

## ESA Position Paper

on

**Proposal for a Directive of the European Parliament and of  
the Council on  
Environment Liability  
with regard to the prevention  
and remedying of environmental damage**

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### **General**

ESA – European Seed Association - recognises the political intention of the Commission Proposal aiming to prevent and remedy environmental damage.

In this respect, the introduction of a liability system in the European Community based on the “polluter pays” principle is accepted if the necessary balance between this principle and the public law governing environment as such is assured.

ESA supports the approach followed by the Proposal to leave the definition and reparation of traditional damage to national civil liability regimes.

It is important that the liability of the polluter is based on a transparent approach.

Any liability regime, in order to be practicable, needs to be pre-visible as to products concerned and as to risks involved in order to be suitable for appropriate insurance systems. The minimum prerequisites would be unambiguousness of definitions, practicability and risks and consequences involved.

ESA therefore puts forward the following specific remarks:

## **Specific remarks.**

### 1. Article 3. Nr. 1 - Strict liability for occupational activities Annex I

ESA disagrees with the inclusion of biotechnology in the list of activities implying strict liability. The Commission itself has stated on several occasions that biotechnology per se does not create or imply a technology-specific environmental risk. The risk which a genetically engineered organism or activity may pose to the environment depends largely on the organism's properties and resulting interaction with the environment, regardless of whether these properties are the result of breeding technologies or natural evolutions.

### 2. Article 2. Nr. 5/18 - Definitions

The definition of the notion "damage" lacks to precise in a scientifically reliable manner what has to be understood under the terms of "adverse change" and of "impairment". The reference to "measurable" is not sufficient and leaves room for different national interpretations.

This is of special importance, since the definition of "environmental damage", Art. 2 Nr. 18 clearly integrates the notion of "damage" as defined in Art. 2. Nr. 5.

### 3. Art. 2. Nr. 14. – Qualified entities

ESA supports the Commission's proposal not to give public interests groups the right to bring claims against presumed polluters. Criteria for "qualified entities" being entitled to request a competent authority to take action need to be set in order to avoid misuse. Minimum standards should be a long standing and/or a sufficient interest in the environment, e.g. a clearly stated objective as defenders of the environment in respective Statutes and a well-established track record as indicated in Art. 2, Nr.14.

### 4. Art. 7.2. - Recovery of costs.

It should be made clear that the operator shall not be required to bear costs for the assessment of environmental damage or of an imminent threat of such damage if the result does not confirm this assumption and where it is not established that the operator was at fault or negligent.

In this case, the measures taken by the authorities have to be considered as original sovereign activities with the consequence to bear all costs involved.

5. Art. 9 - Exceptions and defences.

ESA welcomes the exceptions in Art. 9(1), especially as to the references made in view of the scope of the authorisation issued to the operator and as in view of the state of scientific and technical knowledge at the time of the release or of the activity.

6. Art. 11. – Multiple party causation

ESA underlines the proportionate nature of liability. Therefore, an operator can only be held liable for his contribution to the total damage, based on the evaluation of the importance of this contribution to the causative activity.

In this respect, ESA rejects the reversal of the burden of proof in case of objections to the official establishment of mutual party causation and respective contribution.

7. Art. 19. – Temporal application, burden of proof

ESA welcomes that no retroactive effect is provided for in the Directive.

ESA notes with satisfaction that the principle of necessity of a causal link between an activity and the damage is laid down in Art. 3(6) and Art. 13.(2).

Having stated this, the overall procedural principle as to the burden of proof must be respected as well, i.e. the claimant has to prove and justify his claim.

The case of Art. 19 (2) however, jeopardizes this procedural principal, as it is not clear what is meant by the establishment of the date of the causative activity after the entry into force “with a sufficient degree of plausibility and probability”.

This applies as well to the case of Art. 11 on the multiple party causation where again reference is made to this undefined legal term. Such concept is too vague and leaves room to legal uncertainty and jeopardizes the principle of non-retroactivity.

ESA firmly insists that non-retroactivity as well as the establishment of multiple party causation must in no case be subject to a reversal of the burden of proof of the causal link between activity and liability.