

ENVIRONMENTAL DAMAGE AND THE "POLLUTER PAYS" PRINCIPLE IN EUROPEAN UNION LEGISLATION AND ITS ASSESSMENT

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ABSTRACT: *There has been an enhanced attention / diligence devoted to the environment matter itself and its protection lately, as by the international community, so by the individual governments. European Union by the means of its legislative powers settled by the Founding Treaties makes efforts to guarantee the protection of particular components of the environment situated on its territory. Every EU member state is consequently obliged to apply the rules / standards accepted at the european level by the legislative institutions of the European Union, mostly by European Parliament and Council of the European Union. The most important source of law related to the environment and its protection is considered to be The Directive of the European Parliament and Council of the European Union No. 2004/35/CE of the environmental liability with regard to the prevention and remedying of environmental damage implemented to the system of law in the Slovak Republic by the adopting of the Act No. 359/2007 Coll. on Environmental Damage Prevention and Remedying.*

KEY WORDS: *environmental damage, environment, responsibility in the environment*

INTRODUCTION

The issue of the environment and its protection is currently receiving increased attention, both on the part of the international community and on the part of individual states. The European Union (hereinafter referred to as the "EU"), as a multinational community uniting the states on the European continent, does not take a passive stance on this important issue, but through its legislative powers it tries to ensure the protection of individual components of the environment located on its territory. EU member states are subsequently obliged to apply the standards adopted at the European level by EU legislative bodies, primarily the European Parliament and the Council of the European Union. Last but not least, the European Commission (hereinafter referred to as "the Commission") plays an important role here.

LEGAL LIABILITY IN THE ENVIRONMENT

Environmental protection, which can be characterized as human activity aimed at maintaining a desirable quality of the environment, including activities that prevent pollution or damage to the environment or limit and eliminate this pollution or damage (Košíčiarová 2006), is primarily aimed at protecting individual components of the environment and is not possible without the existence of a fair and effective system of legal responsibility (Damohorský 1999). Since the environment and its components are the subject of legal regulation of various legal branches, which, through their norms, regulate the authorizations and legal obligations of entities in the field of the environment, the violation of legal obligations can establish different types of legal liability, depending on the legal branch whose norms were violated and also depending on the fact whether a particular industry has its own mechanism for inferring legal liability. Criminal law (Kantorová 2009) has its own mechanism for deriving legal responsibility in the field of the environment, namely by regulating the various factual elements of criminal acts and the subsequent criminal punishment of subjects in the event of their commission, but also civil law, primarily by general regulation of liability for damage. However, as from a quantitative point of view, i.e. j. from the point of view of the scope of the legislation, as well as from the point of view of the importance of the legislation, the most important role is played

by responsibility in the environment regulated by the norms of administrative law - administrative legal responsibility. The basis of administrative legal responsibility is, as a rule, the illegal conduct of the administered entity of the public administration (addressee), for which an administrative sanction can be imposed. This administrative responsibility is exercised exclusively by administrative authorities with the prescribed competence as representatives and executors of public authority, and this towards the obliged subjects of responsibility (natural and legal persons), who must submit to the appropriate administrative procedure and suffer the sanction imposed.

Legal regulation of administrative liability of natural and legal persons represents an important tool for promoting the interests of environmental protection. Inferring administrative liability fulfills three basic functions in general, but also in relation to liability for damage to the environment: preventive, repressive and reparative.

In the field of environmental protection and its components, prevention plays a key and irreplaceable role. Inferring environmental liability acts in the field of prevention both individually, namely against the perpetrator of an environmental crime, in which it is assumed that after the inference of responsibility in the relevant proceedings and the imposition of a sanction, he will be negatively motivated to further commit crimes in the field of the environment, and also collectively - against others to potential perpetrators of crimes, whose liability for an environmental administrative crime should deter them from similar unwanted behavior in the future. However, the fulfillment of the preventive function is conditional on the real fulfillment of the other functions of inferring administrative liability. By imposing a sanction by decision of an administrative authority on the perpetrator of the crime, the repressive function of legal responsibility is implemented. Its purpose is to inflict some kind of damage on the perpetrator of the crime, usually property damage, which is realized primarily by imposing a monetary fine. However, the implementation of the punitive function in the case of environmental liability is insufficient by itself, since the inference of responsibility in the area of environmental care is part of environmental protection, and therefore the most important function of inference of environmental responsibility is probably the reparative function.

The reparative component within the framework of delictual liability manifests itself both in cases where the relevant standards of administrative law directly allow the imposition of compensation for damage at the same time as a sanction, or in the field of the environment rather corrective measures, and mainly indirectly - i.e. in earmarking of funds from sanctions. For example, in the Slovak Republic, earmarking of funds from imposed fines is relatively common, but it is not a rule and occurs almost exclusively in administrative offenses committed by legal entities and natural persons in the course of business activities. However, the attachment is not directly related to the affected length, time or place, so in essence it is not a true reparative effect, but rather a kind of framework and timeless compensation (Cepek 2010).

ELEMENTARY LEGISLATION OF THE EUROPEAN UNION IN THE FIELD OF ENVIRONMENTAL LIABILITY

The EU authorities, aware of the seriousness of the issue of the environment, its current state and protection, and aware of the fragmentation and inconsistency of the legal regulations of individual EU member states, adopted Directive 2004/35/EC of the European Parliament and the Council of the European Union on environmental responsibilities in the prevention and removal of environmental damage (hereinafter referred to as the "Directive"). In doing so, they have created tools to eliminate losses in the environment, regardless of whether the losses arise from illegal activity or from activity that is carried out in accordance with the law. The aforementioned directive represents the first framework attempt by the EU authorities to solve situations involving environmental damage in the EU territory. In individual member countries, the subsequent adoption of the aforementioned directive expands the catalog of legal responsibility for environmental protection.

The directive was adopted on the basis of conceptual materials prepared by the European Commission. It is about the so-called The Green Book on Liability for Environmental Damage from 1993 and the so-called The White Paper on Liability for Damage to the Environment from 2000. The content of the Directive followed on from the proposal for the Directive on Liability for Damage Caused by Waste from 1989, which was not adopted, however.

The Lugansk Treaty from 1993 was also a source of inspiration. The adoption of the Directive filled a gap in the system of community environmental protection legislation and, in general, its effect represents one of the potentially most significant parts of European environmental protection legislation adopted at the level of the European Union (Cepek 2010).

The reason for the adoption of this directive was the fact that there are many contaminated sites in the territory of the European Union, which pose serious health risks, and the loss of biodiversity has accelerated dramatically in recent decades. Failure to act could result in greater urban contamination and greater biodiversity loss in the future. The prevention and removal of environmental damage to the maximum possible extent contributes to the implementation of the objectives and principles of the EU environmental policy. The aim of the Directive is specifically to create a common framework for the prevention and elimination of environmental damage at a reasonable cost to society, which the Member States cannot sufficiently achieve alone, and thus it is better to achieve them at the pan-European level.

The directive is the first legal norm of the EU, the main purpose of which is to introduce the application of the "polluter pays" principle, while through the enforcement of this principle together with the principle of sustainable development, the prevention and elimination of environmental damage should be implemented. Part of this principle is also the fact that the operator (Article 2, paragraph 6 of the Directive), whose activity has caused environmental damage or represents an immediate threat of this damage, should be considered financially responsible with the aim of forcing operators to adopt and implement measures and develop practices for minimization environmental damage in order to narrow their exposure to financial liability. A significant reason for the adoption of the new legislation and the application of the "polluter pays" principle was also the fact that some components or parts of the environment are not subject to property rights and it is not possible to claim compensation for damage to them through private law. Civil law regimes exist in all EU Member States for compensation for damage to human health and property, but they rarely cover damage to the wider environment. And unless the damage to the environment is remedied, the rest of the public usually bears the costs. However, the regime of the directive is based on the objective responsibility of the operators of selected

risky activities, which is supplemented by the subjective responsibility of the operators of other operational activities in relation to damage to selected protected species of animals and plants and natural habitats. In the sense of the "polluter pays" principle, the operator who caused environmental damage or causes an immediate threat of such damage should, in principle, bear the costs of the necessary preventive or corrective measures. In cases where the competent authority acts instead of the operator itself or through a third party, this authority should ensure that the costs it incurs are recovered from the operator (points 1 to 31 of the directive).

The directive regulates the procedure for the prevention and removal of environmental damage that operators may cause through their activities. Environmental damage to individual components of the environment is assessed. The directive applies to environmental damage caused by any of the work activities listed in the annexes to the directive and to any immediate threat of such damage due to any of the listed activities, and further to damage to protected species and natural habitats caused by other work activities and to any immediate threat of such damage such damage due to these work activities, which occurs due to the fault or negligence of the operator.

- EU countries report to the Commission on the experience gained in the implementation of this directive. They must be collected by 30 April 2022 and every five years thereafter.
- By 30 April 2023 and every five years thereafter, the Commission will publish its assessment of this directive based on information provided by EU countries.
- By 31 December 2020, the Commission must develop guidelines to ensure a uniform understanding of the term "environmental damage" as defined in this Directive.

ENVIRONMENTAL DAMAGE AND THE SCOPE OF THE DIRECTIVE

The Directive regulates uniformly for all member states of the European Community the conditions for preventing and correcting ecological damage, especially in cases of selected operational activities that are risky for human health

and the environment. In this context, it is essential to note that it does not deal with all categories of environmental losses, but only with three categories of damage linked to environmental components that may be the subject of property rights. In the directive, environmental damage (Košíčiarová 2008) is defined as:

- damage that seriously affects the environmental (ecological, chemical or quantitative) status of water resources as defined in Directive 2000/60/EC, the EU Water Framework Directive and Directive 2008/56/EC, the Marine Strategy Framework Directive;
- damage to the earth posing a serious risk to human health;
- damage to protected species and natural habitats that has adverse effects on the maintenance of the conservation status as defined in Directive 2009/147/EC on the protection of wild birds and Directive 92/43/EEC, Directive on natural habitats.

The definition includes the release of pollutants into the air (affecting the state of land or water), into inland surface and groundwater, and any deliberate release of genetically modified organisms as defined in Directive 2001/18/EC.

From the point of view of the concept of environmental damage and from the point of view of the scope of the directive, we can talk about two scenarios of the occurrence of liability:

- Environmental damage caused by any activities listed in Annex III of the Directive, such as the energy industry, metal production and processing, mineral raw materials industry, chemical industry, waste management, large-scale production of pulp, paper and cardboard, textile dyeing and tanning, or large-scale production of meat, dairy products and food.
- Environmental damage to protected species and natural habitats (or its immediate threat) caused by work activities other than those listed in Annex III of the Directive and due to the company's fault or negligence.

Exceptions to the application of the directive include armed conflict, natural disaster, liability for those types of environmental damage covered

by international conventions (e.g. marine pollution), and nuclear risks covered by the Euratom Treaty.

PREVENTIVE AND CORRECTIVE MEASURES AND THEIR COSTS

The essence of the legislative regulation of the directive is to ensure environmental protection primarily by regulation of preventive and remedial activities. The legislation contained in the directive emphasizes preventive action, for which the operator is responsible. If the environmental damage has not yet occurred, but there is an immediate threat of this damage, the operator must immediately take the necessary preventive measures. In the event that the immediate threat of environmental damage is not averted despite the preventive measures taken by the operator, the directive obliges the operator to inform the competent authority of all relevant aspects of the situation as soon as possible.

In the event that environmental damage has already occurred, as part of the corrective action, the operator must immediately inform the competent authority about all relevant aspects of the situation and take all feasible steps to immediately control, prevent the spread, remove or otherwise manage the relevant pollutants and other harmful factors with in order to limit or prevent further environmental damage and adverse effects on human health or further deterioration of services and the necessary corrective action.

According to the directive, the operator must identify possible corrective measures and submit them to the competent authority for approval, unless the competent authority has taken the necessary measures itself. The competent authority will decide which corrective action to take. The axle, or the elimination of environmental damage related to water, protected species or natural habitats can be achieved by restoring the environment to its original state using primary remediation, supplementary remediation and compensatory remediation. By removing the environmental damage, any serious risk that could have adverse effects on human health must also be removed.

In determining the extent of supplementary and compensatory remedies, the use of equivalence of resources or services must first be considered. These approaches first consider measures that ensure natural resources or services

of the same type, quality and quantity as the type, quality and quantity of damaged natural resources or services. Where this is not possible, alternative natural resources or services will be provided. For example, a reduction in quality could be offset by an increase in the amount of corrective action. If it is not possible to use first choice of resource or service equivalence approaches, alternative valuation techniques shall be used. The competent authority may prescribe a method, such as a monetary award, to determine the extent of necessary additional and compensatory remedial measures. If the lost resources or services can be valued, but the replacement natural resources or services cannot be valued in a reasonable time or at a reasonable price, then the competent authority may choose remedial measures, the cost of which is equal to the estimated monetary value of the lost natural resources or services. Complementary and compensatory remedies should be designed to provide additional natural resources or services that reflect the time preferences and time profile of the remedies. For example, the longer it takes to recover, the more compensatory corrective action must be taken.

When selecting individual (suitable and appropriate in the given situation) remedial options, these should be evaluated using the best available technologies based on several criteria recommended by the directive, primarily considering the effect of each option on the health and safety of the public, the costs of implementing the option, the probability of success of each option, the extent to which each option will prevent future damage and collateral damage as a consequence of the implementation of the option, the extent to which each option benefits each component of the natural resource or service, the extent to which each option takes into account relevant social, economic and cultural interests, and other relevant site-specific factors, the time required for the removal of environmental damage to be effective, the extent to which each option will achieve restoration of the site where the environmental damage occurred, the geographical connection to the damaged site.

When evaluating various remedial options, primary remedial measures may be chosen that do not fully restore the damaged water or protected species or natural habitats to their original state or that restore them to their original state more slowly. This decision can only be taken if the natural resources or services that are lost at the primary site as a result of such a decision are offset by more

extensive complementary or compensatory measures to ensure the same level of natural resources or services as the impaired services originally had. This will be the case, for example, when equivalent natural resources or services can be obtained elsewhere at lower costs.

As regards the elimination of damage to land, it is necessary, within the meaning of the Directive, to take the necessary measures at least to ensure that the pollutants concerned are removed, controlled, prevented from spreading or reduced in such a way that the contaminated land, taking into account its current use or its future use approved at the time the damage occurred no longer poses any serious risk of an adverse effect on human health. The existence of such risks is assessed using risk assessment procedures, taking into account the characteristics and function of the soil, the type and concentration of harmful substances, preparations, organisms or microorganisms, their risk and the possibility of dispersion. The use is determined based on the regulations on the use of the territory or possibly other relevant regulations valid at the time when the damage occurred.

The directive obliges the operator to bear the costs of preventive and corrective measures, which the operator is obliged to take according to the directive and the subsequent national transposition act. However, the competent authority may recover from the operator who caused the damage or the immediate threat of damage, the costs incurred by him in connection with the preventive or corrective measures he carried out instead of the operator. These costs can be recovered, among other things, through the institution of property security or other appropriate guarantees, which are regulated by the national legal systems of the member states. However, the competent authority may decide not to recover all costs if the expenses for their recovery would be higher than the recoverable amount or if the operator cannot be identified. The Directive also directly regulates the grounds for exemption from the obligation to bear the costs of prevention and remediation of environmental damage.

DISCUSSION

With the passage of time since the adoption of the directive, it is appropriate to ask what experiences the application of the given directive has brought in practice and whether it has met the expectations that were associated with its adoption. In this context and in this place, we can ask ourselves some relevant questions and try to find answers to them. The same questions were asked by the Commission, and the answer to them is given in its Report of the Commission to the Council and the European Parliament according to Article 18, paragraph Directive 2004/35/EC on environmental liability in the prevention and elimination of environmental damage (hereinafter referred to as the "Commission Report").

What is the content focus and objective of the directive?

The directive deals with cases of serious environmental damage. The "polluter pays" principle is applied, which is set out in Article 191 of the Treaty on the Functioning of the European Union, that is, the public should not have to pay if an industrial operation causes serious environmental damage. Operators who carry out hazardous work activities listed in Annex III of the directive are strictly responsible for the environmental damage they have caused, i.e. j. there is no need to prove fault (intentional or due to negligence). Operators who perform other than dangerous work activities are liable on the basis of fault.

The main objectives of the directive are to prevent environmental damage (if there is an immediate threat that damage will occur) and to eliminate environmental damage (if it has already occurred). In accordance with the "polluter pays" principle, the responsible operator must take the necessary preventive or corrective measures and bear all costs. Damage is considered removed when the environment returns to the state it was in before the damage occurred. The Directive applies to damage to biodiversity (damage to protected species and natural habitats), damage to water and damage to land. However, traditional damage (damage to property, loss of life and injury to health or economic loss) is not covered by the directive.

**Is the directive relevant in relation to the objectives set by the EU?
How effective and efficient is it?**

From the point of view of the relevance of the directive, it can be stated that the objectives of the directive, namely to prevent and eliminate environmental damage, are still relevant and correspond to current needs, because there is always a risk that such types of damage and accidents will occur. It can be concluded that the directive helped to improve the level of environmental protection in the EU to a limited extent. However, it has not yet fulfilled its potential. Since the directive is more relevant in some member states than in others, when assessing the relevance of this directive, it is also necessary to take into account the various national legal frameworks and practices that are already in place in individual states.

As for the effectiveness of the directive, it varies widely, as it is implemented very differently in individual Member States. This is partly due to the framework nature of the directive, which allows for the use of many exceptions, options and flexibility. We see the main cause of uneven application of the directive mainly in its different interpretation and different application of "threshold values of seriousness" when it comes to environmental damage. The effectiveness of the directive can best be expressed through the amount that represents the eliminated environmental damage (approximately EUR 6 million excluding the five major loss cases and EUR 180 million if we include these five major cases). Due to the non-existent data, we mostly do not know the stimulating effect manifested in more extensive preventive measures and better financial security, nor the damage that was prevented with the help of immediate measures taken in case of imminent damage (Commission Report 2016).

As part of the effectiveness assessment, the Commission itself assessed the main categories of costs: remedial costs, administrative costs and financial security costs.

The costs of repairing damaged natural resources should be borne by the responsible person, in accordance with the "polluter pays" principle. Based on the available documents, the commission concluded that the average cost of a corrective measure is approximately EUR 42,000. Calculation based on 137 cases representing slightly more than 10% of all cases under the Directive reported

by Member States, excluding the three largest losses (Kolontár in Hungary, Moerdijk in the Netherlands and the Greek case of Assopos) as they were considered outliers. Greece reported an average of €60,000. However, the cost of remediation in individual cases varies from a few thousand euros to more than 50 million euros in the case of large-scale losses caused by major accidents (such as Kolontár in Hungary or Moerdijk in the Netherlands).

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The costs of environmental damage can be reduced by responsible operators using financial security instruments (financial security instruments include insurance and alternative instruments such as bank guarantees, bonds or funds). Most markets provide sufficient coverage for all risks arising from the Environmental Liability Directive, but demand is low due to the insufficient number of cases in many Member States, lack of clarification of some concepts of the Directive and also due to insurance markets that develop more slowly (e.g. the Baltic States and smaller island member states). European companies are increasingly purchasing liability insurance for environmental damage (since 2006, an average annual increase of 13.6%, especially in high-risk industries) (Collins 2015). Although progress has been made in the area of financial security, problems remain in the application of the directive to major accidents and insolvency of responsible economic entities (Commission report 2016).

Even on the basis of the above, it can be concluded that a meaningful overall assessment of the effectiveness of the given directive cannot be made on the basis of the available information. More work needs to be done, including the collection

of additional data, to address the shortcomings of this assessment. The Commission took the same view in its report.

How was the transposition and implementation of the directive?

Some Member States did not transpose the Directive into national legislation by the deadline (April 30, 2007) and all 27 Member States fully transposed the Directive (Croatia, which announced the transposition of the Directive at the time of its accession to the EU, did not have to submit a national report on the application of the Directive on environmental liability until 30 April 2013, because it only joined the EU on 1 July 2013) until mid-2010. The Commission also analyzed in detail the complex situation that arose as a result of the introduction of a relatively flexible EU framework instrument for ensuring environmental liability, which in most member states was an addition to the existing national regulations. Overall, this led to a certain degree of better coherence from a legal point of view compared to the situation before the transposition of the Environmental Liability Directive (e.g. some Member States had no environmental liability regime in place). However, the current situation is still diverse from a legal and practical point of view, and further steps must be taken to ensure equal conditions throughout Europe. It is true that the Commission has subsequently taken action in relation to late transposition and non-compliance issues (seven Member States have yet to resolve several non-compliance issues). These measures have slightly improved the coherence of the legal systems in place in the Member States. However, diversity continues, as the Environmental Liability Directive is of a framework nature and offers a great deal of flexibility to member states.

Regarding the implementation of the Directive, from April 2007 to April 2013, Member States reported approximately 1,245 confirmed cases of environmental damage where the Directive in question became applicable. However, the number of cases is very different in individual Member States. More than 86% of all reported cases of damage occur in two Member States (Hungary: 563 cases, Poland: 506 cases), the majority of the remaining cases were reported by six Member States (Germany (60), Greece (40), Italy (17), Latvia, Spain and the United Kingdom). Eleven Member States have not reported any cases of damage under the Directive since 2007, probably because they deal with these

cases exclusively within their national system. The number of annually notified cases under the directive thus varies significantly in individual member states, from 95 to less than 1. However, it should be added that a high number of cases in a member state does not necessarily mean that this member state applies the directive more strictly than required. The assessment and compliance check show that these differences can be explained by different legal frameworks and customs (especially from the point of view of whether or not previous legal regulations have been repealed), possible differences in the state of the environment and different interpretations of key terms and concepts (Commission Report 2016).

CONCLUSION

We are living in a new era, which is a consequence, among other things, of the riskiness of the economies of states (Barinková and Žofčinová 2009). In this context, it is important to perceive the right to the environment and its protection as a constitutional right, the protection of which is important for the present, but especially for the life of future generations, despite the financial problems of individual states. The EU authorities, aware of the seriousness of the issue of the environment, its current state and protection, and aware of the fragmentation and inconsistency of the legal regulations of individual EU member states, adopted Directive 2004/35/EC on environmental liability in the prevention and elimination of environmental damage. The directive regulated the objective and subjective responsibility of operators, which is based on the occurrence of environmental damage as a specific legal consequence of work activities. In doing so, it has created tools to eliminate losses in the environment, regardless of whether the losses arise from illegal activity or from activity that is carried out in accordance with the law.

In conclusion, it can be concluded that although the adoption of the aforementioned directive and its application by the EU member states clearly contributes to greater environmental protection, the aforementioned legislation cannot be considered comprehensive. The legal liability that is regulated in it and that should be derived based on it is focused exclusively on the work activities of the operators and therefore does not cover all activities that may cause environmental damage. A certain solution could be the expansion

and practical application of liability for ecological damage. However, this requires the adoption of new legislation at the European and national level, where this form of administrative legal responsibility would be further specified and adjusted.

It is also necessary to state that the implementation of the directive to a limited extent helped to improve the prevention and elimination of environmental damage compared to the situation before the transposition of this directive. In particular, the directive strengthened the "polluter pays" principle (therefore no significant costs from public resources were incurred), while strict liability for environmental damage began to be implemented throughout the EU, and standards of remediation were increased in the restoration of damaged natural resources, especially in the case of damage to biodiversity. However, the degree of diversity between the laws of individual Member States may be cause for some concern.

In terms of evaluation, one of the main problems is the lack of data on cases under the Directive and comparable cases handled under national legislation. Other problem areas include insufficient awareness of the ELD by stakeholders, insufficient resources and lack of expertise to implement the ELD, uncertainty and ambiguity in key concepts and definitions (for example, the threshold of "severity"), insufficient use of complementary and compensatory remedies and insufficient data on environmental damage, remediation cases and costs. Although some of the mentioned aspects of the directive and its context can explain the large variations in the number of cases notified to the Commission and their content, the main reason for the significant differences lies in the different use of the "seriousness threshold" together with the national frameworks that already existed before the adoption of the directive. Other factors that have contributed to the variable impact of the Directive include: variable use of case registers under the ELD, different levels of public participation, different application of the secondary obligation of competent authorities to act where responsible operators do not act or do not exist, and variable levels of awareness among those involved sides.

On the positive side, the Commission reports in its report that the implementation of the directive continues to improve. Industrial entities

and other stakeholders who participated in the evaluation are largely satisfied with the current legal framework. Together with experts from member states, they strongly advocated continuity, predictability and legislative stability in relation to environmental responsibility. The Directive also encourages preventive action and precautionary approaches, thus protecting against high costs of remediation, which are often higher than the costs of preventive measures. However, it is difficult to quantify the benefits gained through prevention, mainly because complete information is not available on all preventive activities and other preventive measures taken under the Environmental Liability Directive (Commission Report 2016).

The Commission clearly states in its report that in all future evaluations the Directive should be assessed alongside pre-existing national legislation to determine the extent to which it has succeeded in creating a level playing field. A level playing field can be created even better by clarifying a few key concepts (especially the concept of "serious damage"). In this regard, the Commission has identified supporting activities at EU level which, together with several recommendations for Member States, will create an adequate response to make this Directive even more "fit for purpose" than this evaluation showed (Commission Report 2016).

The article is an output of the project VEGA 1/0764/24 - Environmental attitudes, pro-environmental behavior and its promotion.

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