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Executive Summary to the REFIT Evaluation of the Environmental Liability Directive

Accompanying the document

Report from the Commission to the European Parliament and to the Council

Pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage

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1. EXECUTIVE SUMMARY

The Environmental Liability Directive (ELD) was drafted to apply common, legally binding EU standards designed to reduce damage to natural resources (biodiversity, water and land). Its purpose is to prevent any imminent threat of environmental damage and, if damage occurs, to restore the pre-damage (baseline) condition. It is based on the 'polluter pays' principle, which means that the polluter, and not the general public (taxpayer), must take the preventive or remedial action needed and bear the costs. It establishes a system of strict liability for operators carrying out the dangerous activities listed in Annex III of the ELD and it requires Member States to encourage the development of financial security instruments and markets for operators carrying out these dangerous activities.

Nearly 12 years after its adoption, and after several years of implementation by the Member States (the last Member States transposed the ELD in 2010), it is time to evaluate whether the Directive is fit for purpose. This REFIT evaluation ties in with the Commission report required by the Directive on its application (COM(2016)204).

The evaluation is based on more than three years of investigation, including several specific studies of the ELD, 27 national reports on its application, and numerous stakeholder and expert meetings and consultations¹. The first chapters explain the purpose and scope of the evaluation and then provide general information on the initiative (its objectives, scope and principles, how it works, the base line and intervention logic). After explaining the process and methodology of the evaluation follows an analysis based on the national reports of how the Member States have transposed and implemented the ELD.

Answering a set of questions relating to the five principal evaluation criteria of relevance, effectiveness, efficiency, coherence and EU added value, the evaluation provides a picture of how the Directive works and identifies what has been achieved and where challenges and gaps need to be addressed.

The evaluation shows that despite delayed transposition by many Member States and several non-compliant provisions found by the Commission in the transposing legislation, national laws are now in place. This led to better coherence of national environmental liability laws in comparison to the situation before the ELD was transposed (some MS did not have any environment liability regime in place). However, the degree of diversity and complexity of the current situation cannot be described as a level playing field. The evaluation also indicates that the Directive has improved, to a certain degree:

- the standards of prevention and restoration of environmental damage, in particular by requiring equivalent alternatives if the original natural resources cannot be restored,
- the application of the 'polluter pays' principle,
- strict liability across the EU for environmental damage,
- EU-wide liability for biodiversity damage, and
- public participation and access to justice for people affected and NGOs.

¹ The Commission decided to carry out an evaluation under its REFIT programme in 2013 well before the guidelines for evaluation were adopted in May 2015. As a consequence, this evaluation could not fully anticipate all the methodological and data needs now enshrined in the guidelines. Also the process is not fully in line with the newest standards, e.g. only a targeted stakeholder consultation and no wider public consultation took place. Despite these issues, the REFIT evaluation guidelines have been used to the widest extent possible in the finalisation of the evaluation.

At the same time, implementation still varies significantly from one Member State to another in terms of the number of ELD cases and the way the Directive is implemented. A few Member States appear to make use of the ELD relatively frequently for environmental damage incidents, using it as a mainstream enforcement tool in circumstances where EU law might in any case require action (e.g. biodiversity damage). Other Member States appear to apply national legislation for environmental damage incidents instead of the ELD, by making extensive use of their interpretation of the 'significance threshold'. The use of complementary and compensatory remediation methods could also be more frequent, even in some Member States that reported more cases. The observed 'patchwork' of environmental remediation, together with the lack of some key data on implementation and on the cost (both administrative and financial security), is a major challenge which needs to be addressed in the Action Plan following this evaluation. To better monitor and implement the ELD and to prepare robust ground for the next evaluation, a regulatory monitoring framework and other measures need to be considered and developed.

Resulting from the most relevant needs found in this evaluation, the main points for the Action Plan are:

(1) To address the uneven interpretation and application of key concepts of the ELD (for instance the significance threshold), to raise the level of awareness and knowledge of stakeholders and practitioners, and to provide administrative support where resources are scarce: (a) guidance or interpretative notices on key concepts should be drafted; (b) the ELD training programme should be continued and widened; and (c) the setting up of an administrative support and assessment facility or 'clearing house' should be explored to help all kinds of ELD practitioners to provide information and respond to the demand for expert advice on risk, damage and remediation assessment.

(2) To help overcoming the lack of data and information needed for a broad range of implementation and regulatory tasks, the setup of an ELD register will be considered as a starting point. The register will satisfy the needs of insurers, operators and competent authorities for better baseline setting, calculation of risks, decisions on remediation etc., as well as the Commission's need for better data to fulfil its monitoring duties including the next ELD REFIT evaluation. This register will look into data on the application of national legislation implementing the ELD and other national regimes which are applied instead of the ELD in case of incidents with environmental damage. Such an EU-wide evidence base would better reflect the strengths and weaknesses in implementation, the reasons for divergent solutions and the links between ELD implementation and environmental outcomes. By having better information on the ELD implementation, it will be possible to document better whether the original ambitions of the European Parliament and the Council, when they adopted the Directive, have been met.

Based on this evaluation, the Commission has set out a number of recommendations and actions in the related Commission report.