member States, it can accept the Common Position in the context of an overall agreement. The Commission supports therefore the Common Position. In addition, the Commission acknowledges that the definition of land damage offers less harmonised guidance to Member States than the definitions on water damage and damage to protected species and natural habitats. It recognises that the initiatives it intends to take on soil policy would contribute to a more common approach among Member States. The Commission has, therefore, issued the following statement regarding soil policy: The Commission reiterates its willingness to identify in the forthcoming Thematic Strategy for Soil Protection needs and deliverables related to protection and sustainable use of soil. It also recalls that a legislative initiative on soil monitoring has been scheduled for 2004. It should aim to ensure that a number of measurements on the identified threats in the relevant areas are carried out in a harmonised and coherent way.?

---

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

---

The committee adopted the report by Toine MANDERS (ELDR, NL) amending the Council's common position under the 2nd reading of the codecision procedure: - to prevent distortion of competition between the Member States, there should be uniform liability rules throughout the EU. Whereas the common position stipulated that national regulations on cost allocation should apply in cases of "multiple party causation" (i.e. where environmental damage is caused by more than one operator), the committee said that in such cases the competent authority in the Member State should be obliged to apportion the share of the costs to be borne by each operator "on a fair and reasonable basis"; - cost recovery proceedings should be initiated within 5 years rather than 3 years as proposed; - public authorities should be obliged, and not simply allowed, to take preventive measures if the operator fails to do so where there is an imminent threat of serious environmental damage; - the functioning of the directive should be evaluated after 6 years (rather than 10 as suggested by the Council), so that the legislation can be further harmonised on the basis of best practice. Proposals for amendment should include a clear European standard for definitions, clean-up standards and calculation procedures and a feasibility study on the introduction of an "Environmental Risk Assessment Management System" (ERAM) or other similar systems; - the provisions in the Annex on "compensatory remediation" and compensation for the temporary loss of natural resources should be deleted on the grounds that they would create a kind of system of penalties or criminal damages. This would raise serious problems of monetary valuation, which would make it much harder in practice to apply the new provisions, and also of insurability; - firms should not be required to bear the cost of environmental damage where the damage is caused by emissions or activities that were explicitly authorised or where the potential for damage could not have been known when the emission or activity took place. ?

---

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

---

The European Parliament adopted a resolution based on the draft by Toine MANDERS (ELDR, NL). The majority of the amendments adopted within the Legal Affairs Committee on 02/12/03 (please see the preceding document) were not adopted. The Parliament favoured the Council common position. In practice this means that a further tightening up of the rules governing environmental liability throughout the EU, as proposed by the Legal Affairs Committee, was not supported by the full House. However, Parliament did back an amendment that calls on the Commission to report to the European Parliament and the Council on measures taken by Member States aimed at encouraging the development of financial security instruments and markets, in order to enable operators to use financial guarantees to cover their responsibilities under the Directive. If, however, these instruments are not established, Parliament urges the Commission to submit proposals on a harmonised compulsory financial guarantee for water and soil damage. Nonetheless, Member States will be free to decide not to apply this provision to low risk activities and may consider establishing thresholds in relation to any insurance requirements under these provisions. This goes against the Council common position, which is less inclined towards harmonisation at this level. Parliament also adopted an amendment, which will not allow operators to limit their liability in accordance with national legislation on the Convention on Limitation of Liability for Maritime Claims and the Strasbourg Convention on Limitation of Liability in Inland Navigation. There is a general provision in both of these Conventions which could mean that environmental damage caused by a navigation accident could be effectively excluded from the operation of the directive, which goes against the grain of the directive, as it should be used as an incentive to up-grade national legislation in these fields instead. Lastly, when drafting a report on the proposal modifications, the Commission is called upon to consider the relationship between shipowners' liability and oil receivers' contributions in order to shift responsibility to shipowners. Thus the allocation of financial compensation with regard to liability should be more balanced.?

---

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

---

The European Parliament adopted 4 amendments. The Commission adopted 1 in full and another in principle. It rejected the remaining 2 amendments. Concerning the amendment accepted in full, it specifies further one of the items to be addressed by the Commission in its report on the functioning of the Directive. This specification concerns the relationship between shipowners' liability and oil receivers' contributions in

the context of the review of the application of Article 4(2) and (4) in relation to the exclusion of pollution, covered by the international instruments listed in Annex IV, from the scope of the Directive. As regards the amendment accepted in principle, it specifies that the competent authorities should only take remedial actions "as a means of last resort". The amendments not accepted by the Commission concern the following issues: - deletion of the provision allowing operators to limit their liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988; - requiring the Commission to present proposals for a harmonised compulsory financial guarantee if no appropriate instruments or markets for insurance or other forms of financial security have been established.?

---

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

---

The Conciliation Committee reached agreement on the Environmental Liability Directive. The main elements of the compromise package are as follows: - 6 years after the entry into force of the Directive the Commission shall present a report on its effectiveness. In relation to financial security the report shall also consider a gradual approach, a ceiling for the financial guarantee and the exclusion of low risk activities. In the light of that report and of an extended impact assessment, including a cost benefit analysis, the Commission shall, if appropriate, submit proposals for a system of harmonised mandatory financial security; - limitation of liability in accordance with international conventions: although operators' right to limit their liability in accordance with the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) or the 1988 Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI) shall in principle be maintained, the Commission shall review the application of the relevant provision, including any appropriate proposals for amendment, in a report to be submitted to Parliament and the Council 10 years after the entry into force of the Directive. In this report the Commission shall also pay particular attention to the differences between the liability levels in Member States; - remedial action: the Council agreed to Parliament's suggestion that the competent authority should take the necessary remedial measures by itself only "as a means of last resort"; - reports and review: the Council agreed to Parliament's proposal that the Commission report on the functioning of the Directive should also examine the issue of the relationship between shipowners' liability and oil receivers' contributions, with the addition that due regard should also be paid to any relevant study undertaken by the International Oil Pollution Compensation Funds.?

---

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

---

The European Parliament adopted the conclusions of the conciliation committee on the Environmental Liability Directive (please refer to the document dated 19/02/04).?

---

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

---

**PURPOSE :** to create a regulatory framework establishing environmental liability with regard to the prevention and remedying of environmental damage. **LEGISLATIVE ACT :** Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage. **CONTENT :** This Directive establishes a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage. The Directive applies to: - environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities; - damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent. The Directive applies without prejudice to more stringent Community legislation regulating the operation of any of the activities falling within the scope of this Directive and without prejudice to Community legislation containing rules on conflicts of jurisdiction. Moreover, the Directive does not give private parties a right of compensation as a consequence of environmental damage. The Directive does not cover certain kinds of environmental damage, a list of which is given in the text. Significantly, it 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. The principal points of the directive are as follows: - With regard to prevention, where environmental damage has not yet occurred but there is an imminent threat of it occurring, the operator must take the necessary preventive measures. If, despite such preventive measures the threat of environmental damage is not dispelled, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible. - With regard to remedial action, where environmental damage has occurred, the operator must inform the competent authority of all relevant aspects of the situation and take all practicable steps to immediately control the relevant contaminants in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services or to provide an equivalent alternative to resources or services as foreseen in Annex II. - The duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which remedial measures should be taken with reference to Annex II will rest with the competent authority. To that effect, the competent authority is entitled to require the relevant operator to carry out his own assessment and to supply any information and data necessary. - The operator will bear the costs for the preventive and remedial actions taken pursuant to this Directive. In cases where a competent authority acts itself, in the place of an operator, the cost incurred by it should be recovered from the operator. Operators must also ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring. Member States may provide for flat-rate calculation of administrative, legal, enforcement and other general costs to be recovered. An operator will not be required to bear the costs of preventive or remedial actions in situations where the damage in question is the result of certain events beyond the operator's control. Member States may allow that operators who are not at fault or negligent will not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place. - Member States may establish national rules covering cost allocation in cases of multiple party causation. Member States may take into account, in particular, the specific situation of users of products who might not be held responsible for environmental damage in the same conditions as those producing such products. In this case, apportionment of liability should be determined in accordance with national law. - The limitation period for recovery of costs is five years from the date on which measures taken pursuant to the Directive have been completed or the liable operator, or third party, has been identified, whichever is the later. - Under the Directive non-governmental organisations promoting environmental protection and meeting any requirements under national law, are deemed to have sufficient interest to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage and are entitled to request the competent authority to take action under the Directive. - With regard to insurance, the Directive states that Member States must

encourage 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 under this Directive. Finally, the Commission, before 30 April 2010, must present a report on the effectiveness of the Directive in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III. The report will also consider in relation to financial security the following aspects: a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission will, if appropriate, submit proposals for a system of harmonised mandatory financial security

DATE OF TRANSPOSITION : 30 April 2007 ENTRY INTO FORCE : 30 April 2004.

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

---

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.