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Implementation challenges and obstacles of the Environmental Liability Directive

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Implementation challenges and obstacles of the Environmental Liability Directive (ELD)

Final Report

European Commission – DG Environment
16 May 2013



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Table of Contents

EXECUTIVE SUMMARY	7
INTRODUCTION	19
CHAPTER 1: INTEGRATION OF THE ELD INTO EXISTING NATIONAL LEGAL FRAMEWORKS	21
1.1 Procedural variations	22
1.1.1 Administrative and judicial systems	23
1.1.2 Structure of environmental legislation	24
1.1.3 Nature of legislation transposing the ELD	24
1.1.4 Degrees of complexity of the transposing legislation	26
1.1.5 Number of competent authorities	26
1.1.6 Number of jurisdictions in Member States	28
1.1.7 Publication of guidance and other documentation	28
1.1.8 Publication of implementation and enforcement data	29
1.2 Substantive variations	29
1.2.1 Optional provisions	30
1.2.2 Provisions specifically providing for the application of national law	38
1.2.3 Adoption of more stringent provisions	44
1.2.4 Adoption of less stringent provisions	52
1.2.5 Application of national law concepts to fundamental legal concepts in the ELD	54
1.2.6 Imprecise language in the ELD	59
1.2.7 Adaptation of the language transposing the ELD	68
1.2.8 Provisions in national legislation to rectify conflicts in the ELD	70
1.2.9 Provisions in national legislation to fill gaps in the ELD	70
1.2.10 Extension to include civil liability	75
1.3 Effect of existing law on the implementation and enforcement of the ELD	76
1.3.1 Existing legislation	77
1.3.2 Standard of liability	80
1.3.3 Scope of multi-party liability	81
1.3.4 Exceptions and defences	82
1.3.5 Limitation of liability to specified operations	82
1.3.6 Other liable persons	83
1.3.7 Standard of remediation	84
1.3.8 Limitations period	85

1.3.9	Fragmentation or harmonisation	85
1.3.10	More and less stringent national law	86
1.3.11	Reasons why Poland may have more ELD incidents than other Member States	87
1.3.12	Overlaps between existing environmental law and the ELD	89
1.3.13	Effect of other EU environmental law	90
1.4	Filling gaps in the ELD	91
CHAPTER 2: PRACTICAL APPLICATION OF THE ELD		95
2.1	General overview	96
2.2	Denmark	97
2.3	France	98
2.3.1	Overview	98
2.3.2	Cases treated under national ELD transposing legislation	98
2.3.3	Cases treated under pre-existing environmental liability legislation	98
2.4	Germany	101
2.4.1	Overview	101
2.4.2	Cases treated under national ELD transposing legislation	102
2.4.3	Cases treated under pre-existing environmental liability legislation	104
2.5	Hungary	106
2.5.1	Overview	106
2.5.2	Cases treated under national ELD transposing legislation	106
2.5.3	Cases treated under pre-existing environmental liability legislation	107
2.6	Poland	108
2.6.1	Overview	108
2.6.2	Cases treated under national ELD transposing legislation	109
2.6.3	Cases of environmental damage treated under pre-existing environmental liability legislation	110
2.7	Spain	110
2.7.1	Overview	110
2.7.2	Cases treated under the respective national ELD transposing legislation	112
2.7.3	Cases of environmental damage treated under pre-existing environmental liability legislation	112
2.8	UK	113
2.8.1	Overview	113
2.8.2	Cases treated under national ELD transposing legislation	113
2.8.3	Cases of environmental damage treated under pre-existing environmental liability legislation	115

CHAPTER 3: STRENGTHS, OBSTACLES AND CHALLENGES IN IMPLEMENTING THE ELD 117

3.1 Strengths of the ELD	117
3.1.1 Effectiveness of the ELD and procedures established under this regime	117
3.1.2 Prevention of environmental damage	118
3.1.3 Remediation of environmental damage	118
3.1.4 Involvement of stakeholders	119
3.2 Obstacles and challenges	119
3.2.1 Conditions for ELD application	120
3.2.2 Expertise and knowledge	126
3.2.3 Organisation and governance	128
3.2.4 Resources	130
3.2.5 Tools	130
3.2.6 Level of co-operation of the liable party(ies)	130
3.2.7 Legislative environment	131
3.2.8 Economic and financial environment	134
3.2.9 Main challenges and obstacles for the application of the ELD	135

CHAPTER 4: RECOMMENDATIONS FOR AN EFFECTIVE APPLICATION OF THE ELD 137

4.1 Best practices to be shared and developed	137
4.2 Uncertainties to be resolved	139
4.3 Potential future actions	142

REFERENCES 147

ACKNOWLEDGMENTS 151

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Executive summary

This study on Implementation challenges of the Environmental Liability Directive (ELD, 2004/35/EC) includes both a legal analysis of the integration of the ELD into existing national legal frameworks in 16 Member States, as well as an empirical study of how the ELD regime is applied in seven Member States. The legal analysis was carried out by examining and analysing existing national legislation and the legislation transposing the ELD. The analysis was reviewed for accuracy by legal experts in all 16 Member States. Those experts also added valuable insights and information to the analysis. The empirical study was carried out through exchanges and interviews with various practitioners of the ELD (e.g. competent authorities, operators, and NGOs) and legal experts in the Member States. This allowed the identification of strengths, obstacles, and challenges related to the application of the ELD in the seven Member States.

Integration of the ELD into 16 existing national legal frameworks

The legal analysis consisted of examining and analysing legislation transposing the ELD in 16 Member States: Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Spain, Sweden, and the United Kingdom. The analysis focused on provisions of the ELD that had been transposed into national law differently in the Member States. The legislation which existed before the ELD to prevent and remedy environmental damage was also examined and analysed to determine how the legislation transposing the ELD supplements this legislation.

A major objective of the legal analysis was to determine the effectiveness of the legislation transposing the ELD in a given Member State in view of the pre-existing legislation and, if not, the obstacles and challenges to making it more effective. The review included an examination of the relationship between the transposing legislation with existing legislation in terms of standards, specificity, precedent/subsidiarity, interaction, and interface. This review took particular account of the degree of stringency of the existing legislation compared with the legislation transposing the ELD. Another major objective of the legal analysis was to review the concept of “significant environmental damage” in the ELD, in particular, biodiversity damage.

The analysis revealed that the transposition of the ELD into the national law of Member States has not resulted in a level playing field but a patchwork of liability systems for preventing and remedying environmental damage across the EU. In some cases, the minimum standards set by the ELD¹ have been interpreted differently by the various Member States, resulting in significant variations in implementation and enforcement of the transposing legislation. In addition, variations in transposing legislation have been particularly pronounced, not merely because the ELD is a Directive and thus flexible as

¹ The legal basis for the ELD is article 192 of the Treaty on the Functioning of the European Union (TFEU). Thus, the ELD was not adopted to create harmonised legislation across the European Union. Instead, it was adopted to establish minimum standards with a high level of protection for the environment.

regards the means and methods to achieve the goals set by the Directive, but also due to options within the ELD itself for variations in transposing legislation.

The variations are of two kinds: procedural and substantive.

The procedural variations include the following:

- **Differences in administrative and judicial systems:** There is a significant variation in the administrative and judicial systems in different Member States. This variation affects the legal mechanisms for challenging orders to prevent and remedy environmental damage. It also affects the nature of offences and the type and level of sanctions for breaching the legislation transposing the ELD.
- **Transposition of the ELD as stand-alone legislation or by incorporating its provisions into pre-existing legislation:** Some Member States had environmental codes, which facilitated integration of the legislation transposing the ELD into them. Some other Member States had separate legislation that imposed liability for preventing and remedying land contamination, water pollution and, less frequently, harm to biodiversity.² Other Member States had general legislation for preventing and remedying damage to the common good, that is, all environmental media and fauna and flora dependent on that media. The study showed that it is more likely that competent authorities will continue to apply pre-existing – and often less stringent – legislation when only stand-alone ELD legislation exists.
- **Transposition of the ELD into the legal systems of Member States:** In some Member States there is a single piece of transposing legislation or, more commonly, two pieces: primary legislation (usually an Act) and secondary legislation (usually a Decree). In some other Member States, the transposing legislation also amended existing legislation, with the number of amendments varying significantly between the Member States. Finally, in some Member States, existing legislation was repealed and superseded by the legislation transposing the ELD. The more pieces of legislation that were enacted or that continue to exist, the greater is the potential for the lack of effectiveness of the implementation and enforcement of the legislation transposing the ELD.
- **Degrees of complexity of the transposing legislation:** Some Member States have enacted complex and lengthy legislation to transpose the ELD, some have enacted legislation that is largely a “copy out” of the ELD, whilst other Member States have enacted very short transposing legislation. Whilst the lengthier legislation tends to fill more of the gaps in

² The term “biodiversity” is used in this report to mean species and natural habitats that are protected by the Birds and Habitats Directives and, in some Member States, existing national legislation. The term “biodiversity damage” means environmental damage to protected species and natural habitats.

the ELD (for example, access to third party property to carry out preventive and remedial measures), it is not possible at this stage to determine which legislation is more effective because, among other things, Member States have applied existing administrative law to supplement provisions of the transposing legislation.

- **Designation of one or more competent authorities:** Some Member States designated one or a few competent authorities; others designated several hundred. The study showed that it is more likely that the designation of multiple authorities will result in less implementation and enforcement of the ELD, as it is more difficult for personnel in many authorities to become experienced in implementing the ELD regime, compared to personnel in a single authority or a limited number of authorities.
- **Number of jurisdictions in Member States:** In Member States that have a federal system, legislation has been enacted at the federal level and, in some such Member States, also at the sub-national level. In other Member States, for example in the UK, each of the devolved Administrations has separate legislation. There could be difficulties when Member States have several different versions of the transposing legislation although this can be resolved at least in part by agreements between the different jurisdictions in the implementation and enforcement of the legislation in areas on the borders of such jurisdictions.
- **Publication of guidance and other documentation:** Some Member States have published guidance to the transposing legislation. Such a publication has increased the potential for stakeholders such as operators, competent authorities, financial security providers, environmental NGOs, etc. to be more aware of the ELD and to become familiar with it.
- **Publication of implementation and enforcement data:** Whilst Directive 2003/4/EC on access to environmental information results in the public having access to information concerning the implementation and enforcement of the ELD in all Member States, some Member States have gone further and published data on the implementation and enforcement of the transposing legislation. The publication of such data has improved the effectiveness of the transposing legislation by making stakeholders and the public more aware of it.

The substantive variations include the following.

- **Optional provisions in the ELD that specifically envisage differences in national ELD regimes:** The ELD contains a number of optional provisions including the adoption, or not, of the permit defence and the state-of-the-art defence, and the extension of liability for biodiversity damage to nationally protected biodiversity. These optional provisions have resulted

in Member States having wide variations in legislation transposing the ELD depending on their selection of options.

- **Provisions in the ELD that specifically provide for the application of existing national law in Member States:** The ELD provides that Member States may apply existing law to various provisions of the ELD. These include differences in the definition of an “operator”, the scope of liability (joint and several or proportionate liability), and the scope of interested parties entitled to submit comments to competent authorities. Again, the application of these provisions has increased the variation in legislation transposing the ELD in the Member States.
- **Specific authorisation in the ELD for Member States to adopt more stringent provisions:**³ The legal base of the ELD means that Member States may enact more stringent legislation, as reiterated in the ELD itself. Some Member States adopted a minimalist approach to transposition whilst others enacted more stringent legislation. The result is substantial differences in liability systems, narrower or broader regimes applying to environmental damage, and, in some Member States, the addition of persons with secondary liability. The ELD is, thus, far from being harmonising legislation but is a patchwork of liability systems.
- **Adoption of less stringent provisions:** Some Member States have adopted less stringent provisions than those in the ELD. Perhaps the most prominent of these is the date on which the transposing legislation applies to environmental damage. In some Member States that transposed the ELD after the deadline of 30 April 2007, that date is the date on which a Member State completed its transposition of the ELD. This difference affects not only the scope of the implementation and enforcement of the ELD but also the information and data reported to the European Commission by Member States on 30 April 2013.
- **The application of national law concepts including the standard of liability, the level of causation, and secondary liability:** Due to existing national law, there are differences between Member States in issues such as the level of proof needed for operators to be liable, the degree of causation that must be shown, and the inclusion of additional persons who are secondarily liable under the ELD due to existing law including secondary liability. The result is a wide variation in crucial components of the ELD between Member States.
- **Imprecise language in the ELD:** Less than precise language in the ELD has had a major effect on its implementation and enforcement. For example, a small minority of Member States have concluded that the so-called “defences” in the ELD are defences to liability (in which case, an

³ The specific provision is art. 16(1), reflecting TFEU art. 193.

operator with a valid defence is not required to remediate environmental damage). Other Member States have interpreted these “defences” as defences to costs (in which case, an operator is required to remediate environmental damage and then has the right to seek reimbursement of its costs). Another crucial difference is the scope of water damage under the ELD, that is, whether the threshold for water damage applies to waters or only to surface and groundwater bodies. Another crucial difference is whether competent authorities have the duty to require an operator who has not carried out preventive measures to carry them out, or only a power to do so. Yet another crucial difference is the application of the ELD regime to biodiversity damage, with the interface between the ELD and the Birds and Habitats Directives being imprecise and, thus, determination of the threshold for biodiversity damage being difficult to ascertain.

- **Adaptation of the language transposing the ELD:** Adaptation of the language in the ELD into transposing legislation has resulted in differences between Member States in, among other things, the costs which a competent authority may recover from an operator and whether the competent authority must, or only may, recover such costs.
- **Provisions in national legislation to rectify conflicts in the ELD:** The ELD is self-executing legislation, that is, an operator must prevent environmental damage immediately after it occurs, even before a competent authority requires it to do so. It is, however, difficult or impossible in many cases for an operator to know when there is an imminent threat or actual environmental damage. In particular, it may take months of assessing criteria before it is known whether water damage or biodiversity damage exceeds the thresholds in the ELD. The result is a substantial difficulty for operators and competent authorities knowing when the ELD should apply.
- **Provisions in national legislation to fill gaps in the ELD:** Some Member States have, rightly, filled gaps in the ELD by enacting legislation. This includes penalties for breaching the transposing legislation, the right of access to third-party land to remedy environmental damage and the creation of registers or other data bases of ELD incidents. Again, this has resulted in substantial differences in the transposing legislation between the Member States.
- **Extension to include a civil liability system:** Whilst the ELD does not apply to claims for personal injury, property damage, and economic loss, it does not prevent a Member State from establishing a civil liability system that tracks the ELD.

The supplementary nature of the ELD, that is, its role in setting minimum standards with a high level of protection for the environment to harmonise environmental legislation and to fill gaps in existing legislation, is also crucial, particularly for biodiversity damage. Most

Member States had not enacted legislation to prevent and remedy damage to biodiversity when the ELD was transposed. Some had pre-existing legislation that could, at least theoretically cover biodiversity damage, but it was usually general or weak. The supplementary nature of the legislation transposing the ELD is thus jeopardised when the legislation that it supplements is weak or non-existent so that the transposing legislation is, in effect, the *only* legislation that covers biodiversity damage.

The problem is exacerbated by a misperception that the ELD applies only to the most severe instances of biodiversity damage. The threshold for biodiversity damage in the ELD, however, is a “significant adverse effect[] on reaching or maintaining the favourable conservation status of [protected] habitats or species” (ELD, article 2(1)(a)). Annex I of the ELD sets out the criteria to be taken into account in assessing whether this significance threshold is met. A reasonable application of the Annex I criteria – indeed the only reasonable application – means that remedial measures should be carried out to ensure that protected species and natural habitats that suffer damage that adversely affects their ability to reach or maintain their favourable conservation status in the European territory of the Member States, the European territory of an individual Member State, and their natural range, are restored to their “baseline” condition. Thus, the meaning of the word “significant” in the context of biodiversity damage in the ELD must be derived from the application of Annex I to the definition of biodiversity damage in article 2(1)(a). Instead, many stakeholders have misinterpreted the word “significant” in the ELD and have taken its meaning, not from Annex I and not even from dictionary definitions of the word “significant”. The terms “severe” and “severity threshold” have been used as synonyms for the terms “significant” and “significance threshold” despite their vastly different meanings.⁴ A common assumption has, therefore, arisen that the threshold for biodiversity damage in the ELD is very high; it is not.

This misperception has resulted in the ELD being likely only to remedy the more severe cases of damage to protected species and natural habitats, whilst lesser harm to them is not remedied. This situation is particularly crucial because one of the key purposes of the ELD is to assist in halting the loss of biodiversity in the EU (ELD, recital 1). The misperception thus needs to be corrected if the ELD is to achieve this key aim.

It is too early to draw firm conclusions on the implications of the above variations for the effective implementation and enforcement of the ELD. Their effect is, however, beginning to show, particularly in the number of ELD cases, which varies from none or only a few in a substantial number of Member States to over 400 in Poland. The difference in the number of cases cannot be attributed only to some Member States having pre-existing wide-ranging environmental liability legislation, stronger enforcement of environmental legislation, and/or operators in such Member States having invested in environmental management systems for their operations. Other reasons for the differences include the land area designated as Natura 2000 (which varies greatly between Member States), the lack of knowledge of the ELD among many operators (particularly small- and medium- sized enterprises), the public and even competent authorities and environmental NGOs; a failure by operators to

⁴ The Oxford Dictionary defines the word “significant” as “sufficiently great or important to be worthy of attention; noteworthy”, and the word “severe” as “very great, intense”.

recognise differences between the ELD's implementation and enforcement in different Member States; and a failure by operators to have insurance or other financial security to cover ELD liabilities – or to recognise the need for it – leading to the potential for the cost of further ELD incidents to fall on the public purse in Member States that have not adopted mandatory financial security.

ELD in practice in seven Member States

The study focuses on the practical application of the ELD in seven Member States: Denmark, France, Germany, Hungary, Poland, Spain and the UK. This empirical analysis is based on data collected from ELD practitioners in these Member States, through interviews (36 out of 65 contacted stakeholders), and a workshop held in Brussels on 16 January 2013.

Findings reveal discrepancies of implementation across the seven Member States. ELD cases remain rare and sometimes non-existent in some countries (e.g. Denmark, France), except notably in Poland. However, for many consulted stakeholders, **the lack of ELD cases should not be viewed as a negative finding, but rather as an indication that the prevention of environmental damage has been effective and, consequently, that the ELD is serving one of its main objectives. In addition, the present study does not prejudge the official number of cases in the studied Member States as this study was finalised before that number was communicated to the European Commission in the reports that were due by each Member State by 30 April 2013.**

The analysis of environmental damage cases in the seven Member States leads to the following conclusions:

- To date, there are still only a few cases of environmental damage for which the ELD regime has been applied. In the cases for which the ELD was applied, this led to the application of remedial measures;
- In the majority of cases, it was not possible to apply the ELD regime because of some specific legal issues, related notably to the significance thresholds set by the ELD (difficulty in demonstrating that such thresholds were met, in particular for water and biodiversity damage), or to the fact that certain activities were not included in Annex III of the ELD;
- In several cases, pre-existing legislative frameworks were used instead of the ELD regime, whereas the latter could have been applied. This results notably from the nature of the ELD transposing legislation in certain Member States, and from the fact that national pre-existing legislation is being considered by competent authorities as more adequate or more stringent than the ELD regime; and
- In some other cases, the absence of application of the ELD regime (in cases where it could have been applied) was based on arguments related to non-legal issues (e.g. expertise, experience, proactivity of liable operators in implementing remedial actions, and robustness of traditional legislation), rather than legal grounds.

Strengths, obstacles and challenges in implementing the ELD in the seven Member States

These strengths, obstacles and challenges may not necessarily be common to all seven Member States, but have been identified by stakeholders in one or several of the studied Member States.

The main identified strengths of the ELD regime concern the following aspects:

- **Effectiveness of the ELD and procedures established under this regime:** some stakeholders highlighted that the ELD allowed gaps to be filled in pre-existing legislative frameworks (e.g. Poland), established a straightforward process to deal with environmental damage and created stronger powers to fulfil responsibilities to prevent and remedy environmental damage. They also emphasised the positive aspect of having a regime that allows them to deal with several types of environmental damage (to land, water and biodiversity) at the same time, and that includes cost recovery provisions (which constitutes an incentive to apply the ELD when no such provisions are provided under conventional legislation);
- **Prevention of environmental damage:** stakeholders considered that the ELD regime is achieving one of its main objectives, i.e. preventing environmental damage. Some operators are already involved in the implementation of preventive actions (e.g. implementation of sectorial environmental risk assessments) voluntarily or due to obligations imposed by national transposing legislation;
- **Remediation of environmental damage:** the positive aspect of the approach to remediation taken in the ELD was emphasised, together with the added value it presents when determining remedial measures (because of the higher standard of remediation it provides in certain Member States, notably for water and biodiversity remediation, e.g. UK). The ELD is also considered useful to remediate environmental damage; and
- **Involvement of stakeholders:** the application of the ELD regime has fostered cooperation between different actors and stakeholders (including competent authorities, operators, and NGOs). In some Member States, the ELD has also reportedly contributed to increasing awareness of operators of the environmental risks associated with their activities (e.g. by implementing environmental risk assessments), but also insurers who have created insurance products to cover ELD risks.

As to the main sources of obstacles and challenges for effectively implementing the ELD, they have been identified as follows:

- **Requirements of the ELD and conditions for its application:**
 - Complexity of the national transposing legislation (particularly when it is linked to numerous other pieces of legislation);
 - Difficulty in demonstrating that the ELD threshold is met: this difficulty has been raised with regards to the three types of environmental damage (land, water and biodiversity). In the case of water damage for instance, the threshold may apply to any waters or only to an entire water body, depending on the Member State. The determination of the significance threshold may also depend on the availability of data (e.g. for the favourable conservation of a protected species);
 - The common misperception that biodiversity damage has a “severity threshold” instead of the much lower “significance threshold” set out in the ELD;
 - Difficulty resulting from the scope of the ELD, in particular Annex III which is considered too broad, too narrow, or inappropriate, depending on the stakeholder. Some Member States have chosen to extend the scope of Annex III in their national legislative framework;
 - Necessity to demonstrate the liability of an operator if the occupational activity is not covered by Annex III (e.g. transportation of oil by pipeline): the standard of liability for ‘fault or negligence’ may differ from one Member State to another (e.g. simple vs. gross negligence); and
 - Inclusion of financial obligations for operators in the context of the current economic climate that are added to other financial constraints, although some stakeholders consider that this should not be viewed as an obstacle.

- **Expertise and knowledge:**
 - Lack of experience and knowledge of the ELD regime among some competent authorities, due notably to the lack of hands-on experience with ELD cases;
 - Lack of data to determine environmental damage or an imminent threat of such damage, i.e. to determine the status of the baseline before the damage occurred (especially for water and biodiversity damage). It can also be difficult to evaluate the contribution of each liable party to environmental damage when there are multiple causes and parties involved, although joint and several liability (adopted in most Member States) alleviates this issue;

- Lack of expertise within competent authorities, which may lead authorities to resort to external experts (e.g. for assessment of the damage); and
 - Level of expertise within some parts of the insurance sector in some Member States, although insurance and other financial products, in particular, insurance policies, have been developed and are widely available.
- **Notification, organisation and governance:**
 - Stakeholders such as environmental NGOs, which play a key role in alerting the authorities, do not always have the necessary legal expertise and/or resources to follow up notifications of environmental damage. In addition, competent authorities do not always show a clear willingness to act once they have been notified of an imminent threat of or actual environmental damage; and
 - The application of the ELD regime may result in a lengthy process to determine whether environmental damage has been caused (and hence whether to bring a case under this regime), when pre-existing national legislation may be more straightforward.
- **Resources:** in some Member States, administrative authorities do not have enough resources (human and/or financial) to investigate all the cases that are reported to them.
- **Tools:** tools to support the implementation of the ELD regime, such as guidance documents for operators, competent authorities, NGOs, the public and insurers, have not been developed in all studied Member States, although many have elaborated such documents.
- **Level of co-operation of the liable party:** although in various instances stakeholders have reported the efficient cooperation of liable parties with other stakeholders in determining and undertaking remedial measures (thus ensuring more widely accepted and swifter remedial actions), this finding may not be generalised as there are cases in which operators have refused to cooperate and have repeatedly appealed decisions from competent authorities (e.g. Poland), leading to long negotiations and/or judicial actions.
- **Legislative environment:**
 - Co-existence of different ELD regimes in the same Member State, where the local and regional administrative entities can be competent to develop the ELD regime on their territory (e.g. Autonomous Communities in Spain);
 - Level of adequacy of the pre-existing legal framework: for instance, in some Member States, pre-existing legislation may be

considered more stringent than the ELD regime and will therefore be applied;

- Discrepancies between the ELD regime and pre-existing legal framework: the national transposing legislation of the ELD and the pre-existing legal framework may be different in some aspects in some Member States, thus potentially representing a challenge or an obstacle to the application of the ELD;
 - Possible overlap of the ELD with pre-existing legislation: in some cases of environmental damage, pre-existing legislation and the legislation transposing the ELD regime could equally apply (e.g. Ireland); the issue of whether the ELD transposing legislation is seen as the primary law or subsidiary to other legislation becomes even more relevant; and
 - Lack of coordination between several related Directives: the legislative framework could be optimised through better coordination of the ELD with other related Directives (IPPC - IED, SEVESO, Water Framework Directive, etc.), in terms notably of pooling data to determine baseline conditions.
- Economic and financial environment: this refers to the economic context that could support (or not) implementation in practice, e.g. the current economic climate could be an obstacle to the thorough implementation of the ELD regime. It refers also to the financial environment and economic concerns of some operators concerning the purchase of financial instruments developed by insurers to cover ELD risks.

Recommendations to foster the practical implementation of the ELD

Several recommendations have been developed on the basis of the analysis of the practices carried out in the seven studied Member States. These cover three main types: best practices, issues that remain to be resolved, and potential future actions.

Identified best practices cover:

- Organisation of workshops and conferences to increase awareness of stakeholders;
- Supporting of competent authorities through e.g. a dedicated team for providing external support when necessary (e.g. in Spain) or the establishment of networks between stakeholders;
- Development of various tools:
 - Tools to support implementation of the ELD through notably the elaboration of guidance documents and background information for competent authorities and/or operators (initiatives may be public or private);

- Tools to notify and register environmental damage cases, through notably the establishment of a national register of ELD incidents (e.g. Poland); and
- Tools to promote the purchase of insurance policies by operators, which have been for the most part publicised by the insurance sector (geographical information system, workshops, publication of leaflets, etc.).

The following issues need to be resolved in order to foster greater implementation of the ELD:

- Widely varying liability systems;
- Clashes between self-executing provisions and determination of environmental damage;
- Difficulties in enforcement;
- Relationship with IPPC/IED and other Annex III regimes;
- Implementation of the correct threshold for biodiversity damage; and
- Relationship with the Birds and Habitats Directives.

Finally, potential actions have been identified which, if implemented, could potentially strengthen implementation and enforcement of the ELD to prevent and remedy environmental damage. Potential actions are proposed for each category of challenges and obstacles (as identified above):

- Drafting technical guidance to support competent authorities in determining significant environmental damage (to improve the conditions of application of the ELD);
- Developing actions to improve expertise and knowledge of all stakeholders (whether these actions are common to all stakeholders or are specific to e.g. operators, competent authorities, insurers);
- Promoting the development of databases for the collection of data on the quality of environmental sectors (i.e. land, biodiversity, water);
- Other actions could aim at improving governance through the creation of coordination bodies and providing resources for investigation assessments, and also the development and/or promotion of specific tools to support the ELD (e.g. tools to notify environmental damage, to assess the significance of damage, etc.); and
- Ensuring greater coordination between the ELD and other related Directives may also be viewed as a desirable action (through, for instance, coordination of corresponding Expert Groups / Working Groups).

These proposed actions aim, in certain cases, to build upon and/or reinforce actions already implemented by various stakeholders.

Introduction

The concept of “environmental damage” was sanctioned by Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD).⁵ The ELD establishes a framework of environmental liability based on the polluter pays principle, in order to prevent and remedy environmental damage.

The ELD entered into force on 30 April 2004, with a deadline of 30 April 2007 for transposition by Member States. Only a few Member States achieved transposition by this deadline. The transposition process remained slow even after the deadline and led to seven judgments by the Court of Justice of the European Union (Finland, France, Slovenia, Luxemburg, Greece, Austria, and the United Kingdom (UK)).

The objective of this study on the Implementation challenges and obstacles of the Environmental Liability Directive is to evaluate the strengths, obstacles and challenges of the current ELD regime based on the implementation of the ELD in Member States by focusing on specific research questions that have not yet been subject to empirical and analytical research. It serves (in addition to the national reports from the Member States to the European Commission that were due by 30 April 2013) the evaluation of the Directive due by the Commission by 30 April 2014. The study was intentionally carried out in advance of the submission of the national reports.

This report presents the results of the study. It is structured in the following chapters:

- Chapter 1: Legal analysis of the integration of the ELD into existing national legal frameworks. This chapter provides the outcomes of the transversal analysis of the transposition legislations studied. The specific analyses conducted for Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, The Netherlands, Poland, Portugal, Romania, Spain, Sweden, and the UK and Gibraltar are described in the accompanying document “Annex - Part A”.
- Chapter 2: Application of the ELD in practice. For seven Member States (Denmark, France, Germany, Hungary, Poland, Spain, and the UK), this chapter provides an overview of the practical application of the ELD and discusses cases of environmental damage, based on information reported by stakeholders. A set of cases are described and analysed in detail in the accompanying document “Annex - Part B”.
- Chapter 3: Strengths, obstacles and challenges in implementing the ELD. This chapter discusses the strengths of the ELD and the obstacles and challenges to its effective implementation in Member States. The

⁵ See, e.g. ELD recitals 1 and 2

highlighted strengths, obstacles and challenges may not necessarily be common to all seven Member States, but have been identified by stakeholders in one or several of the studied Member States.

- Chapter 4: Recommendations to foster the practical implementation of the ELD. This chapter concludes the report by identifying best practices developed in some Member States that could be shared, together with recommendations for the development of new initiatives.

Chapter 1: Integration of the ELD into existing national legal frameworks

This chapter compares legislation enacted by Member States to transpose the ELD, focusing on variations in the transposing legislation and the supplementary nature of the ELD on existing legislation. The legal analyses of the national transposition legislation and existing legislation for selected Member States (i.e. Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Spain, Sweden and the UK and Gibraltar) are set out in the accompanying document “Annex – Part A”.⁶

As discussed below, the transposition of the ELD has resulted in widely varying liability systems in individual Member States. These variations go far beyond the optional provisions of the ELD and provisions that provide for the application of the national law of Member States. They also include the interpretation of imprecise provisions in the ELD, legislation to fill gaps in it, and more stringent provisions in some Member States. The transposition has also been greatly affected by the administrative liability law for environmental damage that existed in Member States prior to the transposition of the ELD. **The result is a patchwork of liability systems for environmental damage across the EU.**

The differences in national liability systems have major implications, a key one of which is that it is more difficult for multinational companies to understand the nature and scope of the ELD – and thus, have a general understanding of it. A study of 68 companies by the Federation of European Risk Management Associations (FERMA) found that only 56 per cent of respondents stated that they knew how the ELD had been transposed into the national law of Member States, with 95 per cent of that percentage coming from companies with a turnover of more than €50 million.⁷ Whereas the variations between Member States should not be an issue for national companies, there is an overall lack of knowledge of the ELD by many, if not most, national companies, in particular small- and medium- sized companies.

The variations in the transposition of the ELD into the national law of Member States are of two major types: procedural and substantive. The effect of these variations has, in some cases, had a major impact on the way in which the ELD is implemented and enforced, leading to some Member States, such as Poland, applying it widely, whilst other Member States have yet to have a single ELD incident. In particular, the transposition of the ELD in stand-alone legislation may lead competent authorities in some Member States to continue to apply pre-existing environmental legislation rather than the new legislation due to their familiarity with the former.

⁶ The summaries of the transposing legislation have been prepared from English translations of the relevant legislation except for France and Belgium, where they were prepared from the French legislation. The translation of other documentation is attributed in some cases to the source from which the English translation was derived.

⁷ See FERMA, Awareness of National Environmental Damage Legislation is Low; available at www.ferma.eu/2012/07/awareness-of-national-environmental-damage-legislation-is-low/ It is highly likely that the responses concerned the optional provisions under the ELD and not all the differences between the transposing legislation in various Member States.

Also, the designation of many competent authorities instead of a single authority or a small number of them makes it more difficult to gain experience in the implementation of the ELD regime. A somewhat similar problem is the lack of resources in a substantial number of competent authorities and, in some, the lack of expert knowledge in carrying out assessments of environmental damage and other tasks necessary to implement and enforce the ELD.

These, and other, variations between Member States (discussed below) are a major cause of the general lack of application of the ELD in many Member States.

Further, it is often difficult to determine when the pre-existing legislation is less – or more – stringent than the ELD. Whereas the existing law of most Member States does not include complementary and compensatory remediation, the existing law is less likely to restrict the types of operations that are subject to liability or to include the permit and state-of-the-art defences. In addition, existing national administrative law for preventing and remediating environmental damage tends to impose strict liability for all activities whereas the ELD imposes fault-based liability for non-Annex III activities.

Still further, the significance threshold for the ELD leads to difficulties in determining whether existing legislation should apply, whether the transposing legislation should supplement existing legislation, or whether it should be applied in lieu of existing legislation.

The self-executing provisions of the ELD are particularly problematic. Whereas the ELD requires an operator to take immediate preventive and abatement action when there is an imminent threat of, or actual, environmental damage, it may be many weeks or months before it is clear whether the imminent threat or damage exceeded the threshold for the ELD to apply. An operator is, thus, required to take measures to prevent “environmental damage” under the ELD without knowing whether the ELD applies at all. The difficulty is aggravated by the absence of existing legislation in Member States of such self-executing provisions.

The scope and nature of the existing administrative liability law for preventing and remediating environmental damage has also had a major effect on the implementation and enforcement of the legislation that transposed the ELD. The application of the ELD in some Member States, such as Poland, has been facilitated by the repeal of some legislation that would have overlapped with it. In other Member States, the supplementary nature of the ELD regime onto already complex existing administrative liability systems has increased the extent of overlapping legislation in those States.

1.1 Procedural variations

The procedural differences between the transposing legislation of Member States include the following:

- Differences in administrative and judicial systems;
- Differences in structures of environmental legislation;
- Nature of legislation transposing the ELD;
- Degrees of complexity of the transposing legislation;

- Designation of one or more competent authorities;
- Number of jurisdictions in Member States;
- Publication of guidance and other documentation; and
- Publication of implementation and enforcement data.

Some of the above differences are more important than others in affecting the implementation and enforcement of the legislation transposing the ELD. All, however, affect it to some degree. As noted above, the number of competent authorities and the nature of the legislation transposing the ELD are particularly important factors in the lack of application of the ELD in some Member States.

1.1.1 Administrative and judicial systems

The administrative and judicial systems in Member States vary greatly. Whilst Member States in continental Europe have administrative courts, others, such as the UK, do not. The structure of the judicial system affects the way in which challenges to orders⁸ under legislation transposing the ELD are heard. It can also affect the nature of offences and type and level of sanctions.

In Member States with administrative courts, offences for breaching provisions of the transposing legislation (for example, the failure to comply with an order to carry out preventive or remedial measures) may be heard together with an action to enforce the order to carry out the measures. This is the case in Sweden and Finland, in which the competent authority combines the order with an administrative fee (*astreinte*) which the recipient of the order must pay (in addition to the costs of complying with the order) if it fails to comply with it. It is not a criminal offence to fail to comply with an administrative order.

In other Member States, including some Member States with administrative courts, such as Portugal, two separate proceedings are brought.

More importantly, there is a greater likelihood that penalties for breaching the legislation transposing the ELD in Member States without administrative courts will be criminal rather than administrative. This is the case in Ireland and the UK in which the failure to comply with the legislation transposing the ELD is a criminal offence and, thus, may result in a criminal record. In contrast, breaches of the transposing legislation in Spain are solely administrative offences.

This does not mean that Member States with administrative courts have not established criminal offences for some breaches of the transposing legislation. The Netherlands, for example, has both types of offences, with criminal offences being limited to the most serious offences. Portugal has three types of offences for breaches of the legislation transposing the ELD: very serious environmental offences, serious environmental offences, and minor environmental offences.

⁸ There are many different terms for “order” depending on the Member State. This documentation, by which a competent authority makes a decision or directs an operator to carry out preventive or remedial measures or to perform other tasks such as providing information have many terms including notices, directions and decisions.

The structure of the administrative system also affects enforcement of the ELD regime. For example, in Hungary, the Netherlands, Portugal and Spain, an operator who wishes to challenge a remedial order must first bring proceedings before the relevant competent authority before having access to the judicial system. In Finland, France and Italy, the operator makes an appeal to the administrative court (in Sweden, the Environmental Court of Appeal), with an additional mechanism in Italy by way of an appeal to the President of Italy. In Member States that do not have administrative courts, such as the UK, an appeal is made to the Secretary of State.

1.1.2 Structure of environmental legislation

There is a significant variance in the structure of environmental legislation in Member States. Some Member States have an Environmental Code which codifies most, if not all, environmental legislation in that Member State. For example, the legislation transposing the ELD in Sweden supplemented a chapter of its Environmental Code thus allowing for the automatic application of various sections of the Code to the ELD regime. In addition, the Swedish Government adopted an Ordinance and made amendments to the Code and existing Ordinances. Further, the legislation authorized the Government or the authority designated by it to issue regulations on specific aspects of the regime.

France transposed the ELD by enacting primary legislation that introduced a new title into its Environmental Code and modified various articles of the Code and existing laws. The Act was accompanied by a Decree which sets out the content of the ELD regime. Italy introduced a new Title, consisting of 19 articles and five Annexes, into its Environmental Code. The legislation does not amend existing national legislation. The Netherlands transposed the ELD by enacting a new Title to its Environmental Management Act (the major environmental legislation in that country), thus, again, automatically applying other sections of the Act to the ELD regime.

Many Member States do not have an Environmental Code but rather a smaller – or greater – number of primary or secondary pieces of legislation.

Whereas existing legislation may apply to the legislation that transposed the ELD regardless of whether the ELD regime is set out in an Environmental Code, the existence of a Code seems more likely to lead to the legislation transposing the ELD being harmonized with existing environmental legislation in a Member State.

1.1.3 Nature of legislation transposing the ELD

The mechanism for transposing the ELD varies widely between Member States. Differences in the method of transposition are due, in large part, to established legal mechanisms for transposing Directives into the national law of Member States and existing legislation.

In many Member States, the ELD was transposed by primary legislation which, in some Member States, was accompanied by a Decree or Ordinance. This was the case in Finland, France, the Netherlands and Spain. For example, the transposing legislation in Spain consists of an Act, a Decree and a Ministerial Order. The Act authorizes the Spanish Government, after consultation with the Autonomous Communities, to adopt various provisions to implement and execute

specified aspects of the ELD regime. No amendments were made to other legislation. The Autonomous Communities are authorized to legislate to adopt more stringent measures in specific areas but they have not done so.

In other Member States, there was a single Act, Decree, Government Ordinance or set of Regulations. This was the case in Germany, Greece, Ireland, Portugal and Romania. In Portugal, for example, the ELD was transposed in a single law that did not amend other legislation. As with many other Member States, Portugal has since enacted amendments to the initial legislation.

In some Member States, such as Ireland and the UK, the transposing legislation is pure stand-alone legislation. In other Member States, such as Germany, it is stand-alone legislation, with some amendments having been made to existing legislation.

In yet other Member States, such as Denmark, Finland, Hungary and Poland, amendments – extensive in some cases – were made to existing legislation to incorporate the ELD regime into existing regimes. The Polish transposing legislation, for example, amended five Acts in addition to the introduction of stand-alone legislation.

Primary legislation is, of course, debated in the legislature. The proposed legislation, amendments to it, as well as debates in the legislature and other documentation are generally recorded and published and may help interpret legislative provisions. For example, the explanatory memorandum to the draft Parliamentary Bill is available through a link in the Dutch Guidance on the ELD.

In contrast, there is no primary legislation to transpose the ELD into national law in some Member States. For example, pursuant to the European Communities Act 1972, the Department for Environment, Food and Rural Affairs prepared and consulted on secondary legislation (regulations) to transpose the ELD into English law. The regulations were then laid before Parliament. Parliament formally approved the regulations but did not debate them; the consultation process was administered by the Department, subject to approval by Ministers, and involved consultations with the public, in particular, stakeholders. The various consultation papers, summaries of comments to them, regulatory impact assessment and draft legislation are publicly available.

It is too early to state whether transposing the ELD regime into national law by amending existing legislation with which competent authorities are familiar encourages its implementation and enforcement but the potential exists that it does so depending, of course, on the complexity of the amendments. For example, officers in a competent authority that are familiar with pre-existing environmental liability law but unfamiliar with the ELD regime, may continue to enforce the former.⁹ This is a particular problem when it is difficult to determine whether the legislation transposing the ELD is more stringent than existing legislation. Even when some aspects of existing legislation are less stringent than the ELD, however, the aspects of the ELD that are

⁹ See, e.g. Commercial Risk Europe, Environmental Risk Report 2012/2013, chapter 1, p. 5 (2012) (quoting an environmental underwriter as stating "If you take the UK, I would say the ELD has barely caused a ripple, largely down to regulators apparently preferring to use legislation they have more experience of, such as the Water Resources Act for example, plus a lack of support in the UK for a regime of mandatory financial provision for the ELD").

more stringent than existing legislation (for example, complementary and compensatory remediation) must be applied.

1.1.4 Degrees of complexity of the transposing legislation

In some Member States, the legislation transposing the ELD is complex and lengthy. In other Member States, it is short and includes a substantial number of provisions that are a “copy out” of provisions of the ELD.

In Denmark, two Acts were introduced. One Act set out transposing legislation; the other Act amended 17 existing Acts. In addition, seven Orders have been made, with authority having been provided for the issuance of additional rules and regulations.

At the other end of the spectrum are Member States such as the Netherlands, Portugal and Germany. Germany enacted a stand-alone 11-page Act and amended federal water and nature conservation legislation. Whilst this was sufficient fully to transpose the ELD, the *Länder* are authorized to enact legislation on the settlement of, or exception from and reimbursement of costs, any permit and state-of-the-art defences and the designation of competent authorities. The *Länder* have designated competent authorities but have not enacted some optional provisions of the ELD such as the permit and state-of-the-art defences.

The Netherlands, meanwhile, transposed the ELD in a single seven-page Act that adds a new Title to the Environmental Management Act and makes minor amendments to legislation on offences and sanctions. Existing legislation on administrative procedures applies to the ELD regime, as it applies to other regimes. Portugal transposed the ELD in a single Act, with no amendments to existing legislation. As with the Netherlands, existing legislation on administrative procedures and offences applies.

It is not necessarily easier to understand brief legislation than it is to understand lengthier legislation; the reverse may be true in some instances. Further, legislation that does not fill at least some of the gaps in the ELD may be particularly difficult to understand. The format of the legislation, however, plays a role in its understanding by competent authorities and other stakeholders in a Member State.

1.1.5 Number of competent authorities

The number of competent authorities designated by Member States varies widely. In some Member States, such as Austria, Germany and the UK (England, Wales and Scotland), several hundred competent authorities have been designated. In other Member States, such as Ireland and the UK (Northern Ireland), only one competent authority has been designated. In yet other Member States, such as Italy, only one competent authority has been designated (Ministry for the Environment) with the transposing legislation providing that the Ministry shall act in collaboration with regional, provincial and local authorities.

Portugal has designated a single competent authority, the Portuguese Environment Agency. In addition, it has designated the General Inspectorate for the Environment and Spatial Planning,

and the Nature and Environment Protection Service of the National Republic Guard to monitor compliance with the transposing legislation.

The number of authorities depends on various factors including whether a Member State has a federal system, the existence of authorities for different aspects of environmental and natural resources law, and the existence of regional, provincial and local authorities. For example, in the federal systems of Germany and Spain, the *Länder* and Autonomous Communities, respectively, designate competent authorities in their jurisdictions rather than the federal Government. In Finland, the competent authorities include regional centres. In France, the *Préfet de département* of the *département* in which an imminent threat of, or actual, environmental damage occurs is the competent authority, although this has not precluded the designation of other competent authorities. For example, the *Préfet de Police* is the competent authority for Paris and the Minister of Defence is the competent authority for defence matters. In Hungary, in addition to competent authorities with environmental competencies, the directorates of disaster recovery, public health, and food safety have also been delegated.

In Hungary, the Minister in charge of the Environment and the Minister of the Interior perform the national level management of the remediation of damage with regard to various specified Inspectorates, Directorates and Institutes. In turn, the Inspectors and their supervising body are the main competent authorities. Further competent authorities, for specific matters, include the directorates of disaster recovery, county-based police administration services of public health and the Hungarian Food Safety Office.

The designation of competent authorities is particularly complex in Greece. The Ministry of the Environment, Energy and Climate Change is the competent authority when the damage affects natural resources or services of national importance that are protected and/or managed by a public authority, or when the imminent threat of, or actual, environmental damage affects natural resources or services in more than one Decentralised Administration or the territory of another Member State. The Decentralised Administrations are the competent authorities when the imminent threat of, or actual, environmental damage affects natural resources or services only within their areas. In addition, the Coordinating Office for Environmental Damage Management (COEDM) supervises and controls the implementation of the ELD regime and co-ordinates actions taken by Environmental Agencies at central and local level and competent bodies of narrow or broader public sector which may be involved in law enforcement issues. The work of the COEDM is supported by a consultative committee called the Environmental Damage Management Committee. Regional Environmental Damage Management Committees have also been established at the regional level.

In Finland, 13 ELY Centres (Centres for Economic Development, Transport and the Environment) are competent authorities, together with Regional State Administrative Agencies, the Board for Gene Technology, and local environmental protection authorities of the municipalities.

If a Member State has established a separate authority for marine matters, it is common for this authority to be the competent authority for marine waters and, in some cases, biodiversity in the marine environment. An example is the UK where the Marine Management Organisation (England and Wales) and Marine Scotland are competent authorities, although not for all environmental damage in the marine environment.

Similarly, if a Member State has a separate authority for GMOs, such as indicated above for Finland, that authority tends to be designated as the relevant competent authority for GMOs.

The number of competent authorities in a Member State may also have implications for the potential to recover costs incurred in responding to an ELD incident that involves, for example, a fire or explosion to which public authorities other than environmental authorities frequently respond (see section 1.4 below).

1.1.6 Number of jurisdictions in Member States

The legal system in Member States has, naturally, affected the transposition of the ELD. In Germany and Spain, the federal Governments have enacted the transposing legislation. In contrast, the *Länder* and Autonomous Communities, respectively, have not enacted the discretionary aspects of the ELD within their competence. In other Member States such as Austria, the splitting of competencies between the Federal Government and the *Länder* has increased the complexity of the transposing legislation due to the *Länder* having enacted transposing legislation as well as the Federal Government.

The lack of transposition of all the ELD's discretionary provisions, as in Germany and Spain, is not, however, confined to federal systems. For example, in Ireland, the national Government transposed the ELD regime into law by regulations (secondary legislation) but decided to transpose the discretionary aspects of the ELD into national law by primary legislation. A draft Bill that was proposed in 2008 to transpose some of the discretionary provisions, such as the permit and state-of-the-art defences and the extension of biodiversity damage under the ELD to nationally protected biodiversity, has not progressed as yet and may not do so.

Transposition of the ELD in the UK is particularly complex due to environmental matters having been devolved to the separate Administrations. Accordingly, different regulations were issued for England, Wales, Scotland and Northern Ireland. Gibraltar has also issued regulations. Although there are many similarities between the regulations, there are also significant differences. For example, England, Wales and Northern Ireland have extended the ELD regime to nationally protected biodiversity; Scotland has not done so. In addition, whereas England, Wales and Northern Ireland have adopted joint and several liability, Scotland has adopted a more complex provision with joint and several liability as a default if liability cannot be allocated on a proportionate basis (see section 2.3.2.2 below).

Another Member State where transposition of the ELD is complex is Belgium. The federal State adopted a Law and three Royal Orders. Each of the Regions adopted transposing legislation (Decrees in the Flemish and Walloon Regions and an Ordinance in the Brussels-Capital Metropolitan Region). In turn, that legislation amended other legislation. In cases of trans-regional environmental damage, a co-operation mechanism is applied.

1.1.7 Publication of guidance and other documentation

Some Member States have published guidance to accompany national transposing legislation. These include Belgium (Walloon Region), Denmark, Finland, France, Ireland, the Netherlands,

Portugal, Spain and the UK. Such guidance typically elaborates on provisions of the national legislation and, in addition, provides case studies and guidelines for determining whether the threshold for biodiversity damage has been exceeded and methods for quantifying such damage.

Other Member States such as Germany, Hungary and Poland, have not published guidance. Hungary has, however, published “Official Releases of the Green Authority” which indicates relevant changes in environmental legislation, relevant decisions and the reasons for them.

Another variation is the publication of regulatory impact assessments that assess the financial and other implications of implementing the ELD regime. Regulatory impact assessments have been published, for example, by Ireland and the UK (England and Wales, Northern Ireland, and Scotland). The publication of such impact assessments tends to be dependent on national legislation in some Member States requiring such publication rather than being specific to the ELD regime.

1.1.8 Publication of implementation and enforcement data

The notification of an imminent threat of, or actual, environmental damage to a competent authority or other authority is required by the ELD. The publication of notifications, ELD incidents, and other information concerning the implementation and enforcement of the ELD is not required.

Publication of such data, however, can enable stakeholders and the public to become much more aware of the existence of the ELD regime and its implementation and enforcement.

In Portugal, for example, convictions for very serious offences as well as breaches of some serious environmental offences depending on the level of fine, both of which include some breaches of the legislation transposing the ELD, are published.

Poland has a particularly broad regime for including information about the implementation and enforcement of the ELD regime in public records as well as publicising its enforcement and implementation (see section 1.2.10 below).

1.2 Substantive variations

There is a large number of substantive variations in the legislation transposing the ELD into the national law of Member States. These variations are a result of many factors. These factors are:

- Optional provisions in the ELD that specifically envisage differences in national ELD regimes;
- Provisions specifically providing for the application of national law;
- Adoption of more stringent provisions;¹⁰
- Adoption of less stringent provisions;

¹⁰ The specific provision in the ELD is art. 16(1), reflecting TFEU art. 193.

- Application of national law concepts to fundamental legal concepts in the ELD;
- Imprecise language in the ELD;
- Adaptation of the language transposing the ELD;
- Provisions in national legislation to rectify conflicts in the ELD;
- Provisions in national legislation to fill gaps in the ELD; and
- Extension to include a civil liability regime.

1.2.1 Optional provisions

The ELD contains the following optional provisions, which are discussed further below:

- Extension of biodiversity damage to nationally protected biodiversity;
 - Permit defence;
 - State-of-the-art defence;
 - Mandatory financial security;
 - Exemption for the spreading of sewage sludge for agricultural purposes from Annex III; and
 - Procedures in the event of environmental damage in a Member State from outside its borders.
- ▶ Extension of biodiversity to nationally protected biodiversity

Article 2(3)(c) of the ELD provides that a Member State may extend liability for preventing and remediating environmental damage under the ELD to species and natural habitats protected under national legislation.

Fourteen Member States have extended the ELD regime to nationally protected biodiversity in order to include species and habitats protected under their national or regional schemes in all or part of their jurisdiction. These Member States are Austria, Belgium, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden and the UK.¹¹ It should be noted in this respect, however, that Austria, Belgium and the UK have not extended the ELD regime to nationally protected biodiversity throughout the entire Member State. For example, Scotland has not extended the ELD regime to nationally protected biodiversity although England, Wales and Northern Ireland have done so. In 2008, the Irish Government published a draft Bill that would extend the ELD regime to nationally protected biodiversity. That Bill has not progressed, however, and may not do so in its current form.

¹¹ Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Under Article 14(2) of Directive 2003/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, COM(2010) 0581 final para. 2.2 (12 October 2010) (COM(2010) 0581).

The extension of biodiversity to nationally protected biodiversity does not, of course, mean that Member States that have extended it protect more biodiversity than Member States that have not extended it. The extent of biodiversity protected in individual Member States varies substantially due, among other things, to the richness of biodiversity in their territories.

The following are the percentages of land areas in the Natura 2000 network for Member States as of January 2013: Belgium 12.74%; Austria 14.96%; Bulgaria 34.34%; Cyprus 28.37%; Czech Republic 14.3%; Denmark 8.94%; Estonia 17.82%; Finland 14.42%; France 12.56%; Germany 15.43%; Greece 27.3%; Hungary 21.44%; Ireland 13.17%; Italy 19.17%; Latvia 11.53%; Lithuania 12.07%; Luxembourg 18.15%; Malta 13.37%; the Netherlands 13.82%; Poland 19.52%; Portugal 20.92%; Romania 22.66%; Slovakia 29.58%; Slovenia 35.52%; Spain 27.24%; Sweden 13.77%; and the UK 8.55%.¹²

The ELD, of course, applies to all biodiversity protected by the Birds and Habitats Directive – as do both of those Directives – regardless of whether the protected species or natural habitat is in a Natura 2000 site. The percentages of areas covered by Natura 2000 do, however, provide an indication of the differences in the extent of the application of the ELD regime between Member States.

► Permit defence

Article 8(4)(a) of the ELD provides that “Member States may allow the operator not to bear the cost of remedial actions taken pursuant to [the ELD] where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by ... an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event”.

The following Member States have adopted the permit defence: Belgium (Regional level), Cyprus, the Czech Republic, Denmark, Estonia (except GMOs), Finland, Greece, Italy, Latvia (except GMOs), Lithuania, Malta, Portugal, Slovakia, Spain, and the UK (except GMOs in Wales). In Germany, the decision on whether to adopt the permit defence rests with the Länder, not the federal Government. None of the Länder has adopted it.

The transposing legislation in Ireland does not include some discretionary provisions such as the permit defence. Instead, the defence was included in a draft Bill that may (or may not) be enacted.

Sweden has not adopted the permit defence but, instead, considers whether an activity was carried out in accordance with a permit as a mitigating factor in determining liability. That is, a competent authority shall take account of “whether the damage was caused by emissions or other measures which, when they took place, were expressly permitted by the provisions of a law or other legislation” in deciding the extent of liability of an operator. These mitigating factors

¹² Natura 2000 Barometer, Updated August 2011, 33 Natura 2000. P. 8 (Jan. 2013).
http://ec.europa.eu/environment/nature/info/pubs/docs/nat2000newsl/nat33_en.pdf

apply only to environmental damage under the ELD regime; they do not apply to pollution damage under existing environmental legislation, to which a reasonability test applies.

The permit defence in Finland differs from that in the ELD. The Finnish version of the defence is, however, in accordance with EU environmental legislation. The transposing legislation states that: "An operator who shows it has proceeded with care will not be fully liable for [costs incurred in remedial measures, assessing damage and its immediate risk, and deciding on remedial measures and monitoring]". Instead, "[r]easonable costs will apply provided that: 1) the damage is due to an emission or event that complies with the conditions of the permit granted for the activity or other decision of any authority; or 2) the activity that caused the damage has been in compliance with the legal obligations regarding the activity".

The permit defence in the Netherlands is also different in that the transposing legislation includes the phrase "in so far as [the costs] cannot, in whole or in part, be reasonably attributed to the operator". This term is not in the ELD. The term applies a mitigation threshold which is similar to the threshold that exists under Dutch administrative law in respect of the recovery of costs by public authorities. That is, the competent authority may decide not to recover part or all of the cost of remedial measures from an operator when the authority concludes that it would be unreasonable to do so. The term "reasonably" is not defined; the Explanatory Memorandum to the draft parliamentary Bill to the transposing legislation mentions "exceptional circumstances" as being unreasonable.¹³ Case law indicates that exceptions to the recovery of costs are narrow. In respect of ELD incidents, the Guidelines to the transposing legislation note that the size of the costs cannot be a factor because considering the size would breach the polluter pays principle. They thus state that the risk of insolvency and possible loss of employment of the operator may not be considered in determining whether the defence applies.

The Guidelines to the Dutch transposing legislation further state that the reasonableness test does not permit a competent authority to waive any costs except the costs of remedial measures. That is, the test does not apply to administrative, legal costs or other costs. It is not clear from the transposing legislation of other Member States whether the permit defence is limited to the costs of remedial measures or whether it also includes other costs; the latter appears to be the case.

The transposing legislation of some Member States does not apply the permit defence, in part or in whole, to GMOs. The Danish transposing legislation provides that an operator in respect of GMOs is the person who uses GMOs. If, however, that person cannot be considered to be the responsible person, the person who, as part of their occupational activities, produced or imported the GMOs is the person responsible; the permit defence is not available to such producers or importers. Estonia, Latvia and the UK (Wales) have not applied the permit defence to GMOs.

► State-of-the-art defence

Article 8(4)(b) of the ELD provides that "Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not

¹³ See Gerd Winter, Jan H. Jans, Richard Macrory and Ludwig Krämer, *Weighing up the EC Environmental Liability Directive*, *Journal of Environmental Law*, vol. 20(2), pp. 163m 178 (2008).

at fault or negligent and that the environmental damage was caused by ... an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place”.

The following Member States have adopted the state-of-the-art defence: Belgium (Regional level), Cyprus, the Czech Republic, Estonia (except GMOs), France, Greece, Italy, Latvia (except GMOs), Malta, the Netherlands, Portugal, Slovakia, Spain, and the UK.

Sweden has not adopted the state-of-the-art defence as a defence but may consider it as a mitigating factor in determining liability. That is, a competent authority shall take account of “whether the damage was caused by emissions or other measures which ... were not considered harmful by scientific and technical expertise available at the time” in deciding the extent of liability of an operator. The mitigating factors apply only to environmental damage under the ELD regime; they do not apply to pollution damage under existing environmental legislation, to which a reasonability test applies.

The transposing legislation in Ireland did not include some discretionary provisions such as the state-of-the-art defence. Instead, the defence was included in a draft Bill that may (or may not) be enacted.

In Germany, the decision on whether to adopt the state-of-the-art defence rests with the *Länder*, not the federal Government. None of the *Länder* has adopted it.

The Netherlands has adopted the state-of-the-art defence but, as with the permit defence, it includes the phrase “in so far as [the costs] cannot, in whole or in part, be reasonably attributed to the operator”. Again, this term is not in the ELD. The mitigation threshold applies, as with the permit defence, when it is unreasonable for the competent authority to recover its costs. Reasonableness must relate to the state-of-the-art defence itself, that is, if the operator demonstrates that it “was not at fault or negligent [and] the damage was caused by an activity, emission or event that, at the time it occurred ... was not considered damaging on the basis of existing scientific and technical knowledge”. The Guidelines to the transposing legislation states that the objective level of science and technology at the time of the activity, emission or event is the relevant issue. The discussion under the permit defence (above), as to reasonableness factors also applies to its application to the state-of-the-art defence.

The state-of-the-art defence in France specifically applies to products. The French transposing legislation provides that the defence applies in the absence of fault or negligence, if a product, used in the framework of an activity was not considered likely to cause environmental damage on the basis of the scientific and technical state-of-the-art when the damage occurred.

► Mandatory financial security

The ELD does not impose mandatory financial security. This highly contentious issue resulted in mandatory financial security not being included in the final version of the ELD. Instead, the ELD directed the European Commission to decide in light of its report on the effectiveness of the ELD in 2010 and “an extended impact assessment, including a cost-benefit analysis” whether to “submit proposals for a system of harmonised mandatory financial security”. The Commission did not submit such proposals in its report, having concluded that it was premature to do so

because: “the transposition of the ELD resulted in divergent implementation rules ... the Member States opting for mandatory financial security do not yet have their systems in place, so mandatory approaches cannot be evaluated, and ... more financial security products are becoming available”.¹⁴

Also in lieu of imposing mandatory financial security, the ELD directed Member States to “take measures to 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 [the ELD]” (article 14(1)).

Most Member States decided not to impose mandatory financial security. The exceptions are Bulgaria, the Czech Republic, Greece, Hungary, Portugal, Romania, Slovakia and Spain. Lithuania has considered whether to impose mandatory financial security but has not done so at this time.

The decision to impose mandatory financial security does not mean that the legislation imposing it has necessarily been enacted as yet or even where it has been enacted, is fully implemented. All the Member States that decided to impose either encountered delays or are still preparing for its introduction.

Primary legislation to establish mandatory financial security has been enacted in Bulgaria, the Czech Republic, Greece, Portugal, Slovakia and Spain. As discussed below, the Czech Republic and Slovakia have introduced mandatory financial security. The legislation will be brought into force in Spain in the near future on the completion of extensive work on risk assessments and other criteria. Portugal is also still carrying out work on the requisites to bring the system fully into effect, as are Bulgaria and Greece. Mandatory financial security in Romania is anticipated to be brought into force on 1 January 2014.

Spain will introduce mandatory financial security gradually, with the following prioritisation: activities covered by Law 16/2002 of July 1 (which transposed the Integrated Pollution Prevention and Control Directive 2008/1/EC) (priority level one); the accident rate at industrial facilities (priority level two); and prior obligations of risk analysis (priority level three). The financial security will not cover all liability under the ELD. Instead, it will cover the following: preventive actions; emergency remedial actions; remedial measures to biodiversity, water and land but limited to primary remediation only. The limit of mandatory financial security is €20 million each and every event and in an annual aggregate.

There are various exemptions to the Spanish mandatory financial security regime, the main ones of which are for: operators of activities liable to cause damage when a verified environmental risk assessment carried out pursuant to the guidelines in UNE Standard 150,008 or equivalent rules indicates that any remedial works will not exceed €300,000; operators of activities liable to cause damage when a verified environmental risk assessment carried out pursuant to the guidelines in UNE Standard 150,008 or equivalent rules indicates that any remedial works will be between €300,000 and €2,000,000 and the operator has a EMAS certificate (EU Eco-management and audit scheme) or ISO 14001 (UNE-EN ISO 14001:1996); and persons who use plant protection

¹⁴ COM(2010) 0581, para. 4.2

products and biocides for agricultural and forestry purposes provided the products and biocides are defined in specified Spanish legislation.

The transposing legislation in Portugal provides that operators of Annex III activities shall be required to have “one or more appropriate and separate, alternative or complementary financial securities” in order to carry out such activities. Financial guarantees are not limited to insurance but also include bank guarantees,¹⁵ participation in environmental funds and the establishment of specific funds. If the financial security instrument is a security, the security must be dedicated, that is, it “shall obey the principle of exclusivity and cannot be allocated towards another purpose or subject to any total or partial, original or supervening encumbrance”. The legislation further provides that the Government may issue an order to establish minimum limits for mandatory financial securities, with the order to be approved by the governmental departments for finance, environment and economy.

In accordance with the transposing legislation, the minimum amounts for financial security instruments in Portugal are being established by reference to the following: the scope of activities covered by them; the type of risk; the length of time for the instrument; the temporal scope of the instrument; and the minimum amount specified in it. Technical Guidelines for the Evaluation of Environmental Damage and Imminent Threat of Environment Damage have been published.¹⁶

The mandatory financial security system in Slovakia came into effect on 1 July 2012. The system applies to Annex III operators, which must provide evidence of financial security to the relevant competent authority (*Obvodný úrad životného prostredia*) within 100 days of the issuance of an environmental permit. The amount of financial security based, as in Spain, on estimated remedial cost. Also, as in Spain and Portugal, the operator should carry out a risk assessment to determine the financial security. Financial security mechanisms include insurance and bank guarantees.

The operator must notify competent authority of any changes in estimated remedial costs immediately. There is a fine of up to €33,193.91 for the breach of transposing legislation concerning financial security, with a fine of up to €6,638.78 for not providing the competent authority with evidence of financial security even if such financial security has been obtained.

The mandatory financial security system in the Czech Republic was introduced on 1 January 2013. It has substantial similarities to the systems in Spain, Portugal and Slovakia. It applies to Annex III operators, with the amount of financial security being based on estimated remedial costs. Financial security mechanisms are not limited to insurance. The operator must carry out a basic risk assessment that focuses on an indicative assessment of the vulnerability of the activities carried out by the operator to the environment. If the total number of points exceeds 50, the

¹⁵ The bank guarantees are issued in favour of the APA. In 2011, for example, the Grupo Banco Espirito Santo issued 24 such guarantees under Decree-Law 147/2008. See Grupo Banco Espirito Santo 2011 Annual Report, p. 55.

¹⁶ See Paula Rios and Ana Salgueiro (2012), Environmental Liability and financial guarantees: The Portuguese system and the Spanish example for other markets, *Gerencia de Riesgos y Seguros*, No. 112; <http://www.mapfre.com/fundacion/html/revistas/gerencia/n112/en/estudio1.html> See also Paula Rios and Ana Salgueiro (2012), Environmental Liability and Financial Guarantees, The Portuguese system and the Spanish example for other markets, *Gerencia de Riesgos y Seguros*, No. 113; www.mapfre.com/fundacion/html/revistas/.../estudio1.html

operator must carry out a detailed risk assessment that focuses on developing detailed scenarios of environmental damage and its consequences. The calculation of the costs of preventive and remedial measures is based on that detailed risk assessment. If potential costs exceed CZK 20 million, the operator must obtain financial security. Exemptions from the requirement to have financial security exist if the operator has EMAS registration or has begun actions to obtain registration, or the operator has a certified environmental management system under ISO 14000 or has begun actions necessary for such certification.

The relevant legislation in Greece states that a system of mandatory financial security, to include insurance policies and other forms of financial guarantees including mechanisms in case of insolvency, shall begin on 1 May 2010 for the purpose of providing cover for an operator's environmental liability under Presidential Decree No. 148/2009. It was anticipated that the system would be phased in by the end of 2012. Introduction of the mandatory financial security was subsequently postponed until 31 December 2012. This date has been postponed, albeit not officially. A draft of a joint ministerial decision has been prepared and is expected to take effect in mid 2013.

Presidential Decree No. 148/2009 further provides that the Minister of the Environment, Energy and Climate Change, together with "any possible jointly responsible Minister, shall issue decisions laying down for each activity or category of the abovementioned activities [falling within the scope of the Decree] the exact deadline" for bringing in such financial security (article 14(2)). Further, the Ministry of Economy and Finance shall determine the amount of financial security. Such determination does not in any way entail a determination of an operator's liability under the Decree, which (determination of liability) is based on the extent, type and size of damage that can be caused by an operator's activities. A joint ministerial decision by the Minister of the Environment, Energy and Climate Change and the Minister of Economy and Finance shall determine the method for the calculation of the amount of financial security, based on "technical criteria capable of ensuring a homogenous assessment of risk scenarios and of the corresponding remediation costs".

The Bulgarian Act on liability with regard to the prevention and remedying of environmental damage requires Annex III operators to have financial security for ELD risks arising from those operations. The requirement became effective on 1 January 2011. The mechanism to be used is an insurance policy in favour of the Ministry of the Environment and Water. Other financial security mechanisms may also apply under the ELD. The minimum amount of financial security is Bulgarian Lev 50,000 (€25,565). The requirements for mandatory financial security in Bulgaria, however, do not appear to be widely observed or enforced as yet.

The transposing legislation in Italy provides that the President of the Council of Ministers may make a Decree following a proposal by the relevant Ministers "to lay down appropriate forms of guarantee and develop the supply of relevant [financial security] instruments". This Decree has not been made as yet.

When the ELD was enacted some Member States already had mandatory financial security under existing environmental law. Finland had enacted the Environmental Damage Insurance Act, under which companies whose activities may cause a significant risk to the environment or which have an environmental permit must have financial security. The scheme is administered by insurance companies, which have established the Environmental Insurance Centre to handle

claims for compensation. The fund pays compensation for bodily injury, property damage and pure economic loss from environmental damage if the liable party is insolvent or cannot be identified. It does not pay for biodiversity damage. Payments made by the fund are limited due to the restrictive nature of its terms. Prior to the ELD, Finland had also established a national oil pollution fund, which is financed by a charge on imports of oil.

Sweden also had a fund, known as the Swedish Environmental Damage Insurance programme, which was set up under the 1986 Environmental Damage Act. The fund was abolished on 1 January 2010. The programme had provided compensation for environmental damage (as well as personal injury and property damage) in cases of pollution when the polluter could not be identified, the liable party was insolvent, or liability was time-limited. Payments made by the programme were limited due to the restrictive nature of its terms as well as the restrictive nature of their application.¹⁷

► Exemption for the spreading of sewage sludge for agricultural purposes from Annex III

Annex III(3) of the ELD authorises Member States to exempt “the spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes” from the definition of a waste management operation under Annex III.

Bulgaria, France, Latvia, Malta, Portugal, Romania, Slovakia, Slovenia, and the UK took the option in the ELD to exempt the spreading of such sewage sludge for agricultural purposes from waste management operations under Annex III.¹⁸ Germany also exempted the spreading of sewage sludge for agricultural purposes.

Romania has exempted the spreading of sewage sludge for agricultural purposes as an exception to the ELD rather than an exemption to an activity under Annex III of the ELD (see section 1.2.5 below).

Member States that have not exempted the spreading of sewage sludge from Annex III tend not to mention it in their transposing legislation.

► Procedures in the event of environmental damage in a Member State from outside its borders

The ELD provides for co-operation between Member States in the event of cross-border environmental damage. Article 15(3) of the ELD provides that “[where a Member State identifies damage within its borders which has not been caused within them it *may* report the issue to the Commission and any other Member State concerned; it *may* make recommendations for the adoption of preventive or remedial measures and it *may* seek, in accordance with this Directive, to recover the costs it has incurred in relation to the adoption of preventive or remedial measures” (emphasis added).

Some Member States have not included provisions specifying procedures to take in the event of damage in a Member State from outside its border. Those that have done so tend to state that

¹⁷ See Hubert Bocken, Alternative Financial Guarantees for Environmental Liabilities under the ELD, *European Energy and Environmental Law Review*, vol. 18, 146, 164-65 (June 2009).

¹⁸ COM(2010) 0581 para. 2.2.

there is a duty to report the damage to the Commission and the other Member State, and a power to make the above recommendations and seek to recover their costs.

For example, the transposing legislation in Italy and Spain provides that there is a duty to report the damage to the Commission and the other Member State. The legislation then provides that there is a power to recommend preventive and remedial measures and to seek the recovery of costs incurred in carrying out preventive and remedial measures. The transposing legislation in Poland also provides that there is a duty to report the damage to the Member State.

The transposing legislation in Portugal states that there is a duty to notify the Commission and the other Member State, as well as to make recommendations for preventive and remedial measures and to seek to recover costs. In Romania, there is a duty to provide information to competent authorities in affected Member States within 24 hours of being notified of the damage. The Romanian authorities then have the power to make recommendations for preventive and remediation measures and to seek recovery of their costs. The transposing legislation in Ireland provides that there is a duty to report the damage to the Commission and the other Member State as well as a duty to make the above recommendations. It then provides that there is a power to seek recovery of costs incurred in carrying out preventive and remedial measures.

1.2.2 Provisions specifically providing for the application of national law

The ELD provides for the application of the national law of Member States in respect of the following, all of which are discussed below:

- Extension of the definition of an operator;
 - Scope of liability;
 - Determination of a “sufficient interest” and “impairment of a right”;
 - Notification of a competent authority’s decision to an interested party; and
 - Exhaustion of administrative procedures by an interested party prior to recourse to judicial proceedings.
- ▶ Extension of the definition of an operator

The ELD defines an “operator” as “any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity” (ELD, article 2(6)).

Most Member States have adopted the above definition. Some Member States have adopted a broader definition (Estonia, Finland, Hungary, Lithuania, Poland and Sweden).¹⁹ The Polish transposing legislation, for example, defines an ‘operator’ as “an entity which uses the environment within the meaning of [existing environmental legislation] which carries out an activity involving a risk of environmental damage, or any other [specified activity] causing

environmental damage or an imminent threat of such damage". This is the same definition as in existing legislation.

In a somewhat similar manner to Poland, an operator in Hungary is referred to as a "user of the environment", that is, the person carries out "an activity involving the utilisation or loading [pollution] of the environment or a component thereof", a definition that is broader than that in the ELD. Again, this is the same definition as in existing legislation.

The Polish transposing legislation and the Danish transposing legislation also provide definitions of different types of operators depending on the activities in question. For example, the Danish legislation defines an operator in various contexts including livestock use, the operation of a ship or aircraft, GMOs and watercourses.

The transposing legislation in Italy includes the following term in the definition of an operator "who has decision-making powers on financial and technical issues of the company, including the person who holds the permit/authorisation to carry out the business". This term appears to be broader and could, perhaps, include directors and officers. Further, the transposing legislation in Italy states that "Any person who performs an unlawful act or who omits mandatory activities or behaviour, in breach of law, regulations or administrative provisions [and who] causes damage to the environment by altering, impairing or destroying it" may be liable for its restoration.

The definition of an operator in the transposing legislation in Spain is: "Any natural or legal, public or private person performing an economic or professional activity or who, under any title, controls the said activity or has decisive economic power over its technical operation. In determining such status, the provisions laid down in sectoral, national or regional law concerning the granting of permits or authorisations, inscriptions in registries or communications to the administration for each activity shall be taken into consideration. In determining whether a person who is granted a permit or authorisation is an operator, relevant sectoral, national or regional law, and inscriptions in registries or communications to the administration for each activity shall be considered". Although this definition is essentially the same as that in the ELD, it does not include contractual bodies of public administration when they conclude administrative contracts. In such a case, the contractual partner is considered to be the "operator".

In Sweden, an operator is defined broadly as "[p]ersons who pursue or have pursued an activity or taken a measure that has contributed to pollution damage or serious environmental damage". This definition, which is based on existing environmental legislation, includes owners of land on which there is ongoing pollution from landfills, oil tanks, barrels, etc.

► Scope of liability

The ELD provides that it "is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation especially concerning the apportionment of liability between the producer and the user of a product" (ELD, article 9).

Most Member States have adopted joint and several liability for indivisible environmental damage. The only Member States not to do so are Denmark, Finland, France, Slovakia¹⁹ and,

¹⁹ COM(2010) 0581 para. 2.2.

following an amendment to its transposing legislation, Italy. As indicated below, however, some of the legislation in those Member States is modified, not pure, proportionate liability.

Under the Danish legislation, the competent authority issues notices to responsible operators that take account of their share of responsibility. If it is not possible to assess the respective shares, the notices are based on the attribution to the responsible persons of equal shares of responsibility including liability that cannot with certainty be attributed to other responsible persons. A new notice may be issued to the person who is presumed to have caused the largest share of the damage or threat of damage if the responsible person cannot agree to comply jointly with the notices. In such a case, a new notice may also be issued to the responsible person(s) who are in control of the affected property(ies). There is a *de minimis* exception to the notices. The Danish legislation includes a mechanism for contribution between the responsible operators.

The transposing legislation in Finland provides that if damage is caused by more than one activity, liability for the cost of remedial measures “must be shared among the operators according to what share of the damage as a whole they are responsible for. If this share cannot be estimated, liability will be shared equally”. If it is difficult to assess each responsible operator’s share of responsibility, responsibility is allocated on a per capita basis. The State may decide to contribute to remediation costs under certain circumstances but is not required to do so.

The application of pure proportionate liability may cause problems depending on the Member State’s legislation at issue. For example, under French law, when environmental damage has multiple causes, the costs of preventive or remediation measures are divided by the competent authority among the operators according to the part their activity took in the damage or imminent threat of damage. If there are, say, two liable operators and one operator cannot be found or cannot pay, the other operator will carry out only the part of the preventive or remediation measures which is attributable to its activity. The question, therefore, remains as to whether the relevant French competent authority will contribute the remaining costs or whether the environmental damage will not be fully remediated.

Under the Scots transposing legislation, the competent authority “may determine the operators’ responsibility on the following basis”: a percentage split; jointly and severally; with reference to a particular area or period of time; or in such other manner as the authority deems appropriate. That is, if proportionate liability is not possible for individual environmental damage, there is a default to joint and several liability.

In a similar manner, the Portuguese transposing legislation has two facets. First, it imposes joint and several liability if the activities of more than one operator caused an imminent threat of, or actual, environmental damage. Second, it specifies the criteria to allocate liability for preventing or remediating the damage between liable persons. That is, liability is allocated according to each person’s degree of contribution to the damage, if possible, and equal shares if this is not possible.

Sweden has adopted joint and several liability but also provides for the allocation of liability under it. In determining the extent of liability under the Swedish transposing legislation, a competent authority takes the following factors into account: whether the discharges or other activities that caused the damage were permitted when the damage took place; the length of time that the activity was carried out or the amount of time that has elapsed since the activity

was carried out; and other general circumstances. These factors already existed in the Swedish Environmental Code, which sets out the applicable criteria.

The competent authorities in some Member States may pursue all operators whose activities they consider to have caused environmental damage. Alternatively, they may decide to pursue only some of them. If they pursue only some of them, liable operators who paid preventive and remedial costs should have a right of recourse against other liable operators. The transposing legislation in some Member States such as Denmark and Germany specifically provides for contribution actions against other liable operators. Some other Member States, such as Ireland, Poland and the UK, are silent on the applicable legal mechanism for such an action. In these Member States, therefore, the right of contribution will depend on the national law of individual Member States.

The imposition of joint and several liability may cause problems in Member States that have adopted the permit and state-of-the-art defences. If, for example, the activities of an Annex III operator and a non-Annex III operator caused indivisible environmental damage and the Annex III operator has a defence to liability, the non-Annex III operator would be 100 per cent liable if it was shown to be negligent.

► Determination of a “sufficient interest” and “impairment of a right”

Article 12(1) of the ELD states that Member States shall determine what constitutes a “sufficient interest” and “impairment of a right” in respect of comments / observations by interested parties. Article 12(1) includes the caveat that “the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of [a sufficient interest and alleging the impairment of a right]”.

There is a substantial difference in the qualifications for the term “sufficient interest” between the Member States. France does not define the term in its transposing legislation. The transposing legislation of some Member States, such as Denmark, states that the articles of association for NGOs to have a “sufficient interest” must have the protection of nature and the environment as their principal object. Similarly, Finland requires an organisation to be registered, have “promotion of environmental protection, the protection of health, nature conservation or pleasant living environments” as its purpose, and a relationship with the environmental effects of the environmental damage at issue. The Netherlands has similar requirements.

Belgium (Walloon Region) requires organisations to have a legal personality, include protection of the environment in their statutory objectives, and prove that their actual activity complies with this statutory objective. The Brussels-Capital Region requires an organisation to be a non-profit organisation, exist prior to the date of the imminent threat of, or actual, environmental damage, have the protection of the environment as a statutory objective, and have the interest invoke in the request for action fall within the statutory objective at the time of the imminent threat of, or actual, environmental damage.

Poland requires the organisation to be listed on the relevant official register, have its main statutory objective as the protection of the environment, be non-profit-making, and be independent (that is, not connected to any political parties or public authorities).

The Danish transposing legislation states that an NGO whose articles of association safeguard a “significant recreational interest, or material leisure interests” has the requisite sufficient interest. The German transposing legislation also refers to landscape preservation. In addition to organisations with the aims or objectives of promoting environmental health, environmental protection, public health or activities likely to be affected by damage, the guidance for England, Wales and Northern Ireland identifies birdwatchers, rambles, recreational fishermen and other persons, depending on the circumstances.

Some Member States have imposed a period during which a person who provides comments / observations must be a member of a qualified organisation. For example, the Irish transposing legislation states that a person has a “sufficient interest” if it can satisfy the EPA that “he or she is a member of an organisation that (a) promotes protection of the environment, and (b) has acted to promote protection of the environment during the period of 12 months before the person submits [observations] and requests [the EPA to perform its functions under the Regulations]”.

The transposing legislation in some Member States is especially broad in respect of persons who may be interested parties. The Hungarian legislation provides that any person, including but not limited to organisations that represent the environmental interests of their members and that are active in an area in which there is an imminent threat of, or actual, environmental damage, may request a competent authority to take action in respect of the threat or damage. The Polish legislation sets out requisites for organisations that may notify competent authorities but also provides that any person may notify a competent authority about damage that relates to the environment as a common good.

The Greek transposing legislation defines “sufficient interest” widely to include any NGO that takes initiatives or actions to promote environmental protection regardless of whether the organisation is a legal entity.

In Portugal, the Constitution provides that “every citizen” has the right to make petitions, protests, claims or complaints to governmental authorities (article 52). The legislation transposing the ELD refers only to a natural or legal person who has “a sufficient interest in environmental decision making relating to the environmental damage or imminent threat of the damage in question”; it does not specify any criteria to determine which persons have a “sufficient interest”. Portuguese national law, which applies to associations and foundations, however, states that such an association must be established as a legal person, have competence under its internal rules, to protect the interests that it is seeking to protect and not carry out professional activities that are in competition with private companies or learned professions.

In Spain, an organisation must be non-profit, the aims set out in its bylaws must expressly include protection of the environment in general or a specific element of it, it must have been legally established for at least two years before making the comments and it must have been actively engaged in the aims stated in its bylaws. Further, pursuant to its bylaws, it must carry out its activities in a territory that is affected by the authority’s act or omission

Swedish law states that “a non-profit association whose rules state that it aims to safeguard nature protection or conservation interests [may appeal a judgment or decision]”. The association must either have 100 members and have been active in Sweden for three years, or “else show public support”. This criteria is less stringent than the criteria that existed when the

ELD legislation was transposed, that is, that the “association must have operated in Sweden for at least three years and have at least 2,000 members”. The relaxation in the criteria resulted from a CJEU decision in which an NGO had been unable, due to its inability to meet the former criteria, to challenge a decision concerning the environmental effects of the construction of a tunnel carrying electricity cables through hills.²⁰

A Member State cannot require an organisation to have individual rights in order to submit comments / observations to a competent authority.²¹ It is difficult for environmental NGOs to meet this requirement because environmental legislation does not grant individual rights but, instead, provides for the public’s interest in protecting the environment.

► Notification of a competent authority’s decision to an interested party

Article 12 of the ELD states that interested parties may submit comments / observations to a competent authority in respect of environmental damage and, at the option of Member States, an imminent threat of environmental damage.

Article 12(3) provides that “Where the request for action and the accompanying observations show in a *plausible manner* that environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations” (emphasis added).

Article 12(4) provides that “The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform [interested parties who have submitted comments / observations] of its decision to accede to or refuse the request for action and shall provide the reasons for it”.

That is, the above provisions appear to provide that competent authority must respond to interested parties who submit comments / observations, but have a duty to consider the comments / observations only if they are plausible.

The transposing legislation of some Member States, however, states that a competent authority need not respond to all comments. For example, the transposing legislation in the UK provides that a competent authority does not need to respond to a comment if it concludes that the person submitting it is not likely to be affected, does not have a sufficient interest, or the information does not disclose a genuine imminent threat of, or actual, environmental damage. Ireland provides that the competent authority must notify the person who submitted the comments / observations if the authority considers that they do not show that environmental damage exists or the person does not qualify as an interested party, notify that person in writing with reasons for its opinion”.

²⁰ See *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (CJEU, Case No. C-263/08, 2009).

²¹ *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg* (CJEU, Case No. C-115/09, 2011).

Other Member States, such as Belgium (Walloon Region), specifically provide for a response. The Flemish Region and the Brussels-Capital Region require competent authorities to respond with its decision as soon as possible and, in any event, no later than 30 days after receipt. The Walloon Region provides that the competent authority must acknowledge receipt of the comments / observations within 10 business days of its receipt. If a request is too vague or too general, the competent authority must invite the interested party to clarify the comments / observations. The competent authority must do this within one month (two months depending on the complexity of the matter) following receipt of the comments / observations. This provision reflects Directive (2003/4/EC) on public access to environmental information (article 3)..

Polish administrative law that existed prior to the transposition of the ELD provides that the competent authority has a duty to respond to the person making the notification. There are no exceptions for frivolous notifications.

- ▶ Exhaustion of administrative review procedures by an interested party prior to recourse to judicial proceedings

Article 13(1) of the ELD provides interested parties with “access to a court or other independent and impartial public body” to challenge the “procedural and substantive legality of the decisions, acts or failure to act of the competent authority in respect of their comments / observations. Such a challenge is “without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings”.

France provides that a challenge to a competent authority’s decision can be made following specific national public law. That is, any interested third party may challenge the competent authority’s decision before the Administrative Tribunal within two months of the publication of the measure. The administrative judge can cancel or reform, totally or partially, the disputed decision.

Poland provides that if the competent authority brings proceedings against the operator, an environmental organisation which made the notification to it has the right to participate in proceedings brought by the competent authority against an operator (other persons notifying the competent authority are not granted such right - even if they were affected by the damage). This right includes a right to appeal against the decision issued by the competent authority and, subsequently, the right to lodge a complaint to an administrative court. This legislation is not, however, related to article 13(1) of the ELD although it applies to cases involving environmental damage.

1.2.3 Adoption of more stringent provisions

Some Member States have adopted more stringent provisions than those in the ELD. Examples of such provisions concern the following:

- Operator;
- Land damage;
- Water damage;

- Application of strict liability beyond Annex III;
- Duty on a competent authority to carry out preventive measures;
- Duty on a competent authority to carry out remedial measures;
- Additional responsible parties;
- Absence of, or changes, to exceptions in the ELD in the transposing legislation;
- Application of exceptions only to environmental damage;
- Increase in, or deletion of, the limitations period;
- Right to bring an action against an operator; and
- Notification of an imminent threat of environmental damage regardless of the success of preventive measures

▶ Operator

Some Member States have adopted broad definitions of operators. These include Estonia, Finland, Hungary, Lithuania, Poland and Sweden. Section 1.2.3 above describes the extended definitions.

▶ Land damage

The ELD defines land damage as “land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms” (article 2(1)(c)). This definition, which is not based on EU legislation, like biodiversity and water damage because the proposed Soil Framework Directive remains in the legislative process, has been subject to various interpretations in transposing legislation, some broader than others. Other Member States, meanwhile, have not defined the term further than in the ELD.

The transposing legislation in Poland and Hungary is broader than the ELD in that it applies to land on which there is not a risk to human health (although legislation has been proposed in Poland to include such a requirement).

The Hungarian transposing legislation contains the term “damage in geological media”. Damage in geological media is any contamination that: creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms; or exceeds the limits for contamination. The threshold for land damage is not, therefore, limited to a significant risk of an adverse effect on human health. If thresholds ‘B’ or ‘E’ for contamination to geological media are exceeded, land damage under the legislation transposing the ELD has occurred.²²

The definition of land damage in the UK (England, Wales and Northern Ireland) is also particularly broad. The guidance for those jurisdictions states that land damage includes ailments such as

²² In Act LIII of 1995 on the General Rules of Environmental Protection, section 87: “Depending on the specific features of the environmental component to be protected or the type of contamination, standards may be defined according to the following types: a) general, b) regional, c) local, d) individual, e) pertaining to protective zones for ecological, health and planning reasons or for use in emergency situations”

headaches, sore throats and drowsiness, as well as death, birth defects, genetic mutation and diseases.

The land damage provisions in the legislation transposing with the ELD have resulted in the majority of overlaps with existing legislation. This is because most, but not all, Member States already had well-developed regimes to remediate contaminated land when the ELD was transposed. Many of those regimes included groundwater contamination and had retrospective as well as prospective effect. They also tend to be more stringent than the ELD in that they contain few, if any, defences or exceptions, have a lower threshold than the ELD, do not restrict activities causing contamination to a list as in the ELD, impose strict liability for all current contamination, and do not have a limitations period. The Netherlands, for example, anticipates that it will continue to enforce its existing legislation for contaminated land because it is more stringent than the ELD. It also seems likely that other Member States are already following, or will follow, this approach.

► Water damage

Article 2(1)(b) of the ELD defines “water damage” as “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in [the Water Framework Directive 2000/60/EC], of the waters concerned”.

A few Member States have adopted more stringent provisions for water damage in their transposing legislation. For example, the threshold in Poland for damage to water is a change or changes that result in a measurable effect on various factors including deterioration in the potential for using bathing places for recreational purposes as a result of adverse changes in the quality of bathing water, deterioration in the conditions of abstraction and treatment of water for human consumption following adverse changes in the quality standards of that water, and an increase in the level of groundwater resulting in adverse quantitative and qualitative changes in groundwater and environment depending of the groundwater.

► Application of strict liability beyond Annex III

Some Member States including Belgium, Denmark, Finland, France, Greece, Hungary, Lithuania, Spain, and Sweden, have extended strict liability beyond the legislation and activities specified in Annex III of the ELD.

Member States that have extended strict liability to non-Annex III activities have done so in two ways; including additional activities in Annex III, or imposing strict liability for biodiversity damage on non-Annex III activities.

For example, in Greece, Hungary and Sweden, the standard of liability for biodiversity damage caused by non-Annex III activities is strict liability. In Spain, strict liability applies to preventive measures and emergency remedial actions for non-Annex III as well as Annex III activities; negligence-based liability applies to remedial measures for non-Annex III activities.

In Belgium, the Royal Order of 8 November 2007 on the prevention and remedying of environmental damage resulting from road, rail, water or air transportation includes alien plant species and alien animal species, and their carcasses following their import, export and transit; as well as wastes during their transit, as an Annex III activity. France extended strict liability to the transport of oil in pipelines following the *Coussouls de Crau* oil spill.

▷ Additional Annex III activities

The federal Belgian legislation on the prevention and remedying of environmental damage resulting from road, rail, water or air transportation added the transport of alien plant species and alien animal species as an Annex III activity. The Brussels-Capital Region added the deliberate release into the environment, and the transport of, invasive alien species. These provisions reflect the European Commission's proposal to adopt a dedicated legislative instrument on invasive alien species in 2013.

Finland provides that an order to remedy biodiversity damage caused by an activity related to damming or water abstraction will be issued regardless of whether the damage is caused by negligence.

Poland includes activities that require a permit to introduce gases or dust into the atmosphere as an activity that is subject to strict liability.

▷ Strict liability for biodiversity damage

Greece has extended strict liability to non-Annex III activities. Therefore, all operators who cause an imminent threat of, or actual, environmental damage to biodiversity are strictly liable.

Hungary has also extended strict liability for preventing or remediating an imminent threat of, or actual, environmental damage to non-Annex III activities.

Sweden imposes strict liability on non-Annex III activities, with an exception to strict liability for farmers, foresters, fishermen, reindeer herders and road keepers; such persons are liable for biodiversity damage only to the extent that they are negligent in carrying out their operations.

Other Member States have largely limited the transposing legislation to the confines of the ELD itself. This is due, in some Member States, to Government policy against "gold-plating" Directives unless exceptional circumstances exist. Such restrictions, which have become more stringent in recent years, now exist, for example, in the Netherlands and the UK.

▶ Duty on a competent authority to carry out preventive measures

Most Member States do not require a competent authority to carry out preventive measures if an operator has failed to carry them out. Poland is an exception to this general rule. In Poland, the competent authority has a duty to carry out preventive measures if the operator cannot be identified, the measures must be carried out immediately because there is a risk to human life or health, or there is a possibility of irreversible environmental damage.

▶ Duty on a competent authority to carry out remedial measures

Most Member States do not require a competent authority to carry out remedial measures if an operator does not carry them out. Poland and Hungary are exceptions to this general rule. In Poland, the competent authority has a duty to carry out remedial measures if the operator cannot be identified, the measures must be carried out immediately because there is a risk to human life or health, or there is a possibility of irreversible environmental damage. In Hungary, the competent authority has a duty to carry out remedial measures if the environmental damage migrates from the operator's property, the operator is unknown, or the operator fails to carry out the measures or carries them out inadequately.

► Additional responsible parties

Article 16(1) of the ELD provides that the ELD “shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including ... the identification of additional responsible parties”.

Any additional parties must have secondary liability; only the operator may be primarily liable for remediating environmental damage in order to comply with the polluter pays principle.²³ This section of the report, therefore, discusses secondary liability under Member State law as well as the identification of additional responsible parties, with the caveat that secondary liability under Member State law is not necessarily more stringent legislation than the ELD.

Most Member States have not extended liability to any person other than an operator.

The Hungarian transposing legislation, however, extends liability to the following persons who are not operators. The owner and possessor/user of real property on which environmental damage or a risk of environmental damage occurs is jointly and severally liable until and unless evidence is provided to the contrary. The owner is exempted from liability if it identifies the actual user of the property and provides proof “beyond any reasonable doubt” that the owner is not liable for the damage or risk of damage. The owner or possessor/user of a non-stationary (mobile) contaminating source which results in environmental damage or a risk of environmental damage is jointly and severally liable for the costs of preventive or remedial actions caused by the mobile source. The owner is exempted from liability if the owner identifies the actual user of the mobile source and provides proof “beyond any reasonable doubt” that the owner is not liable for the damage or risk of damage.

Poland has somewhat similar transposing legislation to Hungary. The transposing legislation in Poland provides that if an imminent threat of, or actual, environmental damage is caused by an operator with the consent or knowledge of the owner of the land, the landowner is jointly and severally liable for carrying out the preventive and remedial measures with the operator that caused the damage. The landowner is not liable if it notifies the competent authority of the imminent threat of, or actual, environmental damage immediately after learning about it.

In Sweden, the owner of the land on which environmental damage has occurred may be liable for its remediation if the liable operator is unable to carry out or pay for the remediation, provided that the landowner knew or should have known of the environmental damage when it acquired the land (keeping in mind the prospective only nature of the ELD). If the environmental damage concerns residences, polluted buildings or structures, there must be actual (not constructive) knowledge. If the landowner is not the operator and does not have, or should not have had, knowledge of the damage, it may nevertheless have an obligation to pay costs that are equivalent to an increase in value of the land resulting from the remediation. The above requirements are an extension of requirements for pollution damage under existing environmental legislation.

²³ See *Raffinerie Mediterranée (ERG) SpA v Ministero dello Sviluppo economico* (CJEU, Case No C-378/08, 2010); *Raffinerie Mediterranée (ERG) SpA v Ministero dello Sviluppo economico* (CJEU, Case Nos C-379/08 and C-380/08, 2010) (including opinion of Advocate General Kokott, 2009).

In Spain, a third party who is not connected with an activity that causes an imminent threat of, or actual, environmental damage and who is independent of an operator may be required by the operator or a competent authority to reimburse the costs of preventing or remedying the threat or damage.

In Austria, if the activity that caused the damage is no longer carried out and the former operator cannot be found, the owner of the land on which the environmental damage occurred is liable provided that the owner has approved or voluntarily acquiesced in the installations or measures from which the damage emanates and has failed to carry out measures to contain the damage that should reasonably have been expected to be carried out.

The decision by Member States not to extend liability to the owner or occupier of land on which a natural resource is damaged is in marked contrast to existing national legislation for remediating contaminated land. In some Member States such as Hungary, the owner of the land is considered to be liable unless the owner shows that another person contaminated the land. In other Member States, such as Belgium, Finland, France, Germany, Ireland, and the UK, the owner (and sometimes the occupier) is also liable, either primarily or secondarily. In Italy, the current owner of contaminated land is liable, but only for carrying out any necessary measures to prevent further damage from the contamination unless the owner caused the contamination.

► Absence of, or changes to, exceptions in the ELD in the transposing legislation

As indicated below, some Member States have adopted variants of the exceptions in the ELD. Further, some Member States have not adopted all the exceptions.

The exclusions for the nuclear and marine conventions specified in annexes IV and V have not been transposed completely by many Member States even when a Convention has been ratified and is in force in the Member State.

The Hungarian transposing legislation does not mention the exceptions for: liability under the nuclear Conventions; liability under the marine Conventions (which do not apply due to Hungary's borders not being maritime borders); diffuse pollution when it is not possible to establish a causal link between the damage and the activities of individual operators; and activities, the main purpose of which is to serve national defence or international security. However, the transposing legislation may apply together with another Act. For example, Act No. CXVI. of 1996 on nuclear energy has its own liability regulation regarding "nuclear damages". This Act, however, was not amended in respect of the ELD.

The Finnish transposing legislation does not include the exception for "an act of armed conflict, hostilities, civil war or insurrection".

Denmark did not adopt the exception in the ELD for "activities the main purpose of which is to serve national defence or international security [and] activities the sole purpose of which is to protect from natural disasters". Instead, the Danish transposing legislation exempts "activities of warships and other ships owned or used by a state to the extent that their activities mainly serve defence purposes or international security or exclusively serve to protect against natural disasters". This exception is narrower than the exception in the ELD and, thus, more stringent.

The Finnish exception for "a natural phenomenon of exceptional, inevitable and irresistible character" has the term "an exceptional weather phenomenon". Despite the different language,

the Finnish Guidance confirms that the exception is the same as the ELD. The Guidance further states that the exception does not include damage caused by “thunder, normal storms or heavy rain” (section 3.3).

The Guidelines accompanying the Dutch transposing legislation state that the exception “for “a natural phenomenon of exceptional, inevitable and irresistible character” would not include “damage caused by lightning, a normal storm, heavy rain, etc., but [would include] a massive flood for example”. There is thus, a difference in the scope of the exception in Finland and the Netherlands.

The Portuguese transposing legislation has the term “natural phenomenon of totally exceptional, unforeseeable or, although foreseen, inevitable character” instead of the exception in the ELD. The difference is not entirely clear but would, in any event, be narrower and thus more stringent than the ELD.

The diffuse pollution exception in the Portuguese transposing legislation applies when “it is possible to establish a causal link between the damage and the harmful activities”. This is the same as the ELD. The transposing legislation then states that: “The causal link test is based on the likelihood and probability that the harmful event is capable of bringing about the harm caused, taking into account the circumstances of the specific case and considering, in particular, the degree of risk and danger and the normality of the harmful action, the possibility of scientific proof of the causal link and the fulfilment or omission of duties of protection”. The diffuse pollution exception in the Portuguese legislation thus appears to be more stringent than that in the ELD because an operator’s acts or omissions may be taken into account in determining whether the exception applies.

- ▶ Application of exceptions only to environmental damage

Article 4(1) of the ELD states that the ELD “shall not cover environmental damage or an imminent threat of such damage caused [by specified exceptions]”.

Some Member States, such as Sweden, have applied the exceptions only to environmental damage. Others, such as France, Germany, Greece, Hungary, Ireland, Portugal, Romania, Spain and the UK, have applied them to an imminent threat of, and actual, environmental damage.

- ▶ Increase in, or deletion of, the limitations period

Article 17 of the ELD states that the ELD does not apply “if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred”.

Whilst the whole of the UK has applied the limitation period of 30 years, as per the ELD, Scotland has applied a limitation period of 75 years in respect of GMOs.

Finland has not applied a limitations period to the ELD regime. This lack of a limitations period accords with existing legislation. In most other Member States, the inclusion of a limitations period in the legislation transposing the ELD is in marked contrast to existing legislation.

- ▶ Right to bring an action against an operator

The ELD does not provide any person other than a competent authority with the right to bring an action against an operator for preventing or remediating an imminent threat of, or actual, environmental damage.

Most Member States do not provide a right to bring an action against an operator under the ELD regime. Hungarian legislation, however, provides that associations that represent environmental interests and which are active in an area in which there is an imminent threat of, or actual, environmental damage may request the competent authority to take action in respect of the threat or damage; and file a suit against the user of the environment. The associations that have this right are associations that are registered by the courts and – as with all civil organisations in Hungary – have thus gained legal personality with the court’s final warrant on being registered. In the above procedure, the association can show its aims – and that it is working on defending the interest of the environment – by submitting its statute which was also submitted to the court before, and can verify its activity in this field with the copy of the court’s warrant.

Poland provides that an interested party may participate in proceedings brought by a competent authority against an operator (see section 1.2.2 above).

- ▶ Notification of an imminent threat of environmental damage regardless of the success of preventive measures

The ELD states that “Member States shall provide that, where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible” (ELD, article 5(2)).

Some Member States, such as Denmark, Finland, the Netherlands and Hungary, require an operator to provide notification of the imminent threat of damage whether or not preventive measures have dispelled the threat. This requirement is more stringent than the more limited duty in the ELD.

Denmark, for example, requires such notification as well as further notification if an imminent threat of environmental damage increases or becomes environmental damage. The Netherlands is also more stringent and requires the operator to notify the competent authority if there is an imminent threat of environmental damage and, again, if the threat is not dispelled by carrying out preventive measures.

The Romanian transposing legislation requires an operator to notify the competent authority within two hours after an imminent threat of environmental damage.

Other Member States, such as France, Poland and the UK, follow the ELD by requiring the operator to provide notification only if the preventive measures do not succeed in dispelling the threat.

The Polish transposing legislation sets out the information that must be provided in a notification of an imminent threat of, or actual, environmental damage to a competent authority. The notification must include:

- forename and surname, or name, of the operator and his/her address or the address of the registered office;
- description of economic activity in accordance with the Polish Activity Classification Code if such an activity is carried out;

- indication of the type of environmental damage or an imminent threat of such damage, its description, place and date of occurrence; and
- description of preventive and remedial measures undertaken after the notification.

In addition to the competent authority, the operator must send a copy of the notification to the Regional Environmental Protection Inspector. The competent authority must send a copy of the notification to the Chief Inspector of Environmental Protection.

1.2.4 Adoption of less stringent provisions

Some Member States have adopted less stringent provisions than those in the ELD.

- Effective date of transposing legislation;
 - Changes to exceptions;
 - Additional exceptions; and
 - Fault-based liability for Annex III activities.
- Effective date of transposing legislation

The most common provision to be adopted that is less stringent than the ELD is its effective date.

The effective date of the ELD is 30 April 2007. Article 17 of the ELD provides that the ELD does not apply to:

“damage caused by an emission, event or incident that took place before [30 April 2007], [or]

damage caused by an emission, event or incident which takes place subsequent to [30 April 2007] when it derives from a specific activity that took place and finished before the said date”.

In respect of this date, the CJEU stated that the ELD applies to “damage caused by an emission, event or incident which took place after 30 April 2007 where such damage derives either from activities carried out after that date or activities which were carried out but had not finished before that date”.²⁴

Many Member States failed to meet the deadline of 30 April 2007 for transposing the ELD due to various reasons including difficulties in transposing the ELD as supplementary legislation and its complexity. Those Member States were thus faced with the decision as to whether to apply their national legislation retrospectively to 30 April 2007 or whether to apply it prospectively only from the date on which the ELD regime came into force. Some Member States, such as Belgium (all Regions and federal State concerning transportation), Germany, Greece, Romania and Spain applied it retrospectively; others, including Ireland and the United Kingdom, applied it prospectively only.

²⁴ *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*, para. 41 (Case No C-378/08) (2010).

Retrospective application of the transposing legislation did not necessarily solve the dilemma. For example, the French transposing legislation provides that liability is applicable retrospectively to 30 April 2007. The Decree, which was indispensable to the application of the Law, however, entered into force on 27 April 2009. This means that prior to the entry into force of the Decree, the Law could not be applied in practice, notwithstanding any event that occurred after 30 April 2007 but before 27 April 2009 being covered by it.

The delays in transposing the ELD and the subsequent dates on which the ELD regime entered into effect in Member States also have implications on the reports to be issued by Member States on 30 April 2013. It appears likely that Member States that transposed the ELD after 30 April 2007 and for which the effective date is after that time will not include ELD incidents prior to that date. The Dutch Government anticipated this issue, however. The Guidelines to the transposing legislation in the Netherlands specifically provide that, although the ELD regime did not enter into effect until 1 June 2008, the report should include ELD incidents that occurred since 30 April 2007.

Another implication of the effective dates for transposition of the ELD into national legislation is the discovery of environmental damage many years after it occurred, for example, damage to a remote area in which there is a species or natural habitat protected by the Birds or Habitats Directive or groundwater. The ELD does not impose a duty on anyone other than an operator to notify the competent authority of environmental damage (see section 1.4 below). In such a case, an issue could arise as to whether the environmental damage is subject to the ELD if the damage occurred after 30 April 2007 but before the relevant Member State's transposing legislation entered into effect. An issue could also arise as to whether the relevant competent authority has the power to enforce the transposing legislation before the date on which the legislation provided the authority with such power.

► Changes to exceptions

Some Member States have changed the exceptions in the ELD resulting, in some cases, in narrower (and, thus, less stringent) exceptions.

Italy had adopted a broader exception for natural disasters, applying it "to activities the main purpose of which is to protect from natural disaster" instead of the "sole purpose". The broadening was, however, subsequently cured by an amendment to the transposing legislation.

The UK (England and Wales) has an exception for environmental damage caused by "an exceptional natural phenomenon, provided that the operator of the activity concerned took all reasonable precautions to protect against damage being caused by such an event." In contrast, the ELD exempts environmental damage caused by 'a natural phenomenon of exceptional, inevitable and irresistible character'; the exemption is not conditioned on an operator having taken any precautions to mitigate the damage.

► Additional exceptions

A few Member States have added exceptions to liability that are not in the ELD.

Poland adopted an exception for forest management carried out in accordance with the principles of sustainable forest management referred to in the Forest Act of 1991. Proposed amendments to the transposing legislation will delete this exception.

Italy has adopted an exception for “pollution situations in respect of which reclamation procedures have in fact been commenced or reclamation of the site has been commenced or has taken place in compliance with the relevant legislation in force, provided that no environmental damage remains at the end of this reclamation”. This exception is not in the ELD.

The UK has an exception for “damage caused in the course of commercial sea fishing if all legislation relating to that fishing was complied with”. Again, this is not in the ELD.

Romania has an exception for “the use for agricultural purposes of the mud resulted from the urban sewage water treatment stations, treated in accordance with an approved standard”. That is, Romania has adopted an exception for the spreading of sewage sludge for agricultural purposes whereas the ELD provides that such use may be exempt only from an Annex III activity. Thus, in Romania, there is no fault-based liability for the spreading of sewage sludge under the ELD.

► Adoption of fault-based liability for Annex III activities

The transposing legislation in Italy does not state that liability for Annex III activities is strict. Further, the legislation does not contain a provision that distinguishes between Annex III activities and non-Annex III activities. Therefore all operators are subject to the same liability regime regardless of the type of activity carried out by them, that is:

“Any person who performs an unlawful act or who omits mandatory activities or behaviour, in breach of law, regulations or administrative provisions, with negligence, lack of skill, carelessness or breach of technical standards, causes damage to the environment by altering, impairing or destroying it, in whole or in part, shall be obliged to restore the situation which existed previously and, failing that, to pay compensation to the State by way of the proprietary equivalent”.²⁵

The European Commission has brought an infringement procedure against Italy, in part, due to the absence of the imposition of strict liability provisions for Annex III activities.²⁶ That procedure is ongoing.

1.2.5 Application of national law concepts to fundamental legal concepts in the ELD

Several provisions of the ELD have been transposed into the national law of Member States in different ways depending on the law of an individual Member State. These provisions are as follows:

- Standard of liability for non-Annex III activities;
- Level of causation;

²⁵ Translation by Massimiliano Montini, Avosetta Questionnaire, Environmental Liability Directive, Report on Italy (Ghent, 1-2 June 2007).

²⁶ See Environment, Commission asks Italy to strengthen laws on environmental liability (IP/12/68, 26 January 2012); http://europa.eu/rapid/press-release_IP-12-68_en.htm

- Security over property or other appropriate guarantees;
 - Information notices; and
 - Secondary liability.
- ▶ Standard of liability for non-Annex III activities

The standard of liability for non-Annex III activities is fault or negligence (ELD, article 3(1)(b)).

The transposing legislation of Member States does not always indicate the appropriate standard of liability for non-Annex III operators. In such a case, the provision in the ELD to the operator having been “at fault or negligent” thus depends on the appropriate standard in a Member State. The term “at fault” in the Polish transposing legislation encompasses both “gross negligence” and mere “negligence”. The standard under the national law of the UK encompasses only mere negligence although gross negligence would obviously also be included.

Meanwhile, in Spain, the standard of liability for non-Annex III operators is “fraud, fault or negligence”. In contrast, the Danish transposing legislation provides that the standard of liability for a non-Annex III operator is “reckless conduct” which equates to gross negligence. In Ireland, the operator is liable if he/she “acts or fails to act and he or she knows or ought to have known that his or her act or failure to act causes or would cause damage or [an] imminent threat of damage”.

Guidelines issued by the Dutch Government for the transposing legislation state that “the concept of liability based on fault requires the [operator] to have acted in a way deserving condemnation”. The Guidelines further state that fault or negligence exists if, for example, an operator “took inadequate precautionary measures to prevent the damage, or the damage was due to carelessness on the part of its employees”.

The difference in the standard of liability between Member States is important because it means that non-Annex III operators are more likely to be liable for biodiversity damage in some Member States than in others due, not to the ELD itself, but to the legal system of that Member State.

- ▶ Level of causation

The ELD imposes liability on an operator whose occupational activities cause an imminent threat of, or actual, environment damage. Article 3(1)(a) refers to “Environmental damage *caused by* any of the occupational activities listed in Annex III.”

Article 3(1)(b) refers to “damage to protected species and natural habitats *caused by* any occupational activities other than those listed in Annex III” (emphasis added).

The national law in Member States for the requisite level of causation that must be proved in order to establish a causal link between the activities of an operator and environmental damage differs substantially. This level is not specific to the ELD but arises from the level of causation inherent in national legislation.

In Ireland and the UK, a competent authority can establish the causal link by proving that, on the balance of probabilities, the operator’s activity caused the environmental damage. In a similar manner, in Sweden, the causal link is established by proving that it is more probable than not that the operator’s activity caused the damage.

In Austria, Germany, Greece and Spain, the level of causation is much higher, with a high level also existing in the legal systems in Belgium, France, Italy and the Netherlands.²⁷

In *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*,²⁸ which involved, among other things, the exception for diffuse pollution under the ELD, the CJEU stated that national legislation that allows a competent authority to enforce the ELD regime on the basis of a rebuttable presumption is permitted. The Court further stated that, “in accordance with the polluter pays principle, in order for such a causal link thus to be presumed, that authority must have plausible evidence capable of justifying its presumption, such as the fact that the operator’s installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities”.²⁹

► Security over property or appropriate guarantees

Article 8(2) of the ELD provides that “the competent authority shall recover, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions taken under [the ELD].”

Some Member States have transposed legislation to authorise competent authorities to recover such costs whereas others, such as Finland, France and Ireland, have not done so. France does, however, authorise a competent authority to require an operator who does not carry out preventive measures to deposit a sum of money with a public accountant until the measures are completed. In the UK, all the jurisdictions except Scotland provide for financial security after an ELD incident has occurred.

In Belgium, the federal State (for marine matters) and all three Regions provide for securities, with the Walloon and the Flemish Region providing details of the applicable types.

The Danish transposing legislation requires a responsible operator to provide security to the Minister for the Environment to cover its obligations under that legislation. The amount of the security is decided by the Minister and includes his costs for administering and enforcing the legislation. The legislation also includes provisions for an appeal of the amount.

The Polish transposing legislation provides that a competent authority may seek reimbursement of the costs of preventive and remedial actions taken by the authority in the same manner as tax obligations. In certain cases this may include the relevant governmental entity being able to pursue a successor company and/or Board members of a company for remedial costs and interest. If there is a potential that the costs and interest will not be paid, the governmental entity may require the operator to secure the amounts owed by bank of insurance guarantee, bank warranty, a bill of exchange with a bank and a charge on land owned by the person owing the costs.

²⁷ See *Environmental Liability and Ecological Damage in European Law* pp. 609-10 (Monika Hinteregger, ed., Cambridge University Press, 2008)

²⁸ Case No C-378/08 (CJEU, 9 March 2010).

²⁹ Case No C-378/08, para. 70 (9 March 2010).

Competent authorities in Spain may require a responsible person to obtain “performance guarantees and any other guarantees that help to ensure the effectiveness and feasibility of [remedial] measures”.

The Hungarian transposing legislation provides that when a competent authority has made a determination of environmental damage, it shall adopt a resolution ordering remedial measures which shall include a prohibition on the transfer or encumbrance of the properties of the person who is required to carry out the measures. The extent of the prohibition shall be the estimated costs of the remedial measures. The competent authority shall then contact the real estate supervisory authority: in order to have the prohibition of transfer and encumbrance in the real estate register recorded; and when the works are completed, in order to have the prohibition or encumbrance removed from the register. If the central budget has financed any of the preventive or remedial measures, the competent authority shall place a lien on the operator’s real estate properties up to the amount of the costs to the benefit of the Hungarian State, and shall file the lien on the properties’ alienation and encumbrance. The lien shall prohibit the transfer and encumbrance of the properties. If the value of the operator’s real estate properties is less than the cost of the preventive or remedial measures that have been financed by the central budget, the competent authority shall also place a lien on the operator’s movable property (i.e., personal property). The lien shall be cancelled by order of the Treasury when the person responsible for the costs of the measures has carried them out.

The transposing legislation in Sweden does not provide for charges on land or financial security after environmental damage. The Environmental Code provides for financial security after environmental damage but this is limited to quarries.

► Information notices

The ELD provides that a competent authority may, at any time require an operator “to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat” (article 5(3)), and “supplementary information on any damage that has occurred” (article 6(2)). The ELD does not, however, specify the form or nature of the above requirements.

Some Member States have simply set out the above provisions in their transposing legislation. Other Member States, such as Ireland and the UK (England, Wales and Northern Ireland), specify that the competent authority may issue an information order (direction) requiring the operator to provide the information specified in it.

► Secondary liability

As indicated in section 1.2.3 above, the inclusion of additional persons other than an operator is stated by the ELD to be more stringent than the ELD. As further indicated above, any additional person must be secondarily, not primarily, liable in order to satisfy the polluter pays principle of the ELD.

Some persons are secondarily liable, not because a Member State has intentionally added them to its transposing legislation but due to national law concepts. Examples of such persons are discussed below.

Under the Portuguese transposing legislation, the responsible directors, offices and managers may be personally liable if their company is liable for preventing or remediating environmental damage. Such liability is joint and several. Further, the transposing legislation states that “If the operator is a commercial company which is in a group or control relationship, environmental liability shall extend to the parent company or controlling company where there is an abuse of legal personality or contravention of the law”. This legislation thus allows the competent authority to pierce the corporate veil in certain limited circumstances.

In Spain, a parent company may be liable if the operator is a trading company belonging to a group of companies and the competent authority detects abusive use of the corporate personality or fraud. Also in Spain, legal and de facto managers and administrators of legal persons may be liable if their conduct was a determining factor in the operator’s liability. Further, managers or administrators of legal persons who abandoned relevant activities may be liable if the legal persons failed to comply with their duties or if decisions or measures were taken that resulted in non-compliance. Still further, successors of a responsible operator in the ownership or undertaking of the activity causing environmental damage may be liable subject to specified limits and exceptions. Also, the manufacturer, importer or supplier of a product, the use of which causes an imminent threat of, or actual, environmental damage may be liable for reimbursing an operator for the preventive or remedial costs incurred by it provided that the operator strictly adhered to the conditions for the use of the product and regulations in force at the time of the emission or the event causing the damage. Finally, receivers and liquidators of legal persons who failed to take the necessary steps to comply with their duties and obligations may be liable.

In Hungary, if an imminent threat of, or actual, environmental damage is caused by an employee during the course of their employment, liability rules are applicable against the employer. If an imminent threat of, or actual, environmental damage is caused by a member of a cooperative in relation to their membership of the cooperative, liability rules are applicable against the cooperative. Finally, a principal and its agent are jointly and severally liable for an imminent threat of, or actual, environmental damage caused by the agent during the period of agency. This means that an agent can be liable under the ELD transposing legislation whether or not that agent is an ‘operator’.

Further in Hungary, if several operators jointly form a business association/company that combines similar or complementary activities that each had formerly performed, the business association/company is regarded as the successor in title to each of its founders and its liability is joint and several with the founders. The shareholders of a company or the owner of a sole proprietorship, and its executive officers who supported a resolution/measure in respect of which they knew, or should have known with reasonable care that the resolution/measure, if carried out, would cause environmental damage are jointly and severally liable, with unlimited liability if the business association/company or sole proprietorship terminates and the resolution/measure results in environmental damage that is not paid for by the business association/company or sole proprietorship. The shareholders of a business association/company or the owner of a sole proprietorship, and its executive officers, who did not take part in the process of adopting the resolution/measure, voted against it, or protected against the measure are exempt from liability. Further, any executive officer of a business association/company or the owner of a sole proprietorship who is subject to the liability in the immediately preceding paragraph is

subsequently barred from serving as an executive officer of a business association/company or the owner of a sole proprietorship, the activities of which are subject to an environmental license, a single environmental permit, or an authorisation prescribed by the EPA.

The Romanian transposing legislation provides that “When the operator producing environmental damage or any imminent threat with such a damage is part of a consortium or of a multinational company, he shall be liable with the consortium or company in question”. This provision is not entirely clear. It appears to mean that the corporate veil may be pierced if the entity causing the damage is a consortium or multinational company. There is not, however, a definition of the term “consortium or of a multinational company”.

1.2.6 Imprecise language in the ELD

Some provisions of the ELD are less than precise. This lack of precision has resulted in differences in the national law of Member States.

The main provisions that have been subject to different interpretations are as follows:

- Scope of water damage;
 - Whether the mandatory and optional defences are defences to costs or defences to liability;
 - Whether emergency remedial actions are remedial measures;
 - Competent authority’s power or duty to require an operator to carry out remedial measures;
 - Competent authority’s power or duty to require an operator to carry out preventive measures;
 - Competent authority’s power or duty to require an operator to carry out emergency remedial measures;
 - Determination of significant adverse effects to biodiversity;
 - Scope of primary remediation;
 - Scope of the exception for “activities the main purpose of which is to serve national defence”;
 - Scope of review of a competent authority’s decisions, acts or failure to act; and
 - Liability of a third party.
- ▶ Scope of water damage

Article 3(1)(b) of the ELD defines “water damage” as “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in [the Water Framework Directive 2000/60/EC], of the waters concerned”.

An important difference in the application of the threshold for water damage is that some Member States have interpreted the ELD to mean that the threshold applies to any water defined by the Water Framework Directive whereas other Member States consider that an entire

surface or groundwater body, as defined by the Water Framework Directive, must be impacted before water damage occurs.

For example, Hungary, Poland and Spain consider that the threshold applies to waters whereas Belgium (Flemish Region), Ireland, the Netherlands and the UK consider that it applies only to water bodies. The transposing legislation of some Member States, such as France does not clearly indicate its application, although the application in the French transposing legislation appears to be damage to waters and not water bodies. It is also not clear whether the damage must be to waters or a water body in Sweden. The Swedish transposing legislation refers to “a water area” in respect of surface water and a “body of groundwater”, as well as “a water area [and] groundwater”.

In deciding that water damage under the ELD covers only damage to water bodies, the Guidelines to the Dutch transposing legislation recognised that the ELD would not, therefore, apply to waters that were not designated as water bodies, such as polder canals.

Determining the applicable threshold for water damage under the ELD is made more difficult not only due to the language of the ELD itself but also because the Environmental Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability), issued on 30 July 2001, specified that the proposed threshold for significance was to be deterioration from one water quality status to a lower one under the Water Framework Directive. It is not clear from the ELD whether this threshold was modified or continued into the final version.

An argument that water damage under the ELD is to all “waters” and not only water bodies is the inclusion in the definition of water damage of the phrase “damage ... of the waters concerned” rather than damage to water bodies. Meanwhile, the definition of water damage states that the damage must “significantly adversely affect [...] the ecological, chemical and/or quantitative status and/or ecological potential ... of the waters concerned”, which could imply that the damage must necessarily be to water bodies.³⁰ Conversely, a communication from the European Commission concerning revisions at the Common Position stage refers to waters and not water bodies.³¹

³⁰ See Guidelines for Title 17.2 of the Dutch Environmental Management Act: measures in the event of environmental damage or its imminent threat, p. 41, chapter 2, II (English translation of original version dated 8 January 2008); available from http://ec.europa.eu/environment/legal/liability/eld_guidance.htm; and Peter De Smedt, Tom Malfait, Robin Slabbinck, Hugo Desmet and Arne Verliefde, Legal advice concerning the Environmental Damage Decree and cases of damage in surface water (commissioned by the Flemish Environment Agency Department Water Monitoring (ARW/RC/HM/IT/dh/09/211, 21 June 2010)

³¹ See Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage /* SEC/2003/1027 final - COD 2002/0021 (“water damage” is still defined by reference to the various concepts defining water quality in Directive 2000/60/EC (“the Water Framework Directive”) but it is no longer required that water’s quality should worsen from one of the categories defined in the Water Framework Directive to another”).

► Defences to costs or defences to liability

Article 8(3) of the ELD provides that:

“An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage:

- (a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or
- (b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.

In such cases Member States shall take the appropriate measures to enable the operator to recover the costs incurred”.

Section 8(4) of the ELD provides that:

“The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by [the permit defence or the state-of-the-art defence]”:

A crucial issue is whether the above language means that the so called “defences” (which are not referred to as such) in the ELD are defences to costs or defences to liability. If the defences are defences to costs, the operator must carry out the preventive or remedial measures and may then bring a cost recovery action against the third party that caused the imminent threat of, or actual, damage (despite appropriate safety measures put in place by the operator), or the public authority that issued the compulsory order. If the third party was a vandal who could not be found or was a person who was not financially viable, the operator would have no recourse. In respect of the permit and state-of-the-art defences, the operator may claim reimbursements of its costs for remedial action from the competent authority.

If, however, the defences are defences to liability, an operator who showed that the defence applied is not required to carry out preventive and remedial measures at all. In Member States that have interpreted the defences as defences against liability, the issue also arises as to whether an order to carry out primary remediation should be suspended until the legal issues are resolved.

An argument that the so-called defences are defences to liability is that an operator should not be required to carry out works in the knowledge that it is not liable for them, whilst the competent authority allows the operator to carry out the works knowing that it will have to pay for them.

An argument that the so-called defences are defences to costs is that neither an operator nor a competent authority can know whether a defence applies until a court had made the final ruling on the operator's legal liability under the ELD. During this time, the environmental damage would not be remedied and could worsen if pollutants migrated (thus defeating a key purpose of the ELD in preventing (further) environmental damage). The competent authority would not be

able to carry out the works itself during the pendency of the appeal because the ELD provides that it may do so only if the operator declines to carry out the works, cannot be identified or “is not required to bear the costs” (ELD, art. 6(3)). As noted above, until a court issued the final ruling on the operator’s legal liability, it cannot be known whether the operator is not required to bear the costs.

Member States are split on this issue. A small minority of Member States, such as Denmark and the UK, consider the defences to be defences to liability whilst others, such as France, Germany, Ireland, the Netherlands, Poland and Spain, consider that they are defences to costs. The position of some other Member States is unclear from their transposing legislation.

The procedure in the UK differs depending on the jurisdiction. In England, Wales and Northern Ireland, an operator may appeal against a notification of liability. If the operator prevails, it does not carry out remedial measures. The operator may also appeal a remediation notice; that notice is suspended unless the person hearing the appeal determines otherwise. In Scotland, a responsible operator may appeal to the Sheriff on questions of law and fact. The appeal removes the need to comply with the remediation notice unless “in the opinion of the competent authority there is an imminent risk to human health, or an imminent threat of environmental damage; and ... the competent authority has notified the operator of this opinion when imposing the requirement in question”.

Some Member States that consider that the defences are defences to liability do not provide a defence to liability for preventive costs and/or emergency remedial actions. For example, in the UK (England, Wales and Northern Ireland), an operator whose activities have caused an imminent threat of, or actual, environmental damage has a duty to carry out preventive measures or emergency remedial actions. The defences to liability apply only to longer term remedial measures.

The explanatory memorandum to the Dutch legislation states that it would not accord with the polluter pays principle for the State to indemnify an operator from paying the costs of measures to remediate environmental damage resulting from compliance with a permit or emissions that were not considered harmful according to the state-of-the-art. Such an indemnification would transfer environmental responsibility from the operator to the State and would give a wrong signal to the public and businesses. The explanatory memorandum further states that full cost recovery may not be pursued in cases in which the operator proves that exceptional circumstances apply such that payment of the full costs by the operator would be unreasonable.

In Hungary, the following are exceptions/defences to costs: an armed conflict, war, civil war, armed uprising; a natural disaster; and execution of a valid authority or court decision containing obligation. That is, the operator must carry out the preventive, emergency remedial actions and remedial measures and then seek recovery of its costs. These provisions could also, of course, be considered to be more stringent measures than the ELD rather than defences to costs.

► Power or duty to require an operator to carry out remedial measures

Article 6(1) provides that “Where environmental damage has occurred the operator shall ... take ... necessary remedial measures”. That is, the operator has a duty to carry out necessary remedial measures.

The ELD also provides that “The competent authority may, at any time ... require the operator to take the necessary remedial measures” (article 6(2)).

Further, the ELD provides that “The competent authority shall require that the remedial measures are taken by the operator” (article 6(3)).

There is, thus:

- a principal obligation for the operator to prevent and remedy damage (see articles 5(1), 6(1), 7(1) of the ELD);
- also a principal duty of the competent authority to ensure that this obligation is enforced (following from the general law systems attributing such basic duty to competent authorities in – at least all – Member States, and more specifically following from articles 5(4) and 6(3) of the ELD); and
- an empowerment for competent authorities to request operators to provide specific information, follow certain instructions relating to prevention and remediation etc., at any time (article 6(2) of the ELD).

That is, the only logical interpretation of article 6 of the ELD is that the competent authority has a duty to require an operator to carry out remedial measures if the operator has not done so. Indeed, most Member States have interpreted the language to provide that a competent authority has a duty to require an operator to carry out remedial measures if the operator has not already done so.

A minority, including Belgium (Federal State, Brussels-Capital Region), Greece, Italy and Portugal, provide that the competent authority has the power but not the duty to do so.

- ▶ Power or duty to require an operator to carry out preventive measures

A similar issue exists as to whether there is a power or a duty to carry out preventive measures.

Article 5(1) of the ELD provides that “Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures”. That is, the operator has a duty to carry out necessary preventive measures.

Article 5(3)(b) provides that “The competent authority may, at any time ... require the operator to take the necessary preventive measures”.

Article 5(4) provides that “The competent authority shall require that the preventive measures are taken by the operator”.

In contrast to most Member States construing similar language to mean that a competent authority has a duty to require an operator to carry out remedial measures, however, most Member States construe this language to mean that a competent authority has the power, but not a duty, to require an operator to carry out preventive measures.

France, the Netherlands, Portugal, Spain and the UK provide a competent authority with the power, but not the duty, to order the operator to carry out preventive measures. Other Member States, such as Greece and Italy, also provide that a competent authority has the power but not the duty to require an operator to carry out preventive measures.

Denmark also provides a power but notes that “The Minister for the Environment shall have any unlawful situation rectified, unless the situation is of minor significance”.

Still other Member States, such as Finland, Hungary, Ireland, Poland and Sweden, place a duty on a competent authority to require an operator to carry out preventive measures if it has not done so.

► Power or duty to require an operator to carry out emergency remedial measures

Article 6(1) provides that “Where environmental damage has occurred the operator shall ... take [emergency remedial actions]”. That is, the operator has a duty to carry out necessary remedial measures.

Some Member States (including France, Italy and Portugal) provide that the competent authority has the power but not the duty to require an operator to carry out emergency remedial measures. In contrast, Hungary, Ireland, Poland and Sweden provide that the competent authority has the duty to require an operator to carry out such measures.

► Determination of significant adverse effects to biodiversity

The ELD defines environmental damage in respect of protected species and natural habitats as “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species” (ELD, article 2(1)(a)).

The “conservation status” of a protected species is defined in respect of “the long-term distribution and abundance of its populations within, as the case may be, the European territory of the Member States ... or the territory of a Member State or the natural range of that species” (ELD, article 2(4)(b)).³²

Similarly, the “conservation status” of a natural habitat is defined in respect of “the long-term survival of its typical species within, as the case may be, the European territory of the Member States ... or the territory of a Member State or the natural range of that habitat” (ELD, article 2(4)(a)).

The word “or” is in the disjunctive. Thus, the ELD appears to state that a competent authority should determine that there is “environmental damage” under the ELD if there is a significant adverse effect on reaching or maintaining the favourable conservation status of a protected species or natural habitat in only one of the following three areas:

- The European territory of the Member States;
- The territory of a Member State; or
- The natural range of the natural habitat.

³² The Birds and Habitats Directives apply to the European territories of Member States plus the outermost regions of Spain and Portugal, that is, the Canary Islands, Madeira and the Azores. They do not apply to the French outermost regions of French Guiana, Reunion, Guadeloupe and Martinique. See European Staff Working Document, Annex to the Communication from the Commission, Halting the Loss of Biodiversity by 2010 – and Beyond; Sustaining ecosystems services for human well-being, Impact Assessment, SEC(2006) 607 53, section 5.1.1 (22 May 2006); see generally V. Fogleman, *Halting the Loss of Biodiversity in the European Union: An Achievable Goal?*, KLRI Journal of Law and Legislation, vol. 2, p. 110 (2012).

Under this interpretation, a competent authority could theoretically determine that the conservation status of a protected species or natural habitat is favourable in, say, “the European territory of the Member States”, even though its conservation status has been significantly damaged or even destroyed by an operator’s activities in “the territory of [an individual] Member State”. It would, however, be unusual – but not impossible – for an operator’s activity to have a significant adverse effect on a protected species in the territory of the entire EU-27. Such a scenario could result if, say, a species that was genetically distinct and reproductively isolated from other species lived only in one area of the EU.

This critical issue is made even more confusing because the ELD does not define the “natural range” of a species or habitat protected by the Birds and Habitats Directives.

The Birds and Habitats Directives are unhelpful in this regard. The Habitats Directive simply refers to the “natural range” of protected species and habitats; it does not define the term or refer to the scale of the natural range at which to assess populations of species and natural habitats.³³

The Habitats Directive is more specific in the meaning of the term “conservation”. This term is defined as “measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status” in the “European territory of the Member States to which the Treaty applies” (articles 1(e), 1(i), 2).

The Birds Directive similarly refers to the “the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies” (article 1).

Further, the Habitats Directive states that the “conservation status” of a species is favourable when, among other things, “the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future” (article 1(i)) and the “conservation status” of a natural habitat is favourable when “its natural range and areas it covers within that range are stable or increasing” (article 1(e)).

To make the issue even more difficult, the natural range of a species or natural habitat varies from one species or habitat to another and, thus, cannot be generally defined. In addition, nature is not, of course, static. Very small incidents can – and often do – change the natural range.

Obviously a Member State can take unilateral measures to conserve biodiversity only in its territory. For example, article 12(1)(d) of the Habitats Directive requires “Member States [to] take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting ... deterioration or destruction of breeding sites or resting places”. The Court of Justice of the European Union has confirmed that, in taking such measures, a Member State should consider only the conservation status of a protected species in its territory. In *European Commission v France*,³⁴ the Court of Justice concluded that France was in breach of article 12(1)(d) because it had failed to establish a programme of measures to ensure

³³ See Charles George and David Graham, *After Morge, where are we now?: the meaning of 'disturbance' in the Habitats Directive*, in *The Habitats Directive; A Developer's Obstacle Course* p. 45 (Gregory Jones, editor, Hart Publishing, 2012).

³⁴ CJEU, Case No. C-383/09, 2011.

strict protection of the European hamster (*Cricetus cricetus*) (an Annex IV(a) species) in its natural range in Alsace. It was not relevant to the Court of Justice's decision – and the judgment did not even mention – that populations of the European hamster also exist in other Member States such as Poland, Germany and the Czech Republic, albeit its natural range has seriously declined in those Member States also.³⁵

Thus, the Habitats Directive is clear that protected species and natural habitats must be conserved, not only in the European territory of all Member States, but also in the territory of each Member State. A primary reason for adopting the ELD was to impose liability for biodiversity damage in order to halt the loss of biodiversity in the EU.³⁶ Thus, the threshold for biodiversity damage under the ELD must refer to (1) the European territory of the Member States, (2) and the territory of a Member State, and (3) the natural range of the natural habitat. That is, the word “or” should be in the conjunctive, not the disjunctive. Whereas, in a given case, one of the territorial references tends to be the most relevant, all three territorial references should be satisfied to comply with the ELD.

The transposing legislation of many Member States, however, does not specify with any precision the appropriate range of a natural habitat or protected species that must be considered in determining its favourable conservation status. As indicated above, this issue is fundamental to determining the threshold for biodiversity damage.

The guidance for England and Wales states that the relevant range under the transposing legislation is the UK with the exception of some species and habitats that also exist at other locations within the EU, populations of species that straddle the border with Ireland, and migratory birds for which the biogeographical range may be appropriate. The guidance is even more specific with regard to a species such as the great crested newt, for which the relevant range may be the entire UK and the stag beetle, for which the relevant range is only part of the UK. The Guidance for Ireland also provides assistance in determinations of biodiversity damage.

The Guidelines to the Dutch transposing legislation conclude that the threshold for biodiversity damage must be determined on a case-by-case basis due, in large part, to differences between the ELD as a liability system and nature conservation as a regime to conserve biodiversity.

Resolving the above issue does not, however, resolve the entire issue concerning the threshold for biodiversity damage. As indicated above, most, if not all, incidents of environmental damage under the ELD will affect only one area in which a protected species or natural habitat is located. The issue thus remains as to whether damage that destroys, say, the population of a protected species in one area is “environmental damage” under the ELD if, say, there is a population of that species at another location in the Member State.

³⁵ See Joanna Ziomek and Agata Banaszek, *The common hamster, Cricetus cricetus in Poland: status and current range*, *Folia Zool*, vol. 56(3), pp. 235, 238-241 ((2007); Agata Banaszek and Joanne Ziomek, *The common hamster (Cricetus cricetus L.) population in the city of Lublin*, *Annales Universitatis Mariae Curie – Skłodowska Lublin – Polonia*, vol. 65(1), pp. 59, 60 (2010).

³⁶ Communication from the Commission to the Council and the European Parliament – Biodiversity Action Plan for the Conservation of Natural Resources para. 5 (COM/2001/0162 final, 52001DC0162(02)).

The issue is made yet more complex by the fact that only 17% of protected species and natural habitats in the EU are in favourable conservation status.³⁷

Still further, data on the natural range of many, if not most, protected species and natural habitats are not currently available. In this respect, information and data tend to be available only for the conservation status of species and habitats in the overall territory of Member States and the territory of an individual Member State in respect of the nine biogeographical regions of the EU.³⁸ This is due, in large part, to the process for designating sites of Community importance under the Habitats Directive. That Directive requires each Member State to propose a list of sites to the European Commission. The sites must appropriately represent natural habitat types and animal and plant species listed in the Directive.³⁹ In order to select proposed sites, Member States carry out a comprehensive assessment of the habitat types and species in their national territories.⁴⁰ The Commission then evaluates the proposed sites in the context of the terrestrial EU and the biogeographical regions and prepares a draft list of sites of Community importance in agreement with relevant Member States.⁴¹

► Scope of primary remediation

The term “primary remediation” is defined as “any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition” (ELD, Annex II, para. 1(a)).

The term “primary remediation” must necessarily, therefore, include measures to clean up pollution as well as measures to restore a damaged natural resource. These two types of measures, however, tend to be distinct and require different expertise. For example, if a Natura 2000 area is damaged by a spill of oil or chemicals, an appropriate clean-up measure may be to contain the spill and to leave any residual pollution at a site under a clay cap. This measure does not, however, restore the damaged natural resources at the Natura 2000 area.

The transposing legislation in the Member States tends not to clarify the differences between the measures. In Member States with many competent authorities, however, it means co-operation and liaison between competent authorities in carrying out the primary remediation. It may, therefore, mean that competent authorities should enter into Memoranda of Understanding, as some Member States have done, as to the appropriate competent authority for different aspects of the remedial and restoration measures.

³⁷ See European Environment Agency, *The European Environment, State and Outlook 2010, Biodiversity*, 12 (2010).

³⁸ The nine biogeographical regions are the Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic regions. The Black Sea and Steppic regions were added when Bulgaria and Romania joined the EU in 2007.

³⁹ Habitats Directive, art. 4(1); annex III; *see id.* annex I (natural habitat types), and annex II (animal and plant species).

⁴⁰ Habitats Directive, annex III, Stage 1. The selection must be carried out according to criteria that include the size and density of the population of species, the relationship of the habitat and species at the site to those within the national territory, and possibilities for restoring the habitat and species. *Id.*

⁴¹ Habitats Directive, art. 4(2).

- ▶ Scope of the exception for activities the main purpose of which is to serve national defence

The ELD includes an exception for “activities the main purpose of which is to serve national defence” (article 4(6)). The Guidance for the transposing legislation in England and Wales states that national defence activities carried out by the armed forces are exempt but not activities such as the manufacture of munitions. This Guidance partially resolves the issue but does not do so entirely. Whilst there should not be a dispute as to whether the main purpose of some military operations is to serve national defence, issues may arise as to whether, say, a leak of heating oil from a tank or the operation of a sewerage system at a military base is covered by the exception.

Most other Member States do not indicate the scope of the exception.

- ▶ Scope of review of a competent authority’s decisions, acts or failure to act

The ELD provides that interested parties “shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under [the ELD]” (ELD, art. 13(1)).

Some Member States, such as Spain, specifically provide for a challenge by an interested party to be decided on its merits. Other Member States, such as the UK (England, Wales and Northern Ireland) limit a challenge to an application for judicial review, which is not decided on its merits but, rather, on whether the authority’s act or failure to act was unlawful, irrational or the authority engaged in procedural impropriety.

- ▶ Liability of a third party

The ELD directs Member States to “ensure that the competent authority may ... require third parties to carry out the necessary preventive or remedial measures” (ELD, article 11(3)). Further, a competent authority may “initiate cost recovery proceedings against the operator, or if appropriate, a third party who has caused the damage or the imminent threat of damage in relation to any measures taken in pursuance of [the ELD] within five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later” (article 10). The reference to a third party is to the defence of an operator when the imminent threat of, or actual, environmental damage that occurred was caused by a third party and occurred despite the fact that appropriate safety measures were in place” (article 8(3)(a)).

Some Member States have included references to a third party in their transposing legislation. It is not always clear from that legislation, however, whether they are by providing that persons other than an operator may be liable.

For example, the transposing legislation in Greece states that a competent authority may require a third party to implement preventive measures and remedial measures.

1.2.7 Adaptation of the language transposing the ELD

Some Member States copied out provisions of the ELD in transposing it in their national law. Other Member States have adapted the language in their national legislation.

The main provisions that have been subject to different interpretations are as follows:

- Scope of costs; and
 - Contributory negligence of a competent authority.
- ▶ Scope of costs

The ELD defines “costs” as “costs which are justified by the need to ensure the proper and effective implementation of this Directive including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs” (ELD, article 2(16)).

Some Member States, such as the Netherlands, provide that a Member State must seek the recovery of its costs.

Member States differ regarding the scope of costs that a competent authority may recover. Denmark, in particular, sets out a lengthy list of costs that can be recovered including time in connection with new information, supervising inspections and sampling, and travel time in respect of a competent authority’s activities. Finland specifies that costs include clarifications necessary to determine environmental damage and its immediate threat, to select remedial measures, and to monitor implemented remedial measures.

- ▶ Contributory negligence of a competent authority

Greece provides that if the competent authority or another public authority is one of the parties liable for the imminent threat of, or actual, environmental damage or further damage arising from it, the Civil Code applies on a pro rata basis in favour of the operator in respect of the allocation or investigation of preventive or remedial costs. Under the Civil Code, a court has discretion, limited by various factors, to make a decision not to award compensation or to reduce the amount of compensation if the claimant is at fault and that fault contributed to the harm suffered by the claimant. Greece thus provides for a form of contributory negligence. That is, if the act or omission of a competent authority or public authority results in the liable operator(s) incurring costs, or higher costs, for preventing or remediating environmental damage, the authority is responsible for paying such costs to the extent that they contributed to the damage.

This provision reflects the approach behind an amendment in the European Parliament’s first reading of the proposed ELD. That amendment revised the then-exceptions for compliance with a permit and state-of-the-art so that they became mitigating factors to be considered by a competent authority in respect of the amount of costs for which an operator is liable, with the authority that granted the permit also to be liable for the cost of remediating environmental damage caused by emissions in accordance with the permit. The approach was subsequently rejected.

1.2.8 Provisions in national legislation to rectify conflicts in the ELD

The ELD contains some conflicting provisions. The major conflict, which is fundamental to the implementation of the ELD, is the duty on an operator to carry out preventive measures “without delay” (ELD, article 5(1)) and emergency remedial actions “immediately” (ELD, article 6(1)(a)), before a determination has been made that the imminent threat of, or actual, environmental damage exceeds the threshold in the ELD for land, water or biodiversity damage (ELD, article 2(1)).

More precisely, the threshold for land damage is “land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms (ELD, article 2(1)(c)).

The threshold for water damage is “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in “Directive 2000/60/EC, of the waters concerned” (ELD, article 2(1)(b)).

The threshold for biodiversity damage is “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species” (ELD, article 2(1)(a)).

It may, however, take several months to determine whether biodiversity damage or water damage has occurred. In such cases, it is impossible for an operator to know whether it has a duty to carry out the necessary actions. The failure to take preventive measures or emergency remedial actions is, however, a criminal offence in some Member States.

This fundamental conflict between the self-executing provisions of the ELD and the thresholds may well be one of the main reasons for the slow implementation of the ELD.

The transposing legislation in the UK (England, Wales and Northern Ireland) helpfully provides that an operator should carry out actions immediately if it is in doubt as to whether reasonable grounds exist to believe that an activity has caused environmental damage. This does not, however, completely resolve the issue.

In some other Member States, the transposing legislation may well be self-defeating. For example, the transposing legislation in Italy provides that an operator must “take the necessary preventive and safety measures” within 24 hours. It further states that an operator cannot take such measures until his notification to the competent authorities has reached the municipal authorities and they have permitted him to carry out the measures. Whereas the review by the authorities could aid in determining whether an imminent threat of environmental damage has occurred, a major purpose of the ELD is to prevent environmental damage from occurring.

1.2.9 Provisions in national legislation to fill gaps in the ELD

Some Member States have enacted legislative provisions to fill gaps in the ELD. Examples of these provisions include:

- Establishment of a register or database of ELD incidents;
- Application of the ELD to biodiversity in a Member State's exclusive economic zone;
- Offences and sanctions for breaches of the transposing legislation;
- Access to third-party property to carry out preventive and remedial measures;
- Authority to carry out inspections and investigations;
- Liability of directors and officers for breaching the transposing legislation;
- Record of environmental damage in land records;
- Publication of enforcement and implementation information;
- Disproportionate costs of remedial measures.

▶ Establishment of a register or database of ELD incidents

The transposing legislation of some Member States, such as Ireland and Poland, specifically provides for the establishment of a register of ELD incidents. The Irish register is not published but information in it is available on request. The Polish register includes details of imminent threats to, and actual, environmental damage. Other Member States, such as Germany, do not mention registers or databases.

Some Member States, such as the UK, publish reports of ELD incidents on government websites without the transposing legislation specifically providing for such compilation or publication.

▶ Application of the ELD to biodiversity in a Member State's exclusive economic zone

Some Member States such as Denmark, Germany, Spain and the UK, which have a maritime border, provide that the ELD regime applies to biodiversity in the exclusive economic zone. Other Member States are silent on the issue.⁴²

▶ Offences and sanctions for breaches of the transposing legislation

The ELD does not establish offences or sanctions for offences. Directive (2008/99/EC) on the protection of the environment through criminal law established measures relating to criminal law to protect the environment, including species and natural habitats protected by the Birds and Habitats Directives. Directive 2008/99/EC thus complements the ELD's establishment of administrative liability for preventing and remediating environmental damage; it does not establish offences for breaching the ELD.

In order to enable competent authorities to enforce the ELD regime, some Member States have enacted varying levels of offences and penalties for them for breaches of specific duties under

⁴² In this respect, we understand that the Commission considers that if a Member State grants a licence for offshore oil and gas operations in its exclusive economic zone, the Habitats Directive applies to this area due to the Member State having exerted its sovereign rights over the area. Communication from the Commission to the Council and the European Parliament, Fisheries management and nature conservation in the marine environment 10, § 5.2.2 (COM(1999) 363 final, 14 July 1999).

the ELD. These range from administrative to criminal offences and sanctions. Belgium (Brussels-Capital Region), France, Ireland and the UK created new criminal offences and sanctions.

The Danish transposing legislation, for example, establishes different levels of penalties, including imprisonment as well as fines, depending on whether a breach of the legislation is committed deliberately or through gross negligence or if, in connection with the breach, damage to nature or the environment has been caused or an imminent threat of such damage has been created, or an economic benefit has been obtained or was sought for the person concerned or for others including through savings.

The Polish legislation provides for fines, including daily fines. The transposing legislation of the UK provides for imprisonment as well as fines.

The Hungarian transposing legislation partially provides for offences and sanctions as well as specified offences and sanctions under pre-existing legislation applying to the ELD regime.

Some Member States, meanwhile, such as Germany, do not mention offences and sanctions in their transposing legislation. In Germany, however, sanctions are provided for general legislation on administrative sanctions and the German Criminal Act which contains provisions on environmental crimes.

► Access to third-party property to carry out preventive and remedial measures

The ELD specifically states that a “competent authority shall invite ... the persons on whose land remedial measures would be carried out to submit their observations and shall take them into account” (article 7(4)). The ELD does not, however, contain any provisions that direct a Member State specifically to authorise access onto third-party property in order to carry out preventive or remedial measures.

The transposing legislation of some Member States, such as Belgium, Greece and Italy, does not mention third-party access although their existing national legislation may well include the relevant provisions. For example, specific provisions do not exist and are not required under the Swedish transposing legislation because chapter 28 of the Environmental Code provides an operator with the right of access to any land or water area in order to carry out preventive and remediation measures.

Some Member States, such as Hungary, the Netherlands, Poland, Romania, Spain and the UK, have filled the gap in the ELD by specifically requiring persons with an interest in the third-party land (such as owners and occupiers) to allow access by competent authorities and operators. Ireland does not specifically provide for access to third-party land in its legislation. Its screening regulatory impact assessment, however, discussed the potential for a third party not to cooperate with, or facilitate, preventive or remedial measures to be taken on its land and stated that “In such instances, the competent authority may have to compel such individuals to take particular action”, and “It is intended that the competent authority be given powers to ensure access and implementation of remedial measures, as appropriate”.

The transposing legislation in France states that the operator must obtain written authorisation from the owner(s), occupiers or other persons with an interest in the site on which remedial measures will be carried out. An agreement can be concluded between the operator and the owner(s) in order to set up the conditions of authorisation and possibly financial compensation

for occupying the land. In the absence of an agreement or in cases of emergency, the authorisation to carry out measures in the land of a third party can be given by a tribunal. If the landowner, occupier, etc., refuses access onto the land to carry out remedial works, the authorisation may be granted by the President of the Tribunal de Grande Instance (article L162-5 of the Environmental Code). Different provisions exist for large scale damage or a high number of affected owners.

Finland provides that the competent authority must provide persons with an interest in the third-party land to a hearing before deciding on applicable remedial measures. The owner or other person with a legal interest in the land is entitled to compensation if the remedial measures cause considerable inconvenience to them or result in substantial harm. If a person entitled to compensation cannot obtain it from the responsible operator, the State is liable to pay the compensation.

The transposing legislation sometimes includes a mechanism by which the person who has allowed access may claim against the operator for any damage to the land. Denmark, for example, authorises the owner of the third-party land to claim compensation from the Minister for the Environment if damage is caused and an agreement cannot be reached or the person causing the damage cannot pay. The Minister is authorised to bring a claim for compensation against the person who caused the damage. Existing national legislation on valuing damage applies.

Legislation in other Member States refers to existing mechanisms that should be applied to implement cost-recovery. Hungary, Poland, Spain and the UK specify measures to claims and cost-recovery. In the Netherlands, the transposing legislation states that providing access is without prejudice to rights to financial compensation.

► Authority to carry out inspections and investigations

The transposing legislation of several Member States, such as Denmark, Hungary, Ireland, Poland, Spain and the UK, specifically provides competent authorities with the power to carry out inspections and investigations to determine whether there is an imminent threat of, or actual, environmental damage. The powers may be quite detailed and specific.

In some cases, such as the UK (England, Wales and Northern Ireland), they incorporate powers from other legislation. In other Member States, such as Denmark, Poland and the UK (Scotland), they specify the powers in the transposing legislation itself. Poland requires the operator to keep the results of measurements of the contents of substances in the soil, subsoil and water, and to monitor natural biological and landscape diversity for five years from the end of the calendar year in which they are taken and submit the results to the competent authority on request.

Other Member States, such as Germany, do not refer to any power or duty of a competent authority to carry out inspections or investigations. Whilst relevant provisions may well exist in other legislation, therefore, the legislation transposing the ELD is silent on the issue.

► Liability of directors and officers for breaching the transposing legislation

The transposing legislation of several Member States, such as Poland and the UK (England, Wales and Northern Ireland), specifies that the director or officer of an operator may be

criminally liable for breaching provisions of the transposing legislation. In Poland, a director or officer, or other person in charge of environmental issues at a facility may also be liable.

In Ireland and the UK (England, Wales and Northern Ireland), a director or officer may be criminally liable if the breach of the transposing legislation by the company operator is committed with their consent or connivance or is attributable to their neglect. In addition, in the UK (Scotland), the partner of a Scottish partnership may also be convicted if the partnership's offence was committed with their consent or connivance or is attributable to their neglect. Equivalent provisions apply to the member, or a person purporting to act as a member, of a Scottish limited liability partnership.

The transposing legislation in other Member States, such as Denmark, Germany and Hungary, is silent on whether a director or officer may be liable for a breach of the legislation in addition to the company itself.

▶ Record of environmental damage in land records

A few Member States such as Denmark require details of property that is affected by an imminent threat of, or actual, environmental damage and for which a preliminary or final notice has been issued to be included in the land register for that property at the cost of the liable operator. Under the Danish transposing legislation, the details of preliminary and final notices are removed when the notice has been complied with.

▶ Publication of implementation and enforcement information

Some Member States have provided for the publication of information on the implementation and enforcement of the ELD regime. For example, the German transposing legislation provides that planned remedial measures for an ELD incident shall be made by public notice so as to give persons and associations that are eligible to submit comments on them to do so.

The Spanish transposing legislation provides for the annual publication of the following information: the economic report prepared by an operator to support its contention to the competent authority that the cost of complementary remediation is disproportionate; information concerning monitoring of remediation projects; final report of a remediation project including the competent authority's decision on its execution; and penalties imposed for breaches of the transposing legislation, on an annual basis to include the acts constituting the breaches and the identification of the responsible operators.

France has a database known as the ARIA database, which lists all the incidents or accidents that have or could have threatened public health or security, agriculture, nature or environment. There is no requirement to include an ELD incident in the ARIA database. Also in France, a copy of the administrative order establishing remedial measures is published for a minimum of 1 month at the city council where the damage occurred. A copy of the administrative order is also sent to every local council that was consulted during the process.

The transposing legislation in Poland directs the competent authority, when preventive or remediation measures have been completed, to send a notification to the Chief Inspector of Environmental Protection to include the following information:

- indication of the type of the imminent threat of, or actual, environmental damage, including its description, place and date of occurrence or detection;

- if the operator has been identified, the following information:
 - if the operator is an individual, their full name and residential address,
 - if the operator is a company, the company name and registered office address;
- a description of the activity that caused the imminent threat of, or actual, environmental damage according to the Polish Activity Classification Code;
- the date on which proceedings were initiated;
- copies of decisions;
- information concerning any appeals against such decisions including the identity of the entity which appealed the decision, the authority against which the appeal was lodged, the reasons for lodging the appeal, and the date on which the issue was resolved;
- the date of completion of preventive and remedial actions;
- a description of preventive and remedial actions; and
- a description of the ecological effect that was achieved.

The Polish transposing legislation also sets out additional information that may be provided. If enforcement proceedings continue after completion of the preventive or remedial actions, information on the result of such proceedings is entered when they are completed. The above information is included in the register of imminent threats of environmental damage and environmental damage. Unlike most other Member States, the transposing legislation in Poland sets out detailed requirements for the extensive information held in the register.

Hungary has a database on which, among other things, an authority that has information of an imminent threat to human health or the environment must immediately publish the information in respect of the public who are likely to be affected in order to enable them to take actions to prevent or mitigate damage.

Existing national law in Portugal provides that details of any conviction for a very serious environmental offence may be published as well as any conviction for a serious environmental offence when the fine for that offence exceeds half of the maximum amount of the applicable fine (see section 1.1.1 above).

1.2.10 Extension to include civil liability

The ELD provides that it “does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages” (ELD, recital 14).

The ELD provides that it “shall not prevent Member States from adopting appropriate measures, such as the prohibition of double recovery of costs, in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under this

Directive and by a person whose property is affected by environmental damage” (ELD, article 16(2)).

There is, therefore, nothing in the ELD to prevent a Member State establishing a civil liability regime that tracks the ELD. Portugal has established such a regime.

The Portuguese transposing legislation authorises a cause of action for compensation against an operator whose activities cause environmental damage. An Annex III operator is subject to strict liability; a non-Annex III operator is subject to fault-based liability (fraud or negligence). There is a contributory negligence defence which limits the damages payable to an injured person if that person’s negligence has contributed to the environmental damage or its exacerbation.

Further, a person who is injured by environmental damage does not have a claim for compensation against the operator if the damage has been prevented or remediated under the administrative liability regime set out in the transposing legislation. The legislation establishing the civil regime thus provides, in effect, that any claim for compensation is secondary to the administrative liability regime in that the claim does not exonerate the liability of the operator for carrying out preventive and remedial actions and that it cannot impede actions of the competent authorities in implementing the administrative liability regime.

1.3 Effect of existing law on the implementation and enforcement of the ELD

The ELD was transposed into widely varying administrative liability systems for preventing and remedying environmental damage. The wide variance in the existing legislation, in turn, led to a wide variance in the introduction of the legislation transposing the ELD, its implementation, and its enforcement.

This section discusses aspects of the administrative environmental law that existed in Member States when the ELD was transposed. The discussion is not intended to be comprehensive but is intended to indicate differences between that legislation and the liability regime created by the ELD. It is also intended to show that concepts that are present in the transposition of the ELD into various Member States are due, in some cases, to such concepts having already been present in existing environmental legislation. A notable example of this is the modified system of mitigated proportionate liability in some Member States.

More extensive discussions of the existing legislation in Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Spain, Sweden and the UK and Gibraltar are contained in Annex – Part A to this report. The summaries for each of these Member States includes a brief section that notes key features and differences between existing legislation and legislation transposing the ELD.

This section also includes a discussion of existing environmental legislation in Poland and the transposition of the ELD regime into that law. The discussion is included to illustrate reasons for the larger number of ELD incidents in Poland than in other Member States.

1.3.1 Existing legislation

When the ELD was transposed, all Member States had some form of existing administrative liability law for preventing and remedying environmental damage. In many Member States the law was highly developed, often as a result of its evolution over a large number of years. In other Member States, such as Greece, Portugal and Romania, it existed but was less well developed.

All the legislation imposing liability for preventing and remediating environmental damage was statutory in nature; sometimes primary legislation, sometimes secondary legislation, sometimes both. That is, the legislation was, and is, adopted by the legislative branch of the Government and is written down in Codes, statute books, and written legislation. Even in Member States with a common law system, such as Ireland and the UK (England, Wales and Northern Ireland), legislation imposing liability for preventing and remediating environmental damage is statutory in nature.

► Soil contamination

The administrative liability legislation that is most developed in some Member States concerns the prevention and remediation of soil contamination (also called land contamination or contaminated land). In many Member States, this legislation includes liability for preventing and remediating groundwater pollution due to its obvious linkage with soil contamination. In other Member States different regimes apply. In yet other Member States, there is overlapping legislation for land contamination and water pollution.

Much of the legislation on soil contamination was developed to remediate contamination from historic as well as future pollution incidents. This legislation continues to be implemented and enforced alongside the ELD regime. In some Member States, liability differs depending on the time at which a pollution incident occurred, with more historic incidents in some Member States subject to fault-based rather than strict liability.

Member States with well-developed legislation to remediate soil and groundwater contamination include: Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Spain, Sweden and the UK. Ireland does not have a dedicated regime to remediate land contamination but, instead, applies other environmental legislation.

The legislation on soil contamination often has a long history. For example, prior to new legislation being enacted, the courts in Finland had construed provisions in the Waste Act of 1993 to impose liability for remediating contamination.

The legislation to remediate soil contamination in Germany came into effect in 1999. Its focus is sites at which operations that may or are causing contamination are no longer carried out. The current German Soil Protection Act imposes liability on a wide range of persons in a hierarchical manner, including the polluter, its legal successor, the owner of the contaminated land, the lessee or other occupier and, subject to specific conditions, the former owner.

In the Netherlands, the Soil Protection Act entered into effect on 1 January 1987. The Act is more stringent than the ELD and is so well developed in respect of land contamination that the Dutch Government anticipates that the legislation transposing the ELD will not, as a general rule, be

applied to soil contamination. The only amendment to the Soil Protection Act by the transposing legislation was to clarify that it covers organisms and micro-organisms.

Sweden has a single regime for remediating water pollution and land contamination which also includes buildings and structures. The focus of the regime is, however, land contamination. Under the regime, operators (defined as “[p]ersons who pursue or have pursued an activity or taken a measure that is a contributory cause of the pollution”) are liable for the remediation (called “after-treatment”) of “polluted areas”. The existing legislation has retrospective effect in that any person who carried out such operations after 30 June 1969 may be liable if the operations caused pollution.

The UK has legislation for remediating water pollution and contaminated land. The water pollution legislation provides that a person who causes or knowingly permits “any poisonous, noxious or polluting matter or any waste matter [to be or to have] been present in, or [to be] likely to enter, any controlled waters [that is, surface, ground and coastal waters]” or to harm or to be likely to harm such waters “by any event, process or other source of potential harm” is liable for: “(a) removing or disposing of the matter; (b) remedying or mitigating any pollution [or harm] caused by its presence in the waters; or (c) restoring (so far as it is reasonably practicable to do so) the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before the matter became present in the waters”. The legislation thus imposes liability for biodiversity damage although such liability is limited.

The UK legislation for remediating contaminated land is highly complex. The legislation establishes liability for remediating “contaminated land” on a person who caused or knowingly permitted the contamination. If the competent authority cannot find such a person after a reasonable inquiry, the owner or occupier of the contaminated land is liable. Liability under the legislation is retrospective as well as prospective; there is no limitation to such liability. The scope of liability is modified joint and several liability – which consists of a complicated mix of joint and several and proportionate liability.

► Water pollution

Legislation in Member States to prevent and remediate surface and marine water pollution tends to be less well developed than legislation to prevent and remediate soil and groundwater contamination. When it exists, however, it tends to have a low – sometimes very low – threshold. Liability under the legislation also tends not to be limited to operators but extends to any person who causes water pollution regardless of whether their activity is professional or personal.

For example, liability under the Spanish Water Act is strict. Liability is also joint and several, subject to a competent authority allocating liability between multiple persons when feasible to do so. The threshold is significantly lower than that of the ELD. If it is not possible to remediate the damage or if the damage is irreparable, the liable person must pay a compensatory amount determined by the Spanish Government. Liability for remediating water pollution under UK legislation is also strict and joint and several. The threshold for water damage is particularly low.

Liability for water pollution may also extend to marine waters. For example, Danish legislation imposes strict liability on vessels and offshore installations to remediate environmental damage caused by such installations.

► Biodiversity damage

Legislation in Member States to prevent and remediate biodiversity damage tends to be much less well developed – if it exists or is developed at all – than legislation to prevent and remediate soil and groundwater contamination. Most Member States did not have any existing legislation that set out detailed criteria for restoring biodiversity.

Existing legislation for preventing and remedying biodiversity damage in the vast majority of Member States, therefore, does not overlap with legislation transposing the ELD for biodiversity damage.

A crucial issue, therefore, is that most Member States that did not have – or that had weak – legislation for preventing and remedying biodiversity damage prior to the ELD did not enact legislation to impose liability for biodiversity damage below the ELD threshold when they transposed the ELD. The adoption of the ELD, therefore, has resulted in the establishment of liability for preventing and remedying only “significant” damage to biodiversity with no – or weak – national legislation that imposes liability for preventing or remedying damage below that threshold. That is, the ELD does not supplement national legislation for biodiversity damage; it is the *only* detailed legislation for biodiversity damage in most Member States. This raises the issue of the extent to which the ELD can fulfil one of the main reasons for its adoption, namely, halting the loss of biodiversity (ELD, recital 1).

The problem of the extent at which to remedy minor incidents of biodiversity damage has been called the “Achilles Heel” of protecting critical natural habitats in the US.⁴³ It would seem to be an even greater problem in the EU due, not to the word “significant” in the ELD, but the way in which that word has been interpreted – or its meaning simply misperceived – by many stakeholders.

The threshold for biodiversity damage in the ELD is a “significant adverse effect[] on reaching or maintaining the favourable conservation status of [protected] habitats or species” (ELD, article 2(1)(a)). Annex I of the ELD sets out the criteria to be taken into account in assessing whether this significance threshold is met. A reasonable application of the Annex I criteria – indeed the only reasonable application – means that remedial measures should be carried out to ensure that protected species and natural habitats that suffer damage that adversely affects their ability to reach or maintain their favourable conservation status in the European territory of the Member States, the European territory of an individual Member State, and the natural range of the species or habitat, are restored to their “baseline” condition.

The meaning of the word “significant” in the context of biodiversity damage in the ELD must, therefore, be derived from the application of Annex I to the definition of biodiversity damage in article 2(1)(a). Instead, many stakeholders have misinterpreted the word “significant” in the ELD and have taken its meaning, not from Annex I and not even from dictionary definitions of the word “significant”. The terms “severe” and “severity threshold” have been used as synonyms for

⁴³ See Dave Owen, Critical Habitat and the Challenge of Regulating Small Harms, *Florida Law Review*, vol. 64, pp. 141, 189-191 (2012).

the terms “significant” and “significance threshold” despite their vastly different meanings.⁴⁴ A common assumption has, therefore, arisen that the threshold for biodiversity damage in the ELD is very high; it is not. This misperception is not necessarily the result of the transposition of the ELD into Member State law. It does, however, have a substantial impact on the implementation and enforcement of the ELD that needs to be corrected if the ELD is to achieve a key aim in assisting in halting the loss of biodiversity in the EU.

► General environmental damage

Some Member States had general legislation that imposed, and continues to impose, liability for preventing and remediating environmental damage. For example, Hungarian legislation imposes liability for preventing and remediating damage to the environment. A person who poses a hazard to, or who pollutes or damages the environment (known as a “user of the environment”) must cease doing so, prevent further damage, and remediate the environment to its state before the damage. Liability is strict. A user of the environment includes, but is not limited to, an occupier of land such as a tenant as well as the owner or possessor of a mobile source of pollutants. The user of the environment may be a past, as well as a current, user. Liability for remediating damage to the environment is, therefore, retroactive.

Poland also has general environmental legislation (see below).

1.3.2 Standard of liability

The standard of liability in existing environmental legislation to prevent and remedy environmental damage tends to be strict liability. Fault-based liability tends to exist mainly when it applies to the remediation of historic contamination (generally with cut-off dates between fault-based and strict liability) and regulatory legislation concerning installations with environmental permits.

For example, two categories of persons are liable under the Danish Contaminated Soil Act. A person who carried out an activity or who used a commercial or public facility from which the contamination originates at the time of the original contamination, and a person who caused the contamination due to their reckless conduct or conduct which leads to stricter liability provisions under other legislation. The legislation then differentiates between the time at which the contamination occurred. The operator of a commercial or public facility that caused contamination after 1 January 1992 is strictly liable for complying with a notice to investigate contamination. The operator of such a facility is strictly liable for complying with a notice to remediate contamination that occurred after 1 January 2001. Prior to those dates, liability is based on negligence.

The Environmental Protection Act in Finland, that Member State’s framework environmental legislation, has a separate chapter on contaminated land. The Act applies only to contamination that has been caused after 1 January 1994 (when the Waste Act 1993 (a predecessor to the Environmental Protection Act) entered into effect). The Act imposes strict liability for the

⁴⁴ The Oxford Dictionary defines the word “significant” as “sufficiently great or important to be worthy of attention; noteworthy”, and the word “severe” as “very great, intense”.

investigation and remediation of contaminated soil and groundwater. The person whose activities caused the contamination is primarily liable for investigating and remediating the contamination. If the polluter cannot be found or is not sufficiently financially viable to investigate and remediate the contamination, the owner or occupier of the contaminated area is secondarily liable provided that they consented to the contamination or the owner knew or should have known that the site was contaminated when it acquired the site. If the owner cannot be found or the owner and occupier are not financially viable, the municipality must investigate the contamination and, if remediation is required, carry out the remediation. The Finnish State is not obliged to contribute to remediation costs. Funds budgeted to the Ministry of the Environment are available for financing remediation in some circumstances, but funding is always based on case by case consideration. If the contamination completely ceased before 1 April 1979 the polluter is not liable. If the contamination occurred prior to 1 January 1994, the polluter is liable for remediation provided that the activity causing the contamination continued after 1 April 1979. If the contamination completely ceased before 1 April 1979, the current landowner is liable regardless of whether it caused the contamination. The former landowner (that is, any person who owned the land before the current landowner) is not liable provided that it did not cause the contamination.

1.3.3 Scope of multi-party liability

The scope of liability in existing environmental legislation tends to be joint and several liability.

There are limited exceptions such as France. Some liability systems impose joint and several liability with an accompanying system for allocating liability between liable persons (right of (internal) redress). For example, the German Act concerning the prevention and remedying of environmental damage provides for contribution actions between responsible operators. Contribution actions are time-barred after three years from the date on which the costs have been collected by the competent authority or the responsible operator has completed the preventive or remedial measures and obtained knowledge of the identity of other responsible operators. There is a long stop of 30 years for contribution actions. Any disputes are to be settled in courts of law.

The Environmental Liability (Scotland) Regulations 2009 provide that the competent authority “may determine the operators’ responsibility on the following basis”: a percentage split; jointly and severally; with reference to a particular area or period of time; or in such other manner as the authority deems appropriate. The above scope of liability thus allows a competent authority to apply joint and several liability if it cannot proportion liability between the operators.

Further, under the Danish Contaminated Soil Act, a competent authority may serve a notice on all liable persons, with each person bearing a proportionate share of liability in relation to their contribution to the damage. If the competent authority cannot allocate the shares proportionately, it may allocate them in equal shares. Further provisions specify when a notice may be served on only one person. The complex details of the system for proportioning liability, however, have resulted in it rarely if ever having been used. A person who complies with a notice has a right of contribution against other liable persons.

1.3.4 Exceptions and defences

Exceptions and defences in the existing environmental legislation are rare and, if they exist, narrow. For example, there are no exceptions or defences to liability under the legislation for remediating contaminated land in Spain or the UK.

Defences that do exist tend to be for *de minimis* contamination. For example, there is a defence under chapter 10 of the Swedish Environmental Code (the legislation imposing liability for remediating land contamination and water pollution) to the application of joint and several liability for “an operator who shows that his or her responsibility for the pollution is so insignificant that it does not by itself justify [remediation]”. If such a *de minimis* operator meets this burden, it is liable only “to the extent that corresponds to his share of responsibility”. In other words, modified joint and several liability applies. That is, liable operators who are not *de minimis*, are jointly and severally liable for the costs of remediating pollution with the application of specified equitable factors to allocate liability between them.

In particular, it is extremely rare for the permit or the state-of-the-art defence to be included in existing environmental legislation. Member States that have not included them in existing environmental liability legislation include Belgium, France (Classified Installations Act), Germany (Soil Protection Act), Ireland (Water Pollution Act and Waste Management Act), Italy and the UK.

1.3.5 Limitation of liability to specified operations

It is rare for a liability system for preventing and remediating land-based environmental damage to be limited to specified operations unless the regime is specifically created as a regulatory regime for specified installations. For example, liability regimes in many Member States including Belgium, Denmark, Sweden and the UK do not have such a limitation.

In Sweden, for example, liability for remediating pollution damage is not limited to operators. If an operator is unable to carry out or pay for the remediation of pollution damage, the owner of the polluted property is liable for its remediation provided that the landowner knew or should have known of the pollution when it acquired the property and also provided that it acquired the property after 31 December 1998. The requirement for actual or constructive knowledge is, in essence, an innocent purchaser defence in that a person who acquires property can avoid liability for remediating any contamination at the property if the landowner carries out investigations to show that it did not know or should not have known that such contamination existed when it acquired the property. The innocent purchaser defence applies only when the source of contaminants at the property no longer exists. If, for example, the contents of a landfill or pit on the land continue to seep into groundwater or to migrate, the owner of the land is considered to be an operator even though the owner does not continue the operation of the landfill or pit. A landowner who is not an operator and who did not have, or should not have had, knowledge of the pollution, may nevertheless have an obligation to pay costs that are equivalent to any increase in value of the land resulting from the remediation. This obligation may apply to persons who acquired contaminated land prior to 1 January 1999 as well as after that date.

As indicated above, the exception to the limitation of liability to specified operations is the regime for IPPC / IED installations. In some Member States, this regime is much wider than that under the EU Directives and also applies to smaller installations. This means that the scope of persons who are subject to requirements to prevent and remediate environmental damage is much broader than the activities under Annex III in the ELD. For example, the Danish, Finnish and French environmental liability legislation applies to nearly all operations.

In Finland, the Environmental Protection Act, which transposed the IPPC / IED regime, applies to 23,000 smaller installations. In France, the Classified Installations Law applies to over 500,000 installations, including many installations that are not subject to the IPPC / IED regime. In addition, France has a specific regime for remediating contaminated sites and soil which applies regardless of whether the contaminated land is at a classified installation.

It is also rare, except in regulatory regimes such as the IPPC / IED regime, to limit liability for preventing and remediating soil and water contamination to operators of professional activities.

An exception is liability under the Finnish Nature Conservation Act, which is limited to professional activities, including a person who *de facto* controls such an activity. There is an exception for biodiversity damage caused by hunting. Liability for biodiversity damage under the Finnish Forest Act, Land Extraction Act is, however, not limited to professional activities.

The existing environmental law in Hungary imposes liability on a “user of the environment”, which is much broader than the liability of an operator.

Liability under the Water Pollution Act in Ireland is not limited to an operator. Neither is liability under the Swedish Environmental Code or legislation for preventing and remediating contaminated land and water pollution in the UK.

1.3.6 Other liable persons

Many Member States impose liability on persons other than operators, particularly in liability systems for remediating contaminated land and associated groundwater. Such liability is secondary in some Member States. That is, if the polluter cannot be found or is not financially viable, the owner (and in some cases, the lessee or other occupier, or another person) is liable.

France has extended secondary liability. If the operator of a site subject to the Classified Installations Law becomes insolvent and is liquidated, the liquidator must order an environmental consultant to prepare a report detailing any remediation work that should be carried out. The liquidator must ensure that adequate funds are secured from the insolvency estate’s assets to pay for the remediation depending, of course, on the funds that are available. The parent company (plus the grandparent company and the great grandparent company) of the last operator (the subsidiary) may also be liable if the parent company acted negligently and, as a consequence, contributed to the subsidiary’s loss of assets.

The General Rules on Environmental Protection in Hungary provide that, in addition to a user of the environment being liable for the prevention and remediation of damage to the environment, the owner of the land that is damaged is also liable. More specifically, the owner of land on which there is a risk of, or actual, environmental damage is jointly and severally liable for its prevention

or remediation. The landowner may be exempted from liability if it proves “beyond a reasonable doubt” that the actual user of the environment caused the risk or damage. The owner of a mobile source of pollutants is also jointly and severally liable unless it names the actual user of the environment and proves beyond a reasonable doubt that the responsibility does not lie with him.

The Polish Environmental Protection Law Act imposes liability for remediating historic contamination, that is, contamination caused prior to 30 April 2007 to soil and subsoil, on the current owner of the contaminated land (or, if the person who registered the title to the land is another entity, on that entity) regardless of whether the owner caused the contamination or carried out any activities on the land. If the contamination of the soil or subsoil was caused prior to 1980 and a risk assessment shows that the contamination does not pose a threat to human health or the environment, the landowner can avoid being required to remediate the land pursuant to a risk assessment.

If the owner (or other registered title holder) of the land proves that another person contaminated the soil or subsoil after the owner/title holder took possession of it, liability for remediating the contamination is transferred to that person provided the owner/title holder did not consent to, or know about, the contamination when it occurred. In order for the current owner/title owner to avoid liability, it must notify the competent authority of the environmental damage immediately after learning about it.

If the owner/title holder succeeds in proving that another person caused the contamination, the competent authority remediates the land and seeks the recovery of its costs from the person who contaminated the land. The competent authority cannot require the person who caused the contamination to carry out the remedial actions. In such a case, the person who contaminated the land has no legal title to the land and, therefore, no right to access it to carry out any activities on it. If the contamination by the other person occurred with the owner/title holder’s consent or knowledge, both parties are jointly and severally liable for its remediation.

The contaminated land regime in the UK also imposes liability on the owner or occupier of contaminated land if the person that caused or knowingly permitted the contamination cannot be found (see above). It is irrelevant whether the owner or occupier caused the contamination or even knew that it existed; their liability is based purely on their status as the owner or occupier of the contaminated land.

1.3.7 Standard of remediation

The standard for remediating contaminated land tends to differ in Member States, depending on whether the contamination to be remediated is a result of historic or current or more recent incidents.

For example, in Belgium (Flemish Region), the Soil Clean-up Statute differentiates between “new contamination” which occurred on or after 29 October 1995 (when the Statute came into effect) and “historic contamination”, which occurred before that date. New contamination must be cleaned up if applicable contaminant threshold levels are exceeded. Historic contamination must be cleaned up only if it poses a potential risk to human health or the environment.

In the UK, the standard under the regime for remediating contaminated land is suitability for its current or proposed use, subject to planning permission, whereas the standard under the regime for current and future contamination is much higher.

1.3.8 Limitations period

It is very uncommon to have a limitations period in administrative law for the remediation of environmental damage. Limitations periods tend to be associated with claims by third parties for bodily injury, property damage and economic loss.

For example, Belgium does not have a statute of limitations in its environmental legislation. Germany does not have a statute of limitations under its federal Soil Protection Act. Hungary does not have a statute of limitations in its environmental legislation for remediating environmental damage. Ireland does not have a statute of limitations under its Water Pollution Act or its Waste Management Act. Sweden does not have a limitations period under chapter 10 of the Environmental Code (which imposes liability for remediating land contamination and water pollution).

This does not mean that no Member State has a limitations period for liability for environmental damage. For example, Denmark has a limitations period of 30 years from the “termination of the production method or use of the plant which caused or could cause the contamination” for liability for remediating soil contamination.

The various environmental statutes and secondary legislation in Spain tend to be subject to statutes of limitation for bringing administrative proceedings that range from six months to three years, depending on the seriousness of the damage (very serious, serious or minor). These general limitations apply unless there is a more specific statute. There is no statute of limitations for bringing proceedings for damage to the public domain.

1.3.9 Fragmentation or harmonisation

Environmental law in some Member States is fragmented; in other Member States, it is harmonised to a lesser or greater extent.

Member States with an Environmental Code, such as France, Italy and Sweden, have the most harmonised environmental legislation. This does not necessarily mean that transposition of the legislation transposing the ELD into the Code is necessarily seamless although it does tend to be more harmonised than transposition in Member States with fragmented environmental legislation.

For example, the interface between the legislation transposing the ELD and existing Swedish environmental legislation is more harmonised than that in most other Member States due to the Swedish Government having transposed the ELD into the Environmental Code. The transposition of the ELD has not, however, resulted in a seamless liability system for environmental damage in Sweden. Application of the thresholds for water damage and biodiversity damage may well create similar problems to those in other Member States in that the ELD requires operators to carry out preventive measures and remedial actions to abate the

damage and to prevent further damage without delay. Carrying out such preventive measures and remedial actions, however, does not sit easily with the length of time that may be required to determine if the damage that is threatened or has been caused by an operator's activities exceeds the thresholds in the ELD. Further, the interaction between the threshold for damage to land that is "pollution damage" (under pre-existing legislation) and the threshold for "serious environmental damage [that] has been caused as a result of soil pollution" (under the ELD-transposing legislation) could be problematic. Still further, the application of a "reasonableness" test to liability for pollution damage compared to the application of mitigating measures to liability for "serious environmental damage" has created two standards of liability and, as a result, uncertainty in cases that could potentially fall within either category.

Some Member States that do not have Environmental Codes have framework environmental legislation. These Member States include Denmark, Finland and the Netherlands. For example, the Environmental Management Act in the Netherlands is the main environmental legislation in that Member State. It incorporates most environmental legislation, with a notable exception being the Soil Protection Act.

Meanwhile, other Member States have specific environmental legislation that focuses on an environmental medium and/or regulatory regime. Such legislation (which includes waste legislation, water legislation, contaminated land legislation and environmental permitting regimes) tends to result in more overlaps between existing legislation and legislation transposing the ELD and, thus, difficulties in implementation and enforcement of the ELD.

1.3.10 More and less stringent national law

The transposing legislation in some Member States specifically states that the ELD transposing legislation shall apply only when it is more stringent than existing national legislation. For example, the German transposing legislation specifically states that if other legislation contains more stringent provisions than the EDA, the other provisions apply. The transposing legislation in Romania provides that it is without prejudice to EU and national legislation which "shall regulate more severely the operation of any of the activities falling within the scope of this [legislation]". Similarly, Belgium (Flemish) Region provides that the legislation transposing the ELD is without prejudice to more stringent provisions regarding occupational activities and applicable liability law.

As described above, however, it is often difficult to determine whether existing legislation is more or less stringent than the legislation transposing the ELD. Whereas virtually all Member States did not impose liability for complementary and compensatory remediation prior to the transposition of the ELD, most existing legislation does not include the following:

- Limitation of liability to specified operators;
- Permit or state-of-the-art defences;
- Other defences and exceptions that are in the ELD;
- Limitation periods; and
- Fault-based liability for current and future environmental damage.

The following example is just one illustration of difficulties that competent authorities face in determining whether existing legislation is more or less stringent than the ELD.

Guidance to the transposing legislation published by the UK Government states that competent authorities may apply existing legislation when "the outcomes required by the [legislation transposing the ELD] have already been fully achieved ... including through other legislation which can be applied more rapidly".⁴⁵

Existing legislation in England and Wales includes the Water Resources Act 1991. That Act, among other things, imposes (1) strict liability for all water pollution incidents (compared to strict/fault-based in the ELD), (2) applies to all waters, that is, surface, ground and coastal waters (compared to only water bodies in the ELD as interpreted in the UK), (3) has a very low threshold which is satisfied by an oil stain on water (compared to a significance threshold in the ELD), (4) does not have a permit or state-of-the-art defence (compared to both defences having been adopted by the UK in the legislation transposing the ELD), (5) requires the polluter to restore aquatic fauna and flora damaged by the pollution to its baseline condition, if reasonably practicable to do so (compared to only protected species and natural habitats under the legislation transposing the ELD), (6) applies to all activities including recreational activities (compared to only occupational activities in the legislation transposing the ELD), and (7) has no exceptions (as opposed to exceptions under the legislation transposing the ELD).

The ELD is, of course, more stringent in that it requires compensatory and complementary remediation. Further, whilst the Water Resources Act 1991 requires a person who damages aquatic fauna and flora to restore them only if reasonably practicable to do so (compared to a requirement to do so in the ELD), the Act has, however, been enforced to require polluters to restock a river with fish, albeit without any requirement for compensatory remediation. In addition, defences which do not apply to the ELD apply to the Water Resources Act 1991.

1.3.11 Reasons why Poland may have more ELD incidents than other Member States

There are vastly more incidents of environmental damage under the ELD in Poland than in any other Member State. In 2009, the regional directors for environmental protection received 275 notifications for an imminent threat of, or actual, environmental damage. They required operators to carry out preventive or remedial measures in 84 cases, which consisted of 46 land damage cases, 13 land and water damage cases, three water damage cases, and 21 biodiversity cases.⁴⁶

⁴⁵ Defra, The Environmental Damage (Prevention and Remediation) Regulations 2009; Guidance for England and Wales (2nd update, November 2009), section A4.2, page 113); see link at <https://www.gov.uk/government/publications/environmental-damage-prevention-and-remediation-regulations-2009-guidance-for-england-and-wales>

⁴⁶ The regional directors decided not to initiate proceedings in 149 of the remaining cases, and continued to consider the remaining 46 cases.

In 2010, the regional directors received 364 notifications for an imminent threat of, or actual, environmental damage. They required operators to carry out preventive or remedial measures in 65 cases, which consisted of 33 land damage cases, 18 land and water damage cases, three water damage cases, and 11 biodiversity damage cases.⁴⁷

The interface between the existing liability regimes and the ELD regime necessarily has an effect on the large number of cases in Poland. Although it is not possible to draw firm conclusions at this time, the following are factors that may have resulted in the large number of cases.⁴⁸

First, there is a relatively clear interface between the Environmental Protection Law Act (EPLA) and the ELD regime for land contamination in the cut-off date of 30 April 2007. The transposing legislation provides that “existing provisions shall apply to environmental damage or to any imminent threat of environmental damage which occurred before 30 April 2007 or resulted from activities which were terminated before 30 April 2007”.⁴⁹ Although other Member States have also necessarily established a cut-off date, the identical threshold for damage to soil and subsoil in the EPLA and the ELD regime means that competent authorities enforce the ELD regime, rather than articles the EPLA, when the transposing legislation applies.

Moreover, for the land damage cases that occurred after 30 April 2007, the threshold is very low - it is not necessary that the contamination creates any risk to human health; it is sufficient that after the damage, soil fails to meet quite strict quality standards for soil. Whereas this factor may influence the number of land damage cases in Poland, however, it does not influence the number of water damage, and biodiversity damage cases.

Second, there is no requirement for an interested person who submits notifications to a competent authority concerning an imminent threat of, or actual, environmental damage to have a “sufficient interest”. This means that in practice every person, including organisations and informal groups may submit such notifications than may submit them in most other Member States. In practice environmental NGOs in Poland are quite active in submitting such notifications.

Third, the previously existing provision applicable to water damage and to damage in biodiversity other than damage to Natura 2000 sites was insufficient and imprecise. It did not provide any criteria on how to assess what constitutes damage (negative impact on the environment) neither did it specify the types of remedial measures that the pollution could be required to carry out. This caused problems for the authorities in its proper application. Moreover, decisions under article 362 of EPLA are issued by environmental departments of the authorities of general competence such as Starost (head of a district (*powiat*)) or the Marshall of the Voivodship (head of the self-governmental administration on the region) while decisions under the transposing legislation are issued by the Regional Director for Environmental Protection who is an authority dealing solely with environmental Issues (Environmental Impact Assessment and ELD issues).

⁴⁷ The regional directors decided not to initiate proceedings in 210 of the remaining cases, and continued to consider the remaining 89 cases.

⁴⁸ This summary of the reasons for the large number of cases in Poland was prepared by Magdalena Bar, Jendroćka Jerzmański Bar & Partners, Wrocław, Poland.

⁴⁹ Act of 13 April 2007 on the prevention and remedying of environmental damage, art. 35(1).

Regional directors seem to be much better prepared to carry out this task. Generally, it may be said that the provisions transposing the ELD provided the authorities with a new valuable tool.

Fourth, in Poland, the competent authority has a duty to carry out remedial measures if the operator cannot be identified, the measures must be carried out immediately because there is a risk to human life or health, or there is a possibility of irreversible environmental damage. In most other Member States, the State has only the power to carry out remedial measures and not a duty to do so. This duty may well provide an impetus to a competent authority in Poland to identify a liable operator and to require it to carry out remedial measures so that the cost does not fall on the Polish Government.

Fifth, the Polish Government has enacted detailed provisions to establish a register of notifications, including making the register available to the public, albeit that members of the public must know about the existence of the register in order to request details of it; it is not available on the internet. In contrast, some Member States have not adopted any provisions to establish a register or data base of ELD incidents, or have done so in a much more limited manner. Public knowledge of the ELD in Poland, therefore, has been facilitated compared to these other Member States.

1.3.12 Overlaps between existing environmental law and the ELD

Some Member States facilitated the introduction of the ELD by repealing some existing legislation that overlapped with it.

For example, in Poland, the legislation that transposed the ELD repealed provisions from the Environmental Protection Law Act in respect of the remediation of soil and subsoil damaged after 30 April 2007. After that date, the transposing legislation applies instead of the prior Act. Other existing legislation continues to apply when the legislation transposing the ELD does not apply.

Italy repealed the provisions of its Waste Management Act (Ronchi Decree) that imposed strict liability on a person who caused an imminent threat of, or actual, damage to soil, surface water or groundwater that exceeded specified limits for contaminants or that resulted in a significant risk to human health. That Act now applies only to environmental damage that was caused before 29 April 2006, when the legislation transposing the ELD came into effect. The legislation transposing the ELD applies to environmental damage after that date. Other existing environmental legislation was repealed as well whilst other legislation on contaminated land and water pollution continues to apply.

Although the repeal of some legislation that would otherwise have overlapped with the ELD does not resolve all the difficulties in implementing and enforcing the ELD as supplementary legislation, it does aid it.

It will not be possible to resolve all overlaps between the ELD regime and existing national environmental legislation. For example, the effective date of the ELD of 30 April 2007 means that existing legislation will necessarily apply before this date. The situation has already arisen with the contamination in Sicily, which was the subject of the CJEU ELD cases, in which pollution had occurred before and after 30 April 2007 illustrates the problem. Such overlaps in legislation are

likely to continue to occur, especially in respect of groundwater which may already be polluted and land subject to previous industrial uses.

Poland and Italy have mitigated this issue by repealing some existing legislation to facilitate the introduction of the ELD. Further, the above discussion in this section shows that cut-off dates for different forms of liability have already been introduced in regimes for remediating soil and groundwater contamination in the national legislation of some Member States.

1.3.13 Effect of other EU environmental law

The environmental law in all Member States necessarily includes EU environmental law, in particular the IPPC / IED regime.

The interface between the IPPC / IED regime and the ELD may be one reason for the lack of many ELD cases. That is, the terms and conditions of environmental permits under the IPPC / IED regime require operators of installations subject to it to remediate environmental damage. They also require land to be brought back into a “satisfactory state” when operations at the installation cease. These requirements are more stringent under the IED.

It is noteworthy that there are no ELD incidents in France. As indicated by chapter 3, the small number of incidents involving IPPC / IED installations in other Member States is also noteworthy. They indicate that, as a general rule, the ELD regime is being applied only when a pollution incident occurs at an IPPC / IED installation and the pollution migrates from the permitted installation. Even then, as indicated by the UK case of pollution in Rye Harbour (see section 2.8.3 and Annex – Part A), the ELD threshold was not exceeded.

Another difficult interface is that between the ELD and the Birds and Habitats Directives. The difference in the purposes of the ELD and the Birds and Habitats Directive leads to problems in applying the threshold for biodiversity damage under the ELD.

The purposes of the ELD and the Birds and Habitats Directives are substantially different. The Habitats Directive states that measures taken pursuant to it “shall be designed to maintain or restore, at favourable conservation status, natural habitats and species ...” (article 2(2)). The ELD, meanwhile, establishes a regime to prevent or remedy damage to biodiversity. There is a big difference between the damage threshold under the ELD and the evaluation of reasons for granting a permit or exception under the national legislation transposing the Habitats Directive.

Further, the Habitats Directive directs Member States to take “appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species ...”. The ELD does not impose liability on an operator who passively allows a protected species or habitat to deteriorate; liability only attaches if the operator causes damage to the species or habitat.

The legislation transposing the ELD in Spain takes account of the fact that many species and natural habitats do not have a favourable conservation status. The legislation provides for a remediation project to restore a damaged site which was in an unfavourable conservation condition, was deteriorated or inferior to its ecological potential to be restored to conservation

conditions better than the baseline condition, with the additional costs to be met by the competent authority.

1.4 Filling gaps in the ELD

The implementation and enforcement of the legislation transposing the ELD has shown actual and potential gaps in the legislation. These gaps include the following:

- Absence of oil pipelines from Annex III activities;
 - Limitation of recovery of costs to competent authorities;
 - Protection of sites at which complementary remediation measures are carried out;
 - Disproportionate costs of remedial measures;
 - Notification requirement for environmental damage that has not been remediated; and
 - Limitation of occupational activities to professional activities.
- ▶ Absence of oil pipelines from Annex III activities

The *Coussouls de Crau* case showed the gap in Annex III of the ELD for oil transportation by pipeline. This gap has been closed in France by adoption of a Decree (see section 2.3.3 below). The gap in the ELD for other Member States, however, remains open.

- ▶ Limitation of recovery of costs to competent authorities;

Article 10 of the ELD provides that “The competent authority shall be entitled to initiate cost recovery proceedings against the operator”. The ELD does not provide authority for any entity other than the competent authority to recover its costs.

The limitation of the above provision was demonstrated in a case in Greece involving an ELD incident that arose when a fire broke out at a temporary storage facility for used tyres in Ksiropotamos of Drama on 20 June 2010. The fire burned for four days causing, among other things, environmental damage. A request for compensation by the Prefecture of Drama for recovery of the costs of fighting the fire (in part by covering the burning tyres with soil), taking soil samples and other monitoring, and transporting contaminated materials was rejected by the competent state audit agency. Although the agency agreed that the damage was environmental damage under the Decree, it stated that the Prefecture was not a competent authority under the Decree and was not, therefore, entitled to reimbursement of its costs.⁵⁰

- ▶ Protection of sites at which complementary remediation measures are carried out

⁵⁰ See Fotis Filentas and Apostolos Paralikas, Lessons learned in implementing the Environmental Liability Directive in Greece: The responsibilities of the Administration and the role of civil protection, Conference on Protection and Restoration of the Environment XI, Thessalonki, Greece (3-6 July 2012) pp. 2423, 2426; www.pre11.org/ocs/index.php/pre/pre11/paper/downloadSuppFile/.../170

Nothing in the ELD provides for a review of sites at which complementary remediation has been carried out to ensure that the natural resources at that site continue to present a zero net loss of biodiversity. If the alternative site meets criteria set out in the Birds or Habitats Directive, it would be required to be classified as a special protection area or designated as a special area of conservation, respectively, which would trigger protective measures under those Directives. If the alternative site did not meet these criteria, however, natural resources at it may not continue to be protected.

One way to fill this gap would be post-remediation reviews at specified intervals. The issue would then obviously arise concerning any further measures that should be carried out if the natural resources at the site were deteriorating. Whilst existing law that transposed the Birds and Habitats Directive in Member States provides for measures to maintain and restore protected species and natural habitats, governmental authorities generally provide funding to the owners and occupiers for such measures.

Measures can, of course, be implemented in existing protected sites by, for example, improving their functions and structures for habitat and species protection, or by extending existing sites. Although such approaches are commonly used, the ELD provides that complementary remediation shall be carried out “[w]here possible and appropriate [at a site that is] geographically linked to the damaged site, taking into account the interests of the affected population” (Annex II, para. 1.1.2). Sites that are already protected may not be sufficiently close to a damaged site.

► Notification requirement for environmental damage that has not been remediated

The notification requirements in the ELD are based on the premise that an operator will notify the relevant competent authority when there is an imminent threat of, or actual, environmental damage.

The research has shown, however, that many operators are not aware of the ELD and, thus, its notification requirements. The potential therefore exists that environmental damage has been caused since 30 April 2007, but which is not discovered until many years later. There is no requirement in the ELD for anyone other than an operator to notify the competent authority of such damage. It is likely in such a case that the operator will no longer be present at the location of the damage.

Although interested persons may provide comments / observations to a competent authority if they are aware of environmental damage, or an imminent threat of such damage. This right does not, however, completely mitigate the absence of a notification provision for persons other than operators because it pre-supposes that the interested party will have access to the site at which the damage has occurred. This will not be the case in many, if not most, situations.

► Disproportionate costs of remedial measures

The ELD provides that a competent authority is entitled to decide that no further remedial measures may be taken if the following two conditions are met:

- “The remedial measures already taken secure that there is no longer any significant risk of adversely affecting human health, water or protected species and natural habitats”; and

- “The cost of the remedial measures that should be taken to reach baseline condition or similar level would be disproportionate to the environmental benefits to be obtained” (Annex II, para. 1.3.3).

The ELD does not, however, state whether the potential for further remedial measures should be kept under review. For example, as science and technology continue to develop, it is likely that measures will be developed that are no longer at a disproportionate cost.

▶ Limitation of occupational activities to professional activities

The ELD applies only to activities that are carried out in a professional capacity. It does not apply to personal activities, including recreational activities.

As described in section 2.8.2, the ELD regime applies to construction work at a protected site that destroyed biodiversity at the site. The ELD regime would not, however, apply if hunters at a protected site inadvertently harmed or destroyed a protected species at it. Such an activity would be recreational. Although the Birds and Habitats Directive have provisions concerning the taking, capture and killing of protected species, the ELD does not. The ELD, therefore, would not apply.

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Chapter 2: Practical application of the ELD

This chapter presents an overview of the practical application of the ELD for seven Member States (Denmark, France, Germany, Hungary, Poland, Spain, and the United Kingdom) with the objective to provide an update of the application of the ELD since the publication of the last empirical findings: as stated by the European Commission in 2010, “the Commission with the support of the network of ELD government experts identified 16 cases treated under the ELD at the beginning of 2010, and estimates that the total number of ELD cases across the EU may now be around 50.”⁵¹

Caveat:

It should be noted that the official number of cases dealt with under the ELD regime (and their details) were communicated by the Member States to the European Commission in the reports on the experience gained in the application of the ELD which each Member State was directed to submit by 30 April 2013. The project team did not have access to this official information at the time the study was carried out.

For each Member State, a brief overview of the situation is provided, followed by a discussion on cases of environmental damage. Two types of cases are considered:

- Cases that have been treated under the respective national ELD transposing legislation, and
- Cases concerning environmental damage that have been treated under pre-existing environmental liability legislation after the national ELD transposing legislation came into effect.

This overview is based on data collected from ELD practitioners in the respective Member States, including competent authorities, legal experts and NGOs. A high number of interview requests was sent, but such requests did not always receive a positive reply and a number of governmental and competent authorities could not be reached. A total of 36 out of 65 contacted stakeholders were successfully interviewed. Stakeholders were also consulted during a workshop⁵² held in Brussels on 16 January 2013, and were given the opportunity to submit additional comments following the workshop.

⁵¹ COM(2010) 581 final. Available at: eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,fr&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=525377:cs&page=

⁵² The website for the workshop is accessible at: eldimplement.biois.com. On the website, the list of participants and the minutes are available. The workshop gathered about 60 participants.

2.1 General overview

Findings reveal discrepancies of implementation across the seven Member States. ELD cases remain rare and sometimes non-existent in some countries (e.g. Denmark, France), except for example in Poland. In this regard, it is worth mentioning that stakeholders (including the insurance industry, governmental and competent authorities) from Germany, France, and Spain consider that the lack of ELD cases should not necessarily be viewed as a negative finding, but rather as an indication that the prevention of environmental damage has been effective and that the ELD is serving one of its main objectives (i.e. the prevention of environmental damage). Consequently, the number of ELD cases in this report should not be interpreted as the only indicator for the success of the ELD.

The implementation of the ELD regime in practice is presented for each Member State in the following sub-sections. Table 1 summarises the findings on the application of the ELD regime in the seven Member States covered by the empirical study. However, the present analysis is necessarily only fragmentary, as it is based on the selection of real cases which were available at the time this study was carried out (thus excluding official Member State reports to the Commission).

Table 1: Level of application of the ELD regime in the seven Member States studied

MS	Level of application of the ELD regime since the adoption of the national transposition legislation
Denmark	No ELD cases so far
France	No ELD cases so far
Germany	Less than ten cases, although much more cases have been officially notified to the Commission
Hungary	At least one case ("Red sludge" case) identified
Poland	High number of ELD cases
Spain	Four cases reported to the consultants by certain regional interview partners: three cases in Catalonia and one in Galicia. However, Spain officially notified much more cases to the Commission.
United Kingdom	Less than twenty ELD cases

The analysis of a set of cases of environmental damage leads to some main conclusions:

- To date, there are still only few cases of environmental damage for which the ELD regime has been applied. In the cases for which the ELD was applied, this led to the application of remedial measures.
- In the majority of cases, it was not possible to apply the ELD regime because of specific legal issues:
 - It was not possible to demonstrate that the damage exceeded the significance threshold set by the ELD regime (for water and biodiversity damage in particular);
 - Specific activities were not included in Annex III.
- In several cases, pre-existing legislative frameworks were used rather than the ELD regime, whereas the latter could have been applied, the pre-existing laws being considered by competent authorities as more adequate or more stringent than the ELD regime.
- In the case of several Member States, the ELD regime has not been applied as it could have been. The justifications provided for not applying the ELD regime were generally not based on legal grounds but rather on arguments related to non-legal issues (expertise, experience, proactivity of liable operators in implementing remedial actions, 'robustness' of traditional legislation, etc.).
- In some exceptional cases, no rationale was provided for not applying the ELD transposition legislation.

2.2 Denmark

No cases of environmental liability have been dealt with under the ELD regime in Denmark so far. According to the Danish Environment Protection Agency (EPA), the absence of ELD cases is a result of environmental damage not meeting the significance threshold. An accident or incident is generally dealt with very rapidly, therefore preventing environmental damage from developing into significant environmental damage and meeting the significance threshold. It was not expected that the ELD would have a strong effect in Denmark given the robust pre-existing legislation, but its transposition into national transposition was regarded as a positive act to allow for a more level playing field in the EU.

Nonetheless, the adopted transposing legislation is considered very complex by a legal expert; he considers it as not being understandable either for industrial operators or for competent authorities and, subsequently, as not very operational. The Danish EPA does not share this view, considering that although the transposition of the ELD into national legislation was challenging, as it notably resulted in amending 14 different acts, the steps to follow for determining whether to apply the ELD regime are clearly set out in a guidance document that was developed for this purpose.

2.3 France

2.3.1 Overview

No cases of imminent threat or environmental damage have been treated under the ELD regime so far. In particular, one case of environmental damage for which the significance threshold was clearly met occurred in the *Coussouls de Crau* nature reserve, presented in section 2.3.3, but it was treated under pre-existing national legislation as the occupational activity (transport of oil by pipeline) was not included in Annex III to the ELD.

2.3.2 Cases treated under national ELD transposing legislation

No cases of imminent threat or environmental damage have been treated under the ELD regime so far.

2.3.3 Cases treated under pre-existing environmental liability legislation

In the case of three occurrences of environmental damage, the application of the ELD regime was raised, but the cases were ultimately dealt with under pre-existing environmental liability legislation because:

- The activity generating the environmental damage was not included in ELD Annex III ("*Coussouls de Crau*" case); and
- The significance threshold was considered as not having been met (cases of discharges of soda/black liquor into a river).

Two other cases occurred before the national transposing legislation was adopted. Pre-existing environmental liability legislation was then applied. Nonetheless, they were identified as examples of cases of environmental damage which could have potentially been dealt with under the ELD regime in France, although they might have been considered as not being significant enough to trigger application of the ELD regime (Commissariat Général au Développement Durable, 2012).

These cases are presented below.

- ▶ Cases for which conditions to apply the ELD regime were not met
 - ▶ "*Coussouls de Crau*" case

In 2009, an underground pipeline transporting crude oil ruptured, resulting in a spill of over 4,000 m³ of oil in the *Coussouls de Crau* nature reserve, a Natura 2000 protected area located in the South of France. This accident resulted in severe pollution of land, water and impacted protected species and natural habitats.

Due to the scale of the accident, the significance threshold of the ELD was met. However, the activity of oil transportation by pipeline was not included in Annex III to the ELD⁵³ (or the transposing legislation at that time) and, therefore, the authorities determined that they had to establish the fault or negligence of the operator in order to apply the ELD regime. Because the authorities had doubts as to whether they could prove the operator's fault or negligence and, in order to avoid the administrative order being challenged before an administrative court, they decided to apply pre-existing national legislation. **This incident illustrates the difficulties potentially faced by administrative authorities when they have to collect robust evidence to support a case of environmental pollution against an operator, in particular when faced with a non-Annex III activity.** Subsequent to the spill, the French Government adopted Decree n° 2012-615 of 2 May 2012 in order to apply strict liability to the transport of oil by pipeline. Although the Decree applies to the ELD regime in France, it was not adopted as part of the ELD transposing legislation.⁵⁴

The pre-existing national legislation that was applied (water protection regime) to the *Coussouls de Crau* oil spill provides for the imposition on the operator of remedial measures only with regards to the aquatic environment. However, in this case, the operator agreed to undertake compensatory remediation as well as primary remediation, with regards to biodiversity, soil and water damage. The remediation costs were covered, at least in part, by the company's insurance.

Since the operator committed to restoring the damaged site, the competent authorities considered that the measures carried out following the application of national legislation were satisfactory, and these measures would not have been different had the ELD regime been applied. However, the operator did not admit any fault or negligence. The municipality where the damage occurred filed a criminal complaint against the operator. An examining magistrate (*juge d'instruction*) was appointed to conduct the investigation and, on 26 October 2012, decided to partially drop the charges, retaining only the count of involuntary pollution, for which the operator will be prosecuted in a criminal court in June 2013. The judges will have to determine whether there was fault or negligence. Nevertheless, the outcome of the proceedings should not have practical consequences regarding remediation of the environmental damage itself because judges in criminal courts do not have the power to retract, amend or supplement the remedial measures as determined by the administrative authorities.

More information on this case is available in Annex B in the accompanying report "Annex - Part B".

⁵³ In answer to a parliamentary question on the scope of the ELD as regards fixed installations for transporting hazardous liquids (P-6130/09 of 3 December 2009), which specifically referred to the Cossouls de Crau case, Mr. Dimas stated, on behalf of the Commission, that "*transport of hazardous liquids through fixed installations is not included in the list of activities in Annex III of [the ELD] (Annex III.7 ELD covers only 'onsite transport')*". See www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2009-6130&language=EN

⁵⁴ Decree No. 2012-615 of May 2012 on the safety, authorisation and public utility declaration of pipelines for the transportation of gas, hydrocarbons and chemical products, which amended Article R.162-1 of the Environment Code to include within the scope of the environmental liability regime "*transport by pipeline of natural gas, liquid or liquefied hydrocarbons, or chemical products*". There is no mention of the ELD in said Decree.

▶ Discharge of soda into the River Vienne

On 8 July 2011, a tank filled with 600 m³ of soda ruptured in an industrial plant (Seveso facility subject to the law on classified installations for environmental protection - ICPE-) in central France, which led to the discharge of a significant amount of soda into the River Vienne. The operator set up a floating dam to contain the pollution, as he is required under the ICPE law to carry out appropriate mitigation measures in case of an accident. This measure, together with the fast flow of the river, prevented any significant damage to the fauna and flora. In this case, **the competent authority, the *Préfet* of the *département*, considered that the damage was not significant enough to trigger application of the ELD** (*Commissariat Général au Développement Durable*, 2012), **although setting up the floating dam may be viewed as a preventive action within the meaning of Article 5 of the ELD.**

▶ Discharge of black liquor into the Arcachon Basin

On 5 July 2012, a tank ruptured at a paper mill in Biganos, releasing 3,500 m³ of black liquor, a corrosive substance (alkaline pH) composed of lignin and a mixture of caustic soda and sulphate. 100 m³ of black liquor reached the Lacanau and Leyre rivers, where fish were found dead; these rivers flow into the Arcachon Basin. Most of the released black liquor was discharged into closed sewage tunnels and stored in a retention basin, and was ultimately treated by the operator.

The plant's activity was suspended for several weeks following the spill. The plant is a classified facility for environmental protection (ICPE) under French law, and the ICPE legislation was applied to the incident. The competent authority (*Préfet*) issued several prefectural orders (*arrêtés préfectoraux*) in relation to the incident. In particular, a prefectural order of 6 July 2012 required the operator to carry out preventive and remedial measures.

The analyses carried out in the days and weeks that followed the discharge showed the pH of the water to be neutral and bathing water to be of good sanitary quality. In December 2012, a post-incident monitoring commission was established, composed of five colleges (administration, local authorities, local residents, operators and employees). However, **the case was not classified as an ELD case, as the competent authority (*Préfet* of the *département*) considered, in the light of the factual elements at his disposal, that there was no significant damage in the sense of the ELD.**

▶ Occurrence of the environmental damage before the transposing legislation entered into force

In addition to the above cases, other cases could potentially have been treated under the ELD regime in France, but the events took place after 30 April 2007 but before the transposing decree entered into force on 27 April 2009 (*Commissariat Général au Développement Durable*, 2012). However, the environmental damage might have been considered as not being significant under the ELD regime.

On 16 March 2008, an oil leak at a refinery in Donges (western France), which took place during the loading of a tanker, led to a spill of more than 400 tons of heavy fuel into the Loire estuary, a Natura 2000 protected site, and contaminated 250 kilometres of shoreline, impacting 38 municipalities. The operator undertook emergency measures (oil recovery operations in the sea and the estuary). The authorities banned sea fishing until April 4 2008. Observations from various

entities⁵⁵ showed that the number of oiled birds decreased due to the implementation of decontamination measures; in addition, analyses performed on shellfish collected on the shoreline showed the presence of hydrocarbons but at levels in compliance with EU standards and national recommendations. As a result, the authorities considered that there had been no significant impact on the environment (*Commissariat Général au Développement Durable*, 2012). A number of individuals, associations and local authorities brought criminal proceedings against the operator, who was found guilty on various counts related to the discharge of harmful substances.⁵⁶

On 30 September 2008, the River Meurthe was polluted in Varangeville (eastern France) following the discharge of clarification sludge from a drinking water production plant. As a result, suspended solids in the discharge covered the aquatic flora, but there was reportedly no fish mortality.

2.4 Germany

2.4.1 Overview

In Germany, the number of cases dealt with under the ELD appears small but has slowly increased and Germany officially reported many cases to the Commission. In 2009, only four cases were reported by the Institute for Environmental Studies and Applied Research (IESAR). Through a consultation of environmental authorities in Germany conducted in 2011-2012 on ELD biodiversity cases, a total of 20 cases of damage to biodiversity were collected; but the number of cases could be higher as not all consulted stakeholders answered the survey. These cases include two that were dealt with under the ELD transposing legislation (i.e. the Environmental Damage Act – EDA (*Umweltschadengesetz*)) by the competent authority, and two cases that could have been treated under the ELD transposing legislation from a legal point of view, but that were treated under the existing law regime (Eberlein A. & G. Roller, 2012). New cases of environmental damage have been reported by environmental associations to competent authorities in 2012 and are being studied. In total, four cases were taken to court by environmental associations following a request for action, under the ELD regime (Eberlein A. & G. Roller, 2012). Hellberg (2012) indicated that additional claims had been introduced and presented one specific case which occurred in 2012 and which was dealt with under the ELD transposing legislation.

One German competent authority pointed out that article 1 of the EDA (ELD transposing legislation) provides that it is subsidiary to pre-existing legislation in Germany, which guarantees the same or a better standard than the ELD. This competent authority further indicated that there are many environmental liability cases in Germany, but that the vast majority of these cases is treated under the national pre-existing legislation (e.g. water and soil protection acts). A case of environmental damage might therefore be handled under pre-existing legislation

⁵⁵ ONCFS (*Office National de la Chasse et de la Faune Sauvage*) and LPO (*Ligue de Protection des Oiseaux*).

⁵⁶ Judgment of 17 January 2012 of the Criminal Court (*tribunal correctionnel*) of Saint-Nazaire, available at <http://www.eau-et-rivieres.asso.fr/media/user/File/Actu2012/JugementTotalTCOR17012012.pdf>

(specific legal act) or under the EDA, but both solutions are possible only as long as the requirements of the specific legislation are met and the decision-making and practical application are fully in compliance with the EDA. For instance, as concerns biodiversity cases, they are not necessarily handled under the ELD transposing legislation but under legislation that had been enacted prior to the ELD transposing legislation (Eberlein A. & G. Roller, 2012). The latter is defined in Section 14 of the Federal Nature Conservation Act which regulates “Compensation for Impairment of Ecosystems”. The fundamental difference between the ELD regime and the Nature Conservation Act concerns the compensation scheme. The scope of compensation for the impairment of ecosystems in the Nature Conservation Act is limited compared to the scope of the ELD regime: as described by Eberlein A. & G. Roller (2012); *“it only applies if a significant impairment is related to a modification of the shape or utilisation of the ground.”* However, Germany amended the EDA by a Law of 21 January 2013, which entered into force on 29 January 2013, in order to resolve the two shortcomings that had been identified in the original EDA as adopted in 2007, concerning Article 2(4) (definition of ‘conservation status’) and Article 10 (limitation period for the recovery of costs) of the ELD. In addition, the official number of cases that Germany communicated to the Commission appears to be substantial, and to apply biodiversity damage according to Annex I of the ELD in a reasonable manner.

Furthermore, one representative from the German Insurance Association remarked that the main problem in finding out the actual number of ELD cases is the potential to count, not only cases that fall under the ELD, but also cases in which, for example, personal injury or property damage (which is not covered by the ELD) has occurred.

2.4.2 Cases treated under national ELD transposing legislation

The cases presented below were dealt with under the national ELD transposing legislation.

- ▶ Filling a trench for ground levelling in a Natura 2000 site affecting biodiversity

This case involved agricultural land (grassland) within a Natura 2000 site in Cuxhaven. A farmer had filled a trench to level the ground in order to increase agricultural productivity; further he applied manure to his field. These actions resulted in environmental damage to habitats protected under both the Habitats Directive and the national law for protected biotopes and, consequently, the high ecological value aspect of the Natura 2000 site was impacted. A private individual informed the competent authority and contacted local environmental associations in order to involve them in the process. The competent authority applied the ELD regime. The operator cooperated and **remedial measures (compensatory measures) were carried out.** (Eberlein A. & G. Roller, 2012)

This case is interesting as the competent authority used the ELD transposing legislation but also pre-existing national legislation (for protected biotopes), as biodiversity damage under the ELD was not extended to nationally protected species and habitats by the transposing legislation.

- ▷ Maintenance works on a riverbank in a Natura 2000 site affecting biodiversity

The environmental damage took place in a Natura 2000 site. The damage was caused by the Federal Waterways and Shipping Administration during maintenance works on a riverbank. A priority natural habitat and nests of protected birds (listed in Annex I of the Birds Directive 2009/147/EEC) were significantly damaged. The case was notified to the competent authority by an environmental association through a request for action. **The damage has been remediated.** (Eberlein A. & G. Roller, 2012)

- ▷ Biogas leak at biogas plant

In April 2012, a biogas leak occurred at a plant in Rotenburg which led to the pollution of the River Bruchbach by liquid manure and digestate, resulting in a probable 100% fish mortality (due to depletion of all the oxygen in the river) up to the confluence of the river with Lake Veerse (in the Netherlands). Protected species were affected.

The competent authority – the nature conservation authority – successfully used the ELD. It was reported that a person from the competent authority had attended a seminar on how to use the ELD, which allowed for effective application of the ELD regime. In addition, there was a large amount of available data (in particular an inventory of fish species) to determine the baseline, as measures had been undertaken in the months prior to the accident for improving the state of the river. The operator fully co-operated and remedial measures (compensatory measures) were undertaken, after a proposal for remedial measures was submitted by an expert appointed by the competent authority. As a result, the latter did not bring legal proceedings against the operator.

The following cases were taken to court by environmental associations, some of which are still pending:

- ▷ Drainage of a bird sanctuary affecting the breeding sites of the black tern

A habitat of protected birds was damaged within a “Special Protection Area” - SPA (under the Birds Directive 2009/147/EEC), characterised by wetland meadows and traversed by water ditches. The damage resulted from land use by farmers: ploughing up grassland and the intensification of drainage, which led to the destruction of a natural breeding habitat for this bird species. During excavation works at the water ditches, clutches of eggs of black terns were destroyed. (Eberlein A. & G. Roller, 2012)

An environmental NGO submitted a request for action to the competent authority. No measures were taken and, consequently, the NGO took the case to court. The court rendered its decision in 2012, ruling that the case could be treated under the ELD; although the court stated that the significance threshold was probably met, it nevertheless considered that the competent authority or the persons using the wetland had not committed any fault (the activity which resulted in the environmental damage was not an Annex III activity and, as such, was not subject to the ELD strict liability regime). It was considered that there was not sufficient evidence to prove that it was the actions of the farmers which had led to a deterioration of the birds' situation.

▶ Damage to protected species in Homburg

Damage to protected species occurred in Homburg in 2009 because of pollution of soils and ballast through pesticides and heavy oils. An environmental NGO submitted a request for action to the competent authority, but no measures were undertaken. The NGO decided to take the case to court. A judgment was rendered in 2012, in which the court ruled that, although the case could have been treated under the ELD regime, the NGO was not allowed to overlook the competent authority; consequently, it did not impose the carrying out of remedial measures.

▶ Recycling railway ballast and sleepers cause soil contamination and affect protected animals

During the construction undertaken for a photovoltaic power plant, a large amount of contaminated gravel was apparently found on the construction site. In turn, the contaminated building material probably polluted soil and groundwater. A company which recycles polluted gravel and railroad sleepers is under suspicion for illegal trash disposal. (Eberlein A. & G. Roller, 2012)

▶ Construction in the tunnels of a railway line affecting natural habitats and bats

A municipal administration plans to build a cycle path on a railway line that has been out of service for several years. After the railway line was shut down, bats began to use the tunnels as a habitat, particularly in the wintertime.

Construction work in the tunnels has led to a decrease in the population of bats. Following notification of the decrease by an environmental association to the local authority, the building works were stopped. In December 2011, **the conflicting parties were trying to find a compromise.** (Eberlein A. & G. Roller, 2012)

The following case dealt with biodiversity damage and was terminated without a court decision.

▶ Construction of a solar energy park affecting protected animals and natural habitats

Damage to biodiversity was reported in the context of the construction of a solar energy park planned on a former military airbase. The construction affected protected reptiles and natural habitats. The operator agreed by contract to take the necessary remedial measures (e.g. remediation of waters, winter quarters for bats, and artificial nesting aids for birds). There was no explicit remediation under the ELD transposition legislation. Meanwhile new habitats for the affected species have been provided.

2.4.3 Cases treated under pre-existing environmental liability legislation

▶ Cases that could have been dealt with under the ELD regime

The following cases were treated under pre-existing environmental liability legislation but could have been dealt with under the ELD transposing legislation. (Eberlein A. & G. Roller, 2012)

▷ Production plant for laundry detergent affecting water and biodiversity

In March 2012, at a production plant for laundry detergent, 800 kg of fatty amines ('Genamin LA 302 D') combined with a chemical catalyst escaped through an exhaust pipe, due to the incorrect positioning of a valve. The combination of the chemicals resulted in a fire upon contact with oxygen in the air. Firefighters intervened and had the fire under control within a very short period of time. However, the escaped chemicals were drained with the firefighting water through the cooling water sewer tunnel into the River Alz. This then resulted in damage to aquatic life and protected species and habitats (100% fish mortality on a 15-km stretch), with impacts throughout the food chain, including in groundwater bodies. **The competent authority required the operator to carry out remedial measures.**

As expressed by the regional competent authority, the question of which law to apply was reportedly not viewed as an issue as remedial measures were proposed and carried out on a voluntary basis by the operator, without officially distinguishing between primary, complementary and compensatory remediation. **Although the ELD transposing legislation could potentially have been applied given that the significance threshold was met, the case was dealt with under the Federal Water Act and the Federal Nature Conservation Act (which regulates compensation for impairment of ecosystems), these special laws being considered by governmental experts as more adequate than the ELD regime to deal with the issue.**

More information on this case is available in Annex 3 in the report "Annex - Part B".

▷ Destruction of corncrakes due to mowing of a field

An employee of an environmental authority considered that highly protected corncrakes were present on a local farmer's field. Corncrakes are rare in Europe, particularly in the locality of the incident. The authority's employee informed the farmer about the existence of these rare birds on his property, and asked him not to mow the field and to contact the authority. The farmer did, however, mow the field. After the field was mowed, the authority's employee monitored the area but could not locate any corncrakes. Experts estimate that only about 150 breeding pairs still exist in this area.

▷ Removal of hedges for construction work affecting protected birds and habitats in the context of the reopening of a disused railway

Two hectares of hedges along a railway line were removed, after a tourism association planned to reopen a disused railway within a "Special Protection Area"- SPA (under the Birds Directive 2009/147/EEC). The hedges served as a habitat for red-backed shrikes, a bird species which is protected by national biodiversity law. The competent authority (the administrative court (*Verwaltungsgericht*) in Karlsruhe), determined that the damage was significant and asserted that the tourism association had unlawfully damaged biodiversity. There is a discussion between the authority and the tourism association on the validity of the permit for the railway operation (the legal context being however that the permit defence is not applied in Germany). The authority considers that the permit is no longer valid because the railway was out of service for a long time. The tourism association, meanwhile, alleges that the old permit is still valid. The association subsequently brought an action against the environmental authority.

This case could have been dealt with under the national ELD transposing legislation for two main reasons:

- Red-backed shrikes are protected by the German ELD transposing legislation; and
 - Environmental damage, as defined by the ELD, was caused by an occupational activity.
- ▶ Cases for which the significance threshold was not met

In three other biodiversity cases reported by Eberlein A. & G. Roller (2012), competent authorities assessed that **the significance threshold was not met in terms of the national transposing legislation**. One case that was provided as an example occurred during maintenance work along a street within a Natura 2000 site. Vegetation was cut without permission. The damage was classified as “insignificant”, however, because the ELD’s conservation objective was not affected and the authority expected nature to recover quickly from the damage.

2.5 Hungary

2.5.1 Overview

According to a representative of an environmental NGO, in Hungary, it is difficult to differentiate the ELD regime from pre-existing national legislation. The ELD transposing legislation is being applied to the “red sludge” case which occurred in 2010. The European Commission has been informed that remedial action plans have been drafted but it did not receive the drafts. The remedial action plans have still not been adopted.. Another case of environmental damage was identified which was treated under the pre-existing Hungarian legislation on environmental liability.

2.5.2 Cases treated under national ELD transposing legislation

- ▶ “Red sludge” case

The MAL company was established in 1995 after the privatisation of the Hungarian aluminium industry. The alumina factory had an Integrated Pollution Prevention and Control (IPPC) permit, issued in 2006. It also had a damage prevention plan but this had been designed for a much smaller-scale accident (leakage of overflow of the tailings reservoir), not a disaster that threatened local inhabitants and caused losses on the scale seen after the collapse of the dam wall.

The “red sludge” case took place in Kolontár, Veszprém County, Hungary.⁵⁷ On 4 October 2010, a dam wall located on one of the red mud ponds at a toxic waste reservoir chain of the Ajkai

⁵⁷ See Justice and Environment (2011) *The “Kolontár Red Mud Case”: Environmental Liability, 2011 Case Study*. Available at: www.justiceandenvironment.org/_files/file/2011%20ELD%20Kolontar.pdf

Timföldgyár alumina plant collapsed. The collapse resulted in around one million cubic metres of red sludge and alkaline water spilling from the reservoir, leading to a one to two meters high wave of toxic waters and sludge flooding several nearby localities (Devecser, Kolontár, Somlóvásárhely). The release of toxic sludge and water killed ten people, injured several hundred more, destroyed over 300 homes, contaminated a thousand hectares of land, including 400 hectares of agricultural land, and polluted the Torna Creek and other local waterways. The chemicals destroyed all life in the Marcal River, and reached the River Danube on 7 October, prompting countries located further down the river to develop emergency plans in response (Adam et al., 2011).

The Inspectorate ordered the operator to:

- Start collecting, channelling, neutralising and clearing the liquids flowing from the damaged reservoir;
- Prepare and submit an intervention plan by 15 October 2010;⁵⁸
- Supply information every two hours to the authority;
- Designate points of measurement and examine air pollution at those points; and
- Monitor the quality of the surface water daily and supply weekly information to the authority.

An overall environmental audit was also ordered to be carried out for the investigation and study of the environmental impacts of the accident.

2.5.3 Cases treated under pre-existing environmental liability legislation

- ▶ Air pollution resulting from recycling activities

In Hungary, a case related to odour pollution (that is, air pollution) was not treated under the ELD but under pre-existing environmental law. The reason is because **the polluted environmental element (air – odour pollution) is not within the scope of the ELD**. The environmental damage occurred in the county of Borsod-Abaúj-Zemplén. From the beginning of the 2000's, inhabitants have continuously complained about a disturbing odour, which is caused by the recycling of hazardous and non-hazardous by-products – containing crude iron – of metallurgy.

⁵⁸ This refers to one of the very first decisions taken by the environmental inspectorate in 2010. Following this decision, the inspectorate rendered a number of decisions regarding the preparation of the fact finding plan and the deadline for the submission of the final fact finding documentation. The intervention plan has still not yet been approved.

2.6 Poland

2.6.1 Overview

A large number of cases have been treated under the ELD in Poland. Since the ELD transposing legislation came into force, there have been over 500 such cases of imminent threats and damages registered by the Regional Directorate for Environmental Protection (RDOŚ), although several experts consider that the estimates should be viewed with caution; in particular, as clarified by a legal expert, because general legislation that imposes liability on a “user of the environment” for a “negative impact on the environment” has not been repealed; neither has legislation on preventing and remediating damage in Natura 2000 sites.

In 2009, 275 cases were notified to RDOŚ, 96 of which were considered as being well founded; the figures for 2010 were 364 notifications, of which 91 were viewed as justified by RDOŚ. From 2007 until 2012, a total of 520 notifications (65 imminent threats of damage, and 455 for actual environmental damage) were registered by RDOŚ as ELD cases, of which 302 are closed and 218 ongoing⁵⁹. Most of the cases concern land damage, followed by biodiversity damage. In 2012 for example, 57 out of the 70 cases considered as well founded by RDOŚ concerned land damage, against nine related to biodiversity damage and three to water damage. According to one legal expert, the ELD regime is the most effective tool for remedying biodiversity damage.

There are several reasons which explain the high number of cases treated under the ELD regime.

The first reason deals with the fact that the transposition of the ELD into the Polish legal system filled a gap in the pre-existing legal framework. Before the ELD was transposed, Poland had some environmental liability legislation in place (regarding land damage, as well as water and biodiversity), but its provisions and scope were rather general, and it was generally unclear and difficult for environmental authorities to apply. When the ELD transposing legislation came into force, it was considered as a very useful instrument by environmental authorities, filling a gap in the legal framework on the issue of environmental liability. In addition, the ELD transposing legislation repealed pre-existing national legislation concerning land contamination (however, general legislation that imposes liability on a “user of the environment” for a “negative impact on the environment” was not repealed; nor has legislation on preventing and remediating damage in Natura 2000 sites been repealed). Furthermore, every notified incident is examined as a potential ELD case, the EDA being considered *lex specialis* in relation to other more general national legislation. The authorities have therefore been extensively using the ELD regime.

The second reason is that there are no restrictions on the categories of persons who may provide a notification of an imminent threat of, or actual, environmental damage. Everyone is therefore entitled to submit a notification. Environmental NGOs have been particularly active and are at the origin of the majority of notifications.

The high number of land damage cases compared to other types of environmental damage may be explained by the way in which the definition of land damage in the ELD was transposed. In the

⁵⁹ The estimates could be updated RDOŚ because still send notifications to register in 2013 concerning 2012.

Polish legal system, the transposition of “damage to land” is very broad. In practice, it covers all damage which occurs on land or soil and which breaches soil quality standards whether or not there is an effect on human health. In this context, a car accident that results in a spill of oil onto a natural resource can potentially lead to an ELD case. However, soil quality standards could be applied to such a situation only together with the provisions of the 2007 Act transposing the ELD: that is, strict liability would apply only if the accident is related to Annex III occupational activity. A Bill is currently going through the legislative process which could reduce the scope of the ELD transposing legislation in Poland. The text could limit soil damage to cases threatening human health, which would considerably reduce the number of further ELD cases.⁶⁰

2.6.2 Cases treated under national ELD transposing legislation

Two interesting cases were reported.

► Construction of a cableway for a ski run

In 2007, it was revealed that a cableway in Stóg Izerski in the Góry Izerskie - Izerskie Mountains (Lower Silesia), which was being constructed for a ski run, had caused damage to protected species and habitats (mainly by a reduction of a population of black grouse, *Tetrao tetrix*).

An environmental NGO (*Pracownia na rzecz Wszystkich Istot*), notified the competent authority (RDOŚ in Wrocław, Lower Silesia – RDOŚ replaced the Voivode as competent authority in November 2008) about the imminent threat of, and actual, environmental damage. The imminent threat of environmental damage was first notified in the summer of 2007, but the competent authority (at the time, the Voivodeship Inspectorate for Environmental Protection in Wrocław) did not, apparently, act upon it. The imminent threat developed into actual environmental damage and, on 7 January 2008, the environmental NGO notified the damage to the competent authority (now RDOŚ).

RDOŚ issued a decision requiring the developer of the cableway (i.e. the perpetrator of the damage) to undertake remedial action. This decision was annulled by the General Director for Environmental Protection (GDOŚ, the appellate body for administrative appeals against RDOŚ's decisions) on procedural grounds. The case was then reconsidered by the competent authority (RDOŚ) which issued a new decision⁶¹ requiring the developer to carry out preventive and remedial measures.

More information on this case is available in the accompanying Annex - Part B.

► Renovation work on a bridge resulting in environmental damage to the natural habitats and species of swallows

On 15 July 2009, an environmental NGO notified the competent authority (RDOŚ) that environmental damage had occurred as a result of renovation work on a bridge in Szczecin. In connection with the renovation work, the person who had invested in the works on the bridge –

⁶⁰ We note that this broad definition of land damage is not unique to Poland and, thus, is not the only reason for the large number of ELD cases in Poland. The Hungarian transposing legislation has a similar threshold for land damage.

⁶¹ Reference number of the decision imposing the remedial action on the perpetrator: WSI.512.4.2011.AP.15

and who supervised the work – destroyed 320 swallow (*Delichon urbicum*) nests, with baby birds in them (the nests were dropped in the water). The incident resulted in a significant negative impact on the appropriate conservation status of the species and its habitat.

On 17 February 2012, the competent authority issued a decision requiring the investor and the building contractor to carry out remedial measures involving the suspension of artificial nests and the inclusion of rugged plaster on some of the surface of the bridge. The investor appealed against this decision, which was reversed, as was the second decision then issued by RDOŚ. However, the third decision (following the two previous reversals) was sustained with small changes by GDOŚ in a decision of 15 November 2012, and later confirmed by the court on 15 November 2012. Following the dismissal of his complaint, and pursuant to the provisions of the final decision, the investor was required to undertake remedial measures and to complete them by 31 March 2013. In addition, he is required to observe the number of nests for 4 years and report the results to RDOŚ.

2.6.3 Cases of environmental damage treated under pre-existing environmental liability legislation

No such cases have been reported, the apparent reason being that in case of notification of an incident, the competent authority will first consider whether the ELD regime applies (the Polish Environmental Damage Act prevails over other pieces of national legislation).

2.7 Spain

2.7.1 Overview

The General Directorate of Environmental Quality and Assessment and Nature of the Ministry of Agriculture, Food and Environment (which acts as Presidency and Secretariat of the Technical Commission on the Prevention and Remediation of Environmental Damage) considers that the effectiveness of the ELD transposing legislation should not be viewed only in terms of the number of ELD cases, as prevention of environmental damage is an important dimension of the ELD; it thus considers that the ELD regime is effective as it notably fostered the undertaking of preventive actions, through the elaboration of sectorial environmental risk assessments which led operators to become aware of certain risks and to act to prevent them.

The Environmental Liability Act (Law 26/2007 of 23 October 2007) was applied, as reported to the consultants by regional interview partners, for at least four cases since its adoption: three cases in Catalonia and one case in Galicia. However, Spain apparently reported many more cases to the Commission in the Member State which was due by 30 April 2013. In addition, there have been a few cases of environmental damage in which the Environmental Liability Act was evaluated, but they were ultimately dealt with under other sectorial legislation. Further information on these cases and additional cases could be mentioned in the official Member State report that Spain is submitting to the European Commission.

As stated by the Spanish Ministry of Agriculture, Food and Environment, one of the main explanations for the low number of cases, as is true in most Member States, is the definition of significant environmental damage. In practice all potential cases of environmental damage that have occurred do not cause significant damage, according to Annex 1 of the ELD as transposed in Law 26/2007, and as a consequence, they are dealt with under existing specific legislation and the measures in that legislation.

Another reason stated for the rare (as far as reported to the consultant) application of the ELD regime is the pre-existence of a robust environmental legislative framework including water, land and biodiversity-related legislation. This is indeed the opinion of a representative from a regional competent authority who further indicated that the competent authorities resort to these pieces of legislation and not to the national ELD transposing legislation, in particular because they have gained experience and knowledge about their use and application. On the contrary, they do not have experience with the ELD regime and therefore have no guarantee of the outcomes of its application to deal with environmental damage. Whenever pre-existing environmental legislation can be applied, the authorities prefer it to the ELD regime. The General Directorate of Environmental Quality and Assessment and Nature of the Ministry of Agriculture, Food and Environment considers that the choice between applying the ELD regime or other pre-existing legislation is not a matter of 'preference', but a result of the scope of the legislation, stating that the significance of the environmental damage is key to the choice of the regime to be applied and noting that the ELD regime did not aim at replacing other pre-existing environmental liability legislation. It was indeed pointed out that Article 6.3 of Law 26/2007 (transposing the ELD into Spanish law) provides that *"if, due to the application of other laws, prevention, avoidance or remediation has been secured at the expense of the liable party, the actions provided for in this Law will not be necessary"*; the ELD transposing legislation therefore anticipates and permits the application of other pre-existing legislation if the result is the same.

Nonetheless, the national ELD transposing legislation is acknowledged by a representative of a regional competent authority as presenting two advantages:

- It makes it possible to deal with all types of environmental damage (i.e. damage related to land, water and biodiversity) all at one time; and
- It is more effective than the pre-existing environmental legislative framework in ensuring the prevention and remediation of environmental damage.

Two other cases occurred before the transposition of the ELD into the Spanish legislative framework and were dealt with under pre-existing environmental liability legislation. However, they could have been dealt with ELD if the damage had been caused after transposition of the ELD.

2.7.2 Cases treated under the respective national ELD transposing legislation

▶ Release of fuel in a canal

In 2010, in Catalonia, around 10,000 litres of fuel from a company were released in a canal. The company notified the damage to the competent authority. A dossier was registered under the ELD regime. The company was proactive in repairing environmental damage. Finally, the ELD regime was not applied in practice to define the remediation actions and to oblige the company to fulfil its environmental responsibilities although all the necessary conditions had been taken to make its application possible (especially as the additional provision of Law 26/2007 provides that the rules to determine the scope of remediation measures must be applied regardless of the nature of the proceedings - civil, penal or administrative).

▶ Soil contamination by fuel with two involved parties

In 2010, resorting to the ELD regime allowed the *Generalitat de Catalunya* to deal with a case of environmental damage where the apportionment of liability between the two parties was difficult to determine. The case involved two companies: one company was the owner of the land on which gas station equipment was installed and was in charge of the management of the gas station; the other party was the owner of the gas station equipment. Due to a lack of maintenance of the equipment following a disagreement between both operators, land under the equipment had been contaminated by fuel. The ELD regime was applied (although pre-existing sectorial legislation could have been applied such as Law 10/1998 on waste and contaminated soil, regarding clean-up obligations). It was determined that both companies were liable and they were obliged to repair the damage.

▶ Loss of sand on a beach located nearby a port

A mayor of a municipality in Catalonia requested an action in December 2010 against a port located close to its city because of the suspicion that the activities carried out in the port had been causing the loss of sand on a beach. In this case, the ELD regime could not have been applied, but it was applied because of the city's request for action. The case was resolved in October 2012. The competent authority concluded that there was no direct link between the port's activities and the environmental damage.

2.7.3 Cases of environmental damage treated under pre-existing environmental liability legislation

▶ Rupture of a pipeline on a beach (Las Palmas in the Canary Islands)

In October 2007, a pipeline carrying fuel oil from a refinery to a water desalination plant ruptured on a beach located at Las Palmas in the Canary Islands. Fifteen tonnes of oil poured into the sea and onto the sandy beach, resulting in contamination. The competent authority immediately carried out remediation measures, cleaning up the contamination on the beach and accessible rocks during the month following the spill. Remediation of contaminants on other rocks was not carried out due to the threat of damage from the remedial works to a nearby protected plant

species. **Spain reported the above incident, but not as an ELD incident as the Coastal Law was applied.**

2.8 UK

2.8.1 Overview

The list of incidents related to environmental liability and reported by competent authorities in the UK to the Department for Environment, Food and Rural Affairs (Defra) for calendar years 2009 - 2012 is available on request from eld@defra.gsi.gov.uk. There were ten reported cases of environmental damage or imminent threat of environmental damage in 2009 and 2010 (four in 2009 and six in 2010); eight cases involving environmental damage and two cases involving an imminent threat of environmental damage. Of these cases, one involved water pollution, seven involved land damage and two involved an imminent threat of environmental damage to protected species (bats and freshwater pearl mussels). Only the water damage case involved complementary / compensatory remediation. Five of the cases were located in England, four in Wales and one in Scotland. In a case that is not included in the list of incidents (in 2009), the competent authority was unable to prove environmental damage (see section 2.8.3 below). Another case which occurred in England in 2009 did not meet the significance threshold of the ELD.

In 2011, three environmental incidents were reported: one in England (environmental damage to a site of special scientific interest (SSSI; protected under the extension of protected biodiversity), one in Northern Ireland (imminent threat to a natural habitat) and one in Wales (imminent threat to protected species). Six additional environmental incidents were reported in 2012 (three in Wales, two in England and one in Scotland), five of which concerned land damage, and one damage to a SSSI.

The total number of incidents in the UK for the years 2009 to 2012, therefore, is:

- Ten land damage incidents, plus two incidents of an imminent threat of land damage;
- One water damage incident;
- Four incidents of an imminent threat of biodiversity damage; and
- Two incidents of damage to nationally protected biodiversity.

2.8.2 Cases treated under national ELD transposing legislation

The following cases were reported by competent authorities to Defra.

- ▶ Soil contamination by volatile hydrocarbons

In 2009, an initial site investigation was undertaken at a residential property adjoining commercial premises due to evidence of vegetation die-back and strong hydrocarbon odour in the garden of the property. The results of the investigation identified significant volatile

hydrocarbon contamination in the top metre of soil in the garden. An investigation by the Health Protection Agency revealed that kerosene, which was stored in an intermediate bulk container at the commercial premises, had leaked into the soil when it had been moved. The Agency concluded that the kerosene formed a significant risk of an adverse effect on human health. In 2010, **the competent authority served a remediation notice on the commercial company, directing it to remediate the contamination.**

▶ Spill of kerosene heating oil caused by oil supplier at residential property

In 2009, a home heating oil supplier caused a spill of kerosene heating oil at a residential property when it mistakenly discharged the oil into a redundant tank instead of the new tank that replaced it. The supplier notified the damage to the competent authority which carried out an investigation and risk assessment that included monitoring within the residence for volatile organic compounds. The authority concluded land damage had resulted due to adverse effects on the health of the residents. The spill of kerosene rendered part of the residence unsuitable for occupation for two weeks until remedial works had been completed. The costs of the remediation were covered by the supplier's insurance policy.

▶ Sewage effluent into surface water (Three Pools waterway)

In July 2009, in northern England, raw sewage and storm water were discharged into a river as a result of pump failure at an unmanned pumping station operated by a water company, United Utilities. The consequence was a release of sewage effluent and storm water into surface water which impacted the biological quality of the water. The spill caused the death of over 6,000 fish in a 5-km stretch of the river. The Agency assessed the damage under the Environmental Damage Regulations. It determined that water damage under the ELD transposing legislation had occurred because the release had resulted in a lowering of the status of the river under the Water Framework Directive (there was good quality of data before and after the incident, so the baseline condition was known). **The Agency served a remediation notice on the water company**, ordering it to restock the river with fish (primary remediation) and to carry out habitat and access improvements to compensate for the loss of services from the damaged aquatic environment to anglers (compensatory remediation). The water company complied with the remediation notice. The Environment Agency also prosecuted United Utilities under the Water Resources Act 1991 (that is, under existing national legislation; not the ELD).

▶ Neat powder coating being discharged from rear of factory and onto adjacent land

This incident of land damage was reported in 2010. It was concluded that the discharge of neat powder coating from the factory presented a significant risk of an adverse effect on human health. **The English local authority (a competent authority) served a remediation notice to cover all aspects of the prevention of further damage and remediation of existing land damage.**

▶ Diesel in inspection chambers at the rear of a block of flats

In October 2009, in Wales, the local authority, which was the relevant competent authority, was made aware that there was evidence of diesel in various inspection chambers at the rear of a block of flats. The plume of diesel was identified by the local authority as having originated from refuelling at a nearby depot. The local authority commissioned work to investigate the extent of

the contamination and to determine the location of the plume. The investigation indicated that the diesel had entered a water meter chamber that contained plastic pipes, threatening contamination of the water supply. In addition, fumes from the plume could affect residents of the flats. The company operator carried out an investigation which indicated significantly elevated concentrations of hydrocarbons in a borehole. **The local authority served a remediation notice on the company in May 2010, directing it to remediate the contamination.**

- ▶ Releases of sediment impacting protected species and natural habitats

In August 2010, Scottish Natural Heritage found damage to fresh water pearl mussels, a protected species, after an enforcement check at a hydro-scheme development. Releases of sediment from the development were identified due to non-compliance with planning conditions. Three operators were involved: the commissioner of the works, the main contractor and the construction sub-contractor. They all potentially contributed to the relevant decisions/actions that gave rise to the imminent threat. Scottish Natural Heritage concluded that **there was damage but that it did not exceed the threshold for biodiversity damage; hence it was defined as an imminent threat. Scottish Natural Heritage served a prevention notice on the three operators,** directing them to reinforce and stabilise the landslip area and to improve measures to trap sediment.

2.8.3 Cases of environmental damage treated under pre-existing environmental liability legislation

- ▶ Rupture of a tank at a chemical factory located next to the English coast

In March 2009, a large tank at a chemical factory located next to the English coast ruptured spilling approximately 350,000 litres of solvents onto a site located next to a river estuary and a SSSI. The site was potentially impacted by the solvent during the first couple of hours following the event (with some possible run off into the estuary via the drainage system) but this was not confirmed. The operator locked down all systems very quickly. Any solvent which had entered the estuary had not resulted in a lowering of its status under the Water Framework Directive due to dilution by tidal flushing, and had thus **not exceeded the threshold for water damage under the ELD transposing legislation. The Environment Agency subsequently concluded that the incident was not an ELD incident.** The Agency further concluded that the risk of harm to aquatic life in the estuary and coastal waters was low. (BIO IS 2009)

More information on this case is available in the accompanying report, "Annex - Part B".

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Chapter 3: Strengths, obstacles and challenges in implementing the ELD

From the information collected from stakeholders consulted in the seven target Member States (Denmark, France, Germany, Hungary, Poland, Spain and the UK), an overview of the strengths of the ELD regime, and the obstacles and challenges in implementing the ELD, is proposed in this chapter.

3.1 Strengths of the ELD

The main strengths of the ELD regime that were reported in the context of the study on the basis of its practical application to deal with environmental damage concern the following aspects and are detailed hereafter:

- Effectiveness of the ELD and procedures established under this regime;
- Prevention of environmental damage;
- Remediation of environmental damage; and
- Involvement of stakeholders.

3.1.1 Effectiveness of the ELD and procedures established under this regime

- ▶ Filling gaps in the pre-existing environmental legislative framework

The ELD regime can fill a gap in the case of a lack of robustness of the pre-existing environmental legislative framework (e.g. in Poland). It is sometimes a robust alternative to a patchwork of pre-existing pieces of legislation addressing many issues. In other cases, however, it is another piece of legislation that has been added to that patchwork.

- ▶ Straightforward process to deal with environmental damage

As concerns the process of dealing with environmental damage, in England, one local authority (district council) considered that the legislation transposing the ELD provided “relatively quick and straightforward to use [procedures that] focused attention on [...] dealing with the incident promptly/effectively and provided clarity as to the requirements on relevant parties”.⁶² Several competent authorities shared the sentiment that for land contamination the ELD makes the process quicker compared to the complex existing national legislation.

⁶² See report of a land damage incident; available at: www.lacors.gov.uk/lacors/NewsArticleDetails.aspx?id=23427

- ▶ More effective than pre-existing national legislation in ensuring the prevention and remedying of environmental damage

As commented by a representative of a regional competent authority, the ELD regime is more effective compared to pre-existing national environmental legislation. As reported by the Spanish Ministry of Agriculture, Food and Environment, compared with the situation before the implementation of the ELD, the administrative regime for environmental liability established a more effective procedure to ensure the prevention of environmental damage, the prevention of further environmental damage, and necessary remedial measures by the operators responsible, thus making furthering the preventive and “polluter-pays” principles.

Furthermore, the ELD regime allows several types of environmental damage (i.e. damage to land, water and biodiversity) to be dealt with at the same time.

3.1.2 Prevention of environmental damage

In Spain, the ELD transposition by Law 26/2007 has fostered the undertaking of preventive actions, as a result of the elaboration of sectorial environmental risk assessments. There are several industrial sectors working on these solutions provided for in Royal Decree 2090/2008 for its application at operator level at a later stage.

3.1.3 Remediation of environmental damage

- ▶ Approach to remediation

For the Danish EPA, the most positive aspect of the ELD is the way remediation is covered under the Directive, i.e. through the restoration of the environment to its baseline condition by way of primary, complementary and compensatory remediation, as laid down in Annex II to the ELD.

- ▶ Added value in determining remedial actions

In the UK (England), some competent authorities consider that the ELD transposing legislation presents an added value when determining remedial actions. That is, the ELD includes a higher standard of remediation for water and biodiversity, which better remedies the damage. For instance, after serving a “notification of liability” on United Utilities in December 2009, the Environment Agency (England) developed and consulted on options for remediation of the damage in accordance with the strict requirements of the Environmental Damage Regulations (i.e. transposing legislation of the ELD). These remediation standards go beyond what the authority can require an operator to do under the Water Resources Act 1991 (i.e. pre-existing legislation). In particular, such standards require the operator to carry out “compensatory remediation” to compensate for the “interim loss” of resources or services pending full recovery.

In Denmark, some aspects of the ELD requirements for remediation of environmental damage are more far-reaching than the requirements under pre-existing national law. According to the ELD guidance document developed by the Danish EPA, *“this applies particularly to the requirements for remedying environmental damage to protected species and natural habitats and*

environmental damage to water as well as the requirements for the handling of environmental damage cases by the authorities."

3.1.4 Involvement of stakeholders

▶ Cooperation between stakeholders

The application of the ELD regime facilitates and encourages cooperation between different actors and stakeholders.

▶ Increasing awareness of operators

It is not a general statement, but in some Member States, the transposition of the ELD into national legislation has contributed to an increased awareness by operators of the environmental risks of their activities (e.g. in Spain with an obligation imposed on operators to carry out environmental risk assessments).

▶ Increase in insurance policies for ELD liabilities

Insurers, particularly in the London market as well as France and Spain, have developed policies specifically to cover ELD liabilities. The number of insurance carriers that offer such cover has also increased as has capacity. These environmental insurance policies, which are offered throughout the EU, cover other environmental liabilities (including bodily injury, property damage and economic loss from environmental damage) as well as ELD liabilities. In Germany, most operators subject to the ELD have insurance cover.

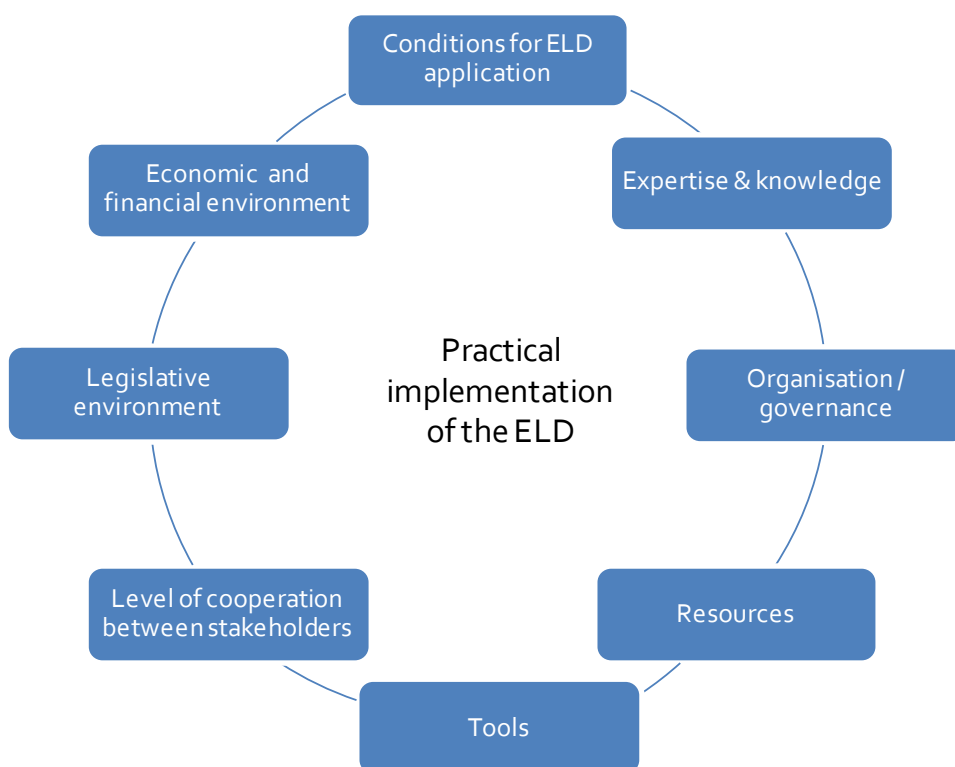
3.2 Obstacles and challenges

The main sources of obstacles and challenges for effectively implementing the ELD are presented in Figure 1 and listed below:

- Conditions for ELD application: the definitions, concepts and obligations included in the ELD itself and the respective national transposition legislation;
- Expertise and knowledge: availability of expertise, availability and accessibility of data and information to define environmental damage and assess remediation measures;
- Organisation/Governance: share of responsibilities and duties between the parties involved; the governance around the ELD application (e.g. step-by-step definition of the main activities);
- Resources: availability of human and financial resources within the organisation responsible for applying the ELD regime;
- Tools: availability of tools to support ELD implementation, from the notification of environmental damage to the closing of a case;

- Level of co-operation between stakeholders: level of co-operation between competent authorities (when there is more than one competent authority in a Member State), liable party(ies), and other stakeholders;
- Legislative environment: the existence of other liability regimes and other legislation that could be applied instead of the ELD regime; and
- Economic and financial environment: this refers to the economic context that could support (or not) implementation in practice; e.g. an economic crisis could be an obstacle to the thorough implementation of the ELD regime. This refers also to the financial environment and the possibility to resort to accurate financial instruments to cover environmental risks and damage.

Figure 1: Sources of obstacles and challenges to implementing the ELD regime



3.2.1 Conditions for ELD application

The requirements of the ELD and the conditions under which it can be applied to an imminent threat of, or actual, environmental damage are the first obstacles to the effective and extensive application of the ELD regime.

- ▶ Complexity of the national transposing legislation

Difficulties to apply in practice the ELD regime can emerge due to the complexity of the national transposition legislation. In the case of Denmark, the adopted transposing legislation is viewed by one legal expert as not being understandable. This expert considers that the complexity of the text is increased due to its interlinkages with 15 other legislative acts. In his opinion, the legislative framework dealing with environmental liability does not, in its present form, make

clear fundamental aspects for its application such as the obligations of an operator, the competent authorities in charge of applying the ELD regime, the requirements to activate the act, the conditions and processes to take the decision to apply it, the procedure to follow for its application, etc.

However, this opinion is not shared by all, in particular by the Danish EPA, although it recognised that it was very difficult to transpose the ELD into the existing regime and a guidance document was developed in 2008, which includes “*guidelines about the concept of environmental damage and about making decisions about whether environmental damage or imminent threat of such damage are present, and who is liable for the damage or threat*”. A representative of the Danish EPA further specified that the ELD was transposed through two acts: one law establishing the procedure on how to handle an ELD case (once a significant threat of, or actual, environmental damage has occurred)⁶³, and another law providing rules on how to conclude that a significant threat of, or actual, environmental damage has occurred (this second act amended 15 pre-existing pieces of legislation).⁶⁴ The Danish EPA confirmed that the competent authorities under the 15 amended acts are not the same; but if the local authority is about to decide that there is a significant environmental damage or imminent threat thereof, it has to consult the EPA; if such damage or imminent threat thereof is ascertained, the procedure is then centralised and the case handled by the EPA.

- ▶ Difficulty to demonstrate that the significance threshold of the ELD is met

To be considered as environmental damage under the ELD, the damage must be significant, i.e. it must meet a significance threshold. The ELD provides the following definitions:

- Damage to protected species and natural habitats, which is any damage that has a significant adverse effect on reaching or maintaining the favourable conservation status of such species or habitats (see section 1.3.1 above).
- Water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects to which Article 4(7) of that Directive applies.
- Land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

In general, **the significance threshold set by the ELD is often seen as a major obstacle to its application to environmental damage**. The thresholds regarding land and water damage in particular (in some but not all Member States) are considered too high by several experts. In Scotland (UK), Scottish Natural Heritage noted that the main difficulty arises when the case is

⁶³ Act No. 466 of 17 June 2008 on investigation, prevention and remedying of environmental damage, as amended (the Environmental Damage Act).

⁶⁴ Act No. 507 of 17 June 2008 amending the Environmental Protect Act and various other Acts (implementation of the ELD).

very close to the threshold but does not obviously exceed it. It is then difficult to establish that the threshold has been met. The Scottish Environment Protection Agency added that conventional non ELD legislation is generally applied to deal with pollution events as the triggering threshold is lower.

Still further, the difficulty is particularly challenging for damage to water and land where the significance of the damage can be difficult to establish. In Germany for instance, the environmental authorities stated that they struggle, in particular, with the concept of “significant adverse effects” (Eberlein A. & G. Roller, 2012). In the case of surface, coastal and interstitial water, even significant pollution can rapidly be dispersed naturally in the water, leaving very little time to the authority to assess the quality of water and to compare it to the baseline. The following illustrates this point: after the rupture of a tank at a chemical factory located next to the English coast in March 2009, any solvent which had entered the estuary was potentially diluted by the tidal flush. It is also difficult when the water is already in a poor ecological state before the damage occurred. In the case of land damage, it might be difficult to evaluate the risk to human health.

An important difference in the application of the threshold for water damage is that some Member States have interpreted the ELD to mean that the threshold applies to any waters under the Water Framework Directive whereas other Member States consider that an entire surface or groundwater body, as defined by the Water Framework Directive, must be impacted. For example, the Netherlands (although the Dutch guidelines are not legally binding but provide recommendations to competent authorities) and Poland consider that the threshold applies to the former whereas the UK considers that it applies only to the latter. According to the Environment Agency (England), where damage to a body of water is required, the fact that some cases do not meet the significance threshold is indeed, for some of them, linked to the fact that the geographical extent of the impact was limited.

Another example concerns Poland and Hungary. The national transposing legislation is more stringent than the ELD and does not require the threshold of “*creating significant risks for human health*” as regards land damage; therefore, the ELD can be applied to any damage caused to land.

As to the significance threshold for biodiversity damage, according to one German researcher, Annex I to the ELD is too complex and too difficult for authorities to understand, and not necessarily clear on how to use the assessment criteria. She therefore expressed the opinion that it would be useful if Annex I could be reviewed and made clearer, so that the significance of the damage might be more easily assessed. The Ad-Hoc Industry Natural Resource Management Group is also of the opinion that methods or approaches that would make it easier for authorities and operators to interpret significance under Annex I would be welcome (as long as they do not lower the significance threshold by assuming that any incident constitutes a significant event). A legal expert further indicated that neither the ELD nor the Habitats Directive specifies the applicable significance threshold for the favourable conservation status of a protected species because neither of them specifies the scale to be applied, that is, whether the range for the favourable conservation status of a protected species is regional, national or EU. As reminded by the European Commission, the objective is indeed that the three reference levels are always fulfilled in parallel. However the applicability of the significance threshold depends on the

availability of the required data. Available data about the natural range of all species and natural habitats protected under the Habitats Directive are sorted by biogeographical regions for the European Union Europe as a whole, and for each individual Member State.

However, despite the reported difficulty in meeting the significance threshold, many stakeholders (competent authorities, researchers, representatives from industries) consider that the significance threshold is not a problem or that it is necessary. Thus, the Danish EPA considers that the demands for remediation under the ELD are appropriate for serious damage, but not for minor damage, especially as it can be quite costly to assess the damage under the ELD regime, and pre-existing legislation may allow for the remediation of minor environmental damage at a lower cost. The Ad-Hoc Industry Natural Resource Management Group is also of the view that the significance threshold is necessary to ensure that the ELD covers only significant environmental damage, pointing out that Member States may choose to go beyond in their national legislation.

On the other hand, other stakeholders, in particular in the insurance sector (Insurance Europe, Spanish Pool of environmental risks), consider that implementation of the ELD may pose uncertainty due to the wordings of some provisions. They illustrate this point by pointing out that the existence of a significance threshold is contradictory with one of the objectives of the ELD, which is to avoid net loss of biodiversity. In this regard, it was pointed out that although minor damage (i.e. not meeting the significance threshold under the ELD) is less harmful, they are however more frequent than significant damage and, as such, may altogether lead to more significant biodiversity loss than those few significant accidents that trigger the ELD threshold.

- ▶ Difficulty resulting from the broad but non-exhaustive scope of the ELD
 - ▷ Scope of environmental damage

The ELD covers damage to land, water and biodiversity. As reported by a legal expert from Hungary, air is an environmental element that is not within the scope of the ELD, although air pollution can create significant risk for human health. It is recognised, however, that air quality is generally improved through regulatory, and not liability, regimes. Further, air pollution is often more difficult to be traced back to identifiable individual polluters (problem of diffuse pollution where a causal link cannot be established, e.g. car traffic, which is better regulated by other instruments such as economic taxes). Therefore, the ELD is not a good instrument to apply to air pollution.

- ▷ Scope of Annex III

It was reported that the broad scope of Annex III, which covers a great number of activities and operators, is sometimes a difficulty. In the case of Spain, the fact that companies operating activities included in Annex III are obliged to have financial security is seen by some stakeholders as an obstacle to the implementation of the ELD for economic and financial purposes (see below).

However, for at least one legal expert, the scope of Annex III is too narrow as most of Annex III activities are activities subject to the Industrial Emissions Directive, whereas 90% of economic activities are carried out by small to medium size companies and do not fall under Annex III.

In several cases, the ELD could, thus, not be applied because the industrial activity which led to the imminent threat of, or actual, environmental damage was not covered by Annex III to the ELD or not included in the ELD transposing legislation of the Member State. For instance, in France, as discussed above, the *Coussouls de Crau* case could not fall within the scope of the ELD because transportation of oil by a pipeline is not an Annex III activity.⁶⁵ Hence, France enacted legislation to impose strict liability on releases from oil pipelines; that legislation brings such releases within activities subject to strict liability under the ELD regime, and as such goes beyond the requirements of the Directive.

In the case of Denmark, strict liability has been established notably for pollution from land-based activities, regardless of whether it is included in Annex III. The application of strict liability in Denmark is therefore broader than under the ELD.

Finally, if some stakeholders consider the scope of Annex III to be too broad and others too narrow, the insurance sector (Insurance Europe) considers the scope of Annex III as currently drafted to be appropriate, and is therefore opposed to any extension of the activities covered by Annex III.

► Need to demonstrate the liability of an operator

A regime of strict liability applies to dangerous activities. If the activity from which the environmental damage resulted is contained in Annex III to the ELD, the operator will be held strictly liable if other conditions (definition of damage, threshold, etc.) are met. If damage is caused to protected species and habitats by a non-Annex III activity, the ELD provides that the operator shall be held liable only if “fault or negligence” can be proven. In France, in the context of the *Coussouls de Crau* case, transportation of oil by pipeline was not, at the time, subject to strict liability and the authorities considered it would have been difficult to prove any unquestionable fault or negligence.

The standard of liability for non-Annex III remedial activities differs from one Member State to another. For example, in the UK, the standard is simple negligence whereas in Spain, the standard of liability for non-Annex III remedial activities is “fraud, fault or negligence,” which equates with gross negligence under English law – a much stricter standard.

In some cases, the liability of an operator can be difficult to prove. For instance, a Polish expert noted that the conditions under which companies are liable are quite imprecise. Companies have issues identifying relevant criteria, especially scientific criteria. Scottish Natural Heritage had difficulty in identifying an operator in one case in which birds of prey had been wilfully poisoned. An operator was suspected to be liable for this environmental damage (which falls under the fault-based liability standard for biodiversity damage), but it was impossible to prove.

Two other issues may arise regarding liability of an operator:

- When the operator carries out an occupational activity with a permit for which a Member State’s transposing legislation may have adopted the ELD optional

⁶⁵ This position was later validated by Environment Commissioner Stavros Dimas in an answer to a parliamentary question. See www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2009-6130&language=EN

permit defence and therefore exempt the operator from having to bear the cost of remedial actions under the ELD; and

- When subsidiaries are liable (pursuant to the definition of 'operator' under the ELD): there could be clearer provisions about responsibility between parent companies and their subsidiaries.

► Inclusion of financial obligations for operators

In Spain, the ELD transposing legislation includes two obligations companies must fulfil:

- Obligation to carry out an assessment of environmental risks, which is not only related to the obligation to be covered by a financial security instrument, but also includes an objective of prevention, through the identification and inducement of operators to undertake risk management actions. Operators reportedly understand this prevention potential; and
- Obligation to own financial insurance to cover environmental damage.

According to the opinion expressed by a representative from a regional competent authority and a legal expert, which is not shared by the Technical Commission on the Prevention and Remediation of Environmental Damage (composed of Autonomous Communities and the central administration), these obligations have apparently created obstacles to the practical implementation of the ELD regime in Spain. It was thus reported that operators were worried about the consequences (in particular economic and administrative) of these obligations; companies are used to owning insurance for civil liability but not for environmental risks. Therefore, the debate accompanying the implementation of the ELD regime has been centralised on these two obligations, and not on the finality of the ELD regime. Firstly, financial instruments to cover environmental risks are still under development. Secondly, resorting to such financial instruments represent a cost which is difficult and sometimes impossible for companies to assume, even more in a context of economic crisis. Thirdly, these costly obligations apply to every company whose activities are included in Annex III to the ELD, whereas the potential of generating environmental damage is not borne similarly between companies, which could generate unnecessary costs for some operators.

However, and as indicated above, this opinion is not shared by the Spanish Technical Commission on the Prevention and Remediation of Environmental Damage. According to it, operators are fully aware of the necessity to avoid the occurrence of environmental damage as the ensuing liability is unlimited, notwithstanding any obligation to take out insurance coverage. It further added that financial instruments have been developed to cover ELD-related risks, and are affordable at a reasonable price. In this regard, a representative from the Spanish Pool for environmental risks indicated that although financial and security instruments may lead to some additional costs, if the tools are well applied and are proportionate to the risk potential, additional costs should be minor. The reason is that insurance coverage leads to a transfer of the risk in exchange of a premium payment: the additional cost of industrial margin and administrative expenses should represent only a limited percentage of the premium. In addition, in the light of information received from the insurance sector, it appears that environmental insurance policies currently offered in Spain are adequate to cover the risks under the ELD

regime (i.e. the requirements of mandatory financial security under Spanish law). Furthermore, the Technical Commission on the Prevention and Remediation of Environmental Damage pointed out that the obligation to have ELD insurance coverage did not apply to all companies operating activities included in Annex III (only to activities related to Seveso, IPPC/IED and mining waste ponds), and the ELD transposing legislation (article 28(b) of Law 26/2007) exempts from this obligation, under certain conditions, operators who have the potential of causing environmental damage for which remediation costs would be between €300,000 and €2,000,000 (this latter threshold applies to activities certified under ISO 14000 or EMAS). Some stakeholders therefore consider that it is not possible to ascertain that mandatory financial security constitutes an obstacle to the implementation of the ELD in Spain, as the obligation to have such financial security has not yet come into force.

The following sections discuss other differences between Member States.

3.2.2 Expertise and knowledge

► Lack of experience and knowledge on the regime of environmental liability

In respect to the overall process of the ELD implementation, administrative authorities in charge of dealing with cases of environmental damage should be the ones with real practical expertise. However, this is not always the case, as noted by a legal expert. Several public ELD practitioners stated that they are not familiar with the ELD and, from their point of view, expertise must be gained by involvement in an ELD case. As indicated above, however, the number of cases in many Member States is still too low to allow competent authorities to gain experience and expertise, particularly when there are many competent authorities in a Member State. Consequently, and according to information provided by researchers and by regional competent authorities, it seems that practitioners prefer to apply the pre-existing regime since they have more experience with it compared to the ELD regime. When applying the pre-existing regime they know, they are more confident in the outcomes of its application.

Another issue raised is that there is no widely spread expertise (e.g. on equivalency methods), and there is no network of experts (with the exception of REMEDE). In addition, when relevant documents are drafted by Member States, a stakeholder reported that they are not always sufficiently circulated and, as a result, remain unknown to local competent authorities and operational agencies.

Another relevant factor to explain the level of application of the ELD regime is whether the ELD has been transposed as stand-alone legislation (which must be enforced on its own) or whether it has been integrated into pre-existing legislation (with which competent authorities are familiar).

► Lack of data to determine environmental damage/imminent threat

The lack of data at local and regional levels to determine the status of the baseline before water or biodiversity damage occurred is a difficulty for implementing the ELD regime, as reported for instance by representatives of the Environment Agency and of the Polish Regional Directorate for Environmental Protection, even if there are several methods to easily overcome this claimed deficiency in at least some cases. These include the following:

- Natural resources of the same kind on the same site or nearby that have been damaged, e.g. further down the river or away from the damaged natural resources;
- Data from similar reference sites; and
- Modelling data.

This lack of data is exacerbated by the difficulty in collecting substantial evidence of damage, especially in relation to discharges into surface water. Moreover, as noted above, in the case of damage to surface water, pollution can be quickly washed away so it is difficult to assess the damage: natural remediation occurs, without the need for additional remedial measures. Consultation with stakeholders actually indicates that cases related to damage to surface water are the most difficult to deal with since such cases require reactivity before the pollution is diffused, resulting in data related to the damage being difficult to collect. As concerns biodiversity damage, in Germany, the consultation of authorities undertaken by Eberlein and Roller (2012) revealed that in six cases of damage to biodiversity, environmental authorities did not provide enough information to assess whether it could be an ELD case.

Furthermore, the facts that lead to environmental damage can be difficult to establish. In particular, it can be difficult to evaluate the contribution of each liable party to environmental damage when there are multiple causes and parties involved. Nonetheless, in case of multiple liable parties, most Member States have adopted joint and several liability which should alleviate significantly the proof requirements. Even in cases where there is only one party involved, evidence to prove liability can be difficult to obtain. However, the CJEU ruled, in the case *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*,⁶⁶ that a Member State may establish a rebuttable presumption that a causal link exists between the contamination that must be remediated and the activities of one or more operators. In Member States where such a rebuttable presumption has been established, it is therefore not as difficult for competent authorities to prove liability (they must have plausible evidence that a causal link exists).

► Lack of expertise within competent authorities

The authorities in charge of determining whether environmental damage has occurred do not always have the necessary expertise within their staff. They may need to be supported by external experts to assess the damage. For instance, in England, in 2009, in the context of two land damage cases, external expertise was required. Firstly, the assessment of land damage after a spill of kerosene heating oil was undertaken by the local authority's (competent authority's) Contaminated Land Officer working in consultation with specialist oil spill contractors. Secondly, the competent local authority commissioned an environmental consultant to undertake a site investigation and risk assessment at a residential property adjoining a commercial premise; there was evidence of vegetation dieback and strong hydrocarbon odour in the garden of the property. Another example took place in Wales: the liable operator engaged specialist advice and undertook a full site investigation as soon as the damage occurred. It was then able to make a full assessment of the extent of the damage and propose remedial measures.

⁶⁶ CJEU, *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*, Case No C-378/08, 9 March 2010.

As concerns the determination of preventive or remedial measures, many cases were reported in which the liable operator itself proposed remedial measures. However, competent authorities still generally ask for external expertise to determine and select the best option among proposed remedial actions.

► Level of expertise within the insurance sector

In certain Member States, such as the UK (London market), Germany and France, the insurance industry has been very active from early on and has strived to create insurance products that meet the additional liabilities faced as a result of implementation of the ELD. In Germany, according to the German Insurance Association, various actors were involved in the development of such instruments (model terms and conditions), including environmental damage experts. Non-binding insurance policy models were also developed for instance in Austria and Switzerland. The fact that the market of insurance products covering ELD risks (with the development of sustainable and well-functioning products) has been growing demonstrates that the insurance sector has also made substantial progress in developing expertise to cover ELD risks, in the light of the detailed expertise and skills required to perform risk assessment for the potential environmental damage (notably to biodiversity).

A few insurance and legal experts considered that expertise on environmental liability is lacking in the insurance sector and that this lack of expertise is an obstacle to the development of financial instruments to cover environmental liability. Other members of the insurance sector who were consulted in the course of this study pointed out that if this is the case, it appears to concern only a minority of Member States. In addition, it was pointed out that ELD insurance solutions are available across Europe and consequently, if insurance companies in some Member States are not able to cover ELD risks, other European insurance companies could do so. Solutions developed by insurance companies include for example ELD extensions to general third-party liability (GTPL) insurance solutions, stand-alone environmental impairment liability (EIL) insurance solutions and EU wide insurance solutions for multinational operators.

Another member of the insurance sector stated that companies' lack of adoption of ELD insurance coverage is not due to a lack of development of financial instruments, but is rather a problem of the ELD regime not being applied, as clients of insurance companies then do not have an incentive to take such coverage (as there are no ELD cases).

3.2.3 Organisation and governance

► Share of responsibilities between involved parties

In general, the split of responsibilities between competent authorities and other stakeholders is clear (e.g. operators, NGOs) and does not represent an obstacle to the implementation of the ELD. The consultation carried out in the framework of this study has not provided any information to support the idea that responsibilities are not clearly allocated between involved parties.

► Lack of engagement of stakeholders to seize cases of environmental damage

As concerns the notification of environmental damage, anybody witnessing potential environmental damage or an imminent threat thereof can inform the authorities but there may not be an impetus to do so. In Member States with many competent authorities, there may also be confusion by members of the public as to which authority they should notify.

Environmental NGOs in some Member States are playing a key role in alerting authorities to environmental damage (e.g. in Poland). However, because of a lack of resources in terms of staff and time, NGOs rarely follow up on notifications of environmental damage by bringing a case challenging a competent authority's decision not to pursue an operator for environmental damage, although exceptions have occurred in Germany. As reported by a legal expert, another reason for the lack of follow through by environmental NGOs may be that many of them do not have the necessary legal expertise or the necessary financial means to instruct lawyers to act for them.

Operators must notify environmental damage resulting from their operational activities. Many, if not most, operators however do not appear to be aware of the ELD or this duty. One organisation of large industrial operators considers that this statement, which is the result of several stakeholders' interviews that were carried out, should be taken with some caution as it does not reflect information available within the industrial community.

Concerning competent authorities, one legal expert expressed the view that despite the common idea that the authorities are willing to implement the ELD, they wait to be notified by a third party before taking on a case of environmental damage or imminent threat of environmental damage, unless major environmental damage occurs. This statement was advanced at least for Germany, Spain and Denmark.

Furthermore, the willingness of the authorities to act is related to the level of pollution or other damage. One expert consulted in the framework of the study claimed that competent authorities are likely to minimise the facts in order to present them as below the significance threshold of the ELD, whereas for other stakeholders, adherence to the precautionary principle may steer governmental authorities in the opposite direction.

► Lengthy process in specific cases

In the case of damage to water, application of the national ELD transposing legislation generally results in a lengthy process to determine whether environmental damage has been caused. In contrast, an equivalent procedure for a determination of land damage is generally quicker.

According to the Scottish Environment Protection Agency, the application of the ELD regime could lead to possible delays because of what needs to be assessed in order to decide whether or not to bring a case under the ELD regime. The application of pre-existing legislation may indeed be more straightforward (e.g. disposing of waste leading to the enforcement of the waste management legislation).

3.2.4 Resources

In some Member States, administrative authorities do not have enough resources to investigate all the cases that are reported to them. Two situations are reported:

- The number of notifications and requests for action is high; and
- There is a lack of resources in general in public institutions.

In the case of Scottish Natural Heritage, when a potential ELD case arises, it is given priority over other activities. Consequently, there are enough staff members available to treat it.

Furthermore, the Scottish Environment Protection Agency reported that the cost recovery provisions are an incentive to apply the ELD as there are no such provisions in conventional legislation. However, a difficulty arises if the investigation assessment does not result in the application of the ELD, as in such a case, costs, which can be considerable, may not be recovered.

3.2.5 Tools

Tools to support the implementation of the ELD regime, such as guidance documents for operators, competent authorities, NGOs, civil society and insurers, are not developed in all Member States. However, such tools are considered to be useful for increasing awareness and encouraging the application of the ELD regime. For instance, the French authorities published guidance on equivalency methods (translated into English), which was elaborated together with stakeholders (representatives of employers' association, insurance sector and civil society, etc.).

The project REMEDE aims at developing, testing and disseminating methods for practitioners for determining environmental damage and the scale of the remedial measures necessary to adequately offset environmental damage; but as some stakeholders pointed out, REMEDE focuses on Annex II to the ELD, i.e. on damage and remediation assessment, and, consequently, is aimed at assessment experts, but is not adequate for policy officers or the general public.

The European Commission has launched the development of ELD training material in 2012 which were finalised in February 2013 and is being made available within the first half of 2013 to everybody, including all ELD stakeholders via the environmental liability website of the Commission.

3.2.6 Level of co-operation of the liable party(ies)

In the process of implementing the ELD, the level of co-operation of the liable party(ies) is key, as indicated by authorities from several Member States. With co-operative party(ies), the process from the notification of the case to its resolution will be shorter and easier. Liable parties can support the environmental authorities in charge of implementing the ELD by:

- Providing data when the authorities are investigating the case;
- Making suggestions when defining preventive or remedial actions; and

- Accepting the level of costs, including costs of investigation and costs for remedial actions that have to be paid.

For instance, in the case of the water damage into the Three Pools waterway at Crossens, Southport in England, following the failure of foul water pumps, the liable operator (United Utilities) was judged to be co-operative by the Environment Agency: the operator provided data and participated in the discussion on remediation options. In Catalonia (Spain), in the case of a fuel release in a canal, the competent authority resorted to the ELD regime after the notification of the environmental damage by the liable operator (to formally open the case at the administrative level). The liable company was proactive on informing the authority, dealing with the damage and implementing remedial actions. As commented by the regional authority, the company fulfilled its responsibilities for remedying environmental damage and the ELD regime was finally not applied in practice.

In other cases of environmental damage (not treated under ELD), the co-operation of the liable operators helped ensure the carrying out of remedial actions. For instance, in the case of the rupture of a large tank at a chemical factory located next to the English coast, the operator immediately reported the incident to the competent authority and co-operated with the Environment Agency and the local authority in recovering most of the solvent. Another example is provided with the French *Coussouls de Crau* case, where the competent authority reported that the operator had fully cooperated: he agreed to carry out primary remediation measures as well as compensatory measures even though it was not strictly compulsory under national legislation.

According to one competent authority, in Germany, all stakeholders (NGOs, operators and competent authorities) are rather eager to avoid any Environmental Damage Act (i.e. ELD) case. Consequently, negotiations tend to take place at an early stage between the operator and local competent authorities.

Nonetheless, cases in which operators do not demonstrate a high level of co-operation have occurred. For example, in Poland, disputes have occurred between competent authorities and liable companies regarding the amount of money that companies must pay when ELD measures are carried out by the authorities. This has led sometimes to (long) negotiations or even judicial actions.

3.2.7 Legislative environment

- ▶ Co-existence of different ELD regimes in the same country

In some Member States, the local and regional administrative entities can be competent to develop the ELD regime on their territory. This can represent a challenge to the homogeneous development and application of the ELD regime in a same country. For instance, in the case of Spain, the Autonomous Communities are competent to further develop the basic national ELD transposing legislation, implying several ways of developing and implementing the ELD regime (although they may not develop it in a way that would contradict the national transposing legislation). In order to stimulate collaboration between administrations and limit discrepancies between ELD regimes, the Autonomous Communities are represented within the Technical Committee for preventing and restoring environmental damage (*Comisión Técnica de Prevención*

y *Reparación de Daños Medioambientales*) of the General Directorate for Environmental Quality and Evaluation of the Spanish Ministry of Environment. Within this committee, the Autonomous Communities work together to resolve conflictive issues related to the implementation of the ELD regime and to exchange information.

► Level of adequacy of the pre-existing legal framework on environmental liability

The adequacy of the pre-existing legal framework for dealing with environmental damage affects the implementation of the ELD. In Germany, for instance, competent authorities claimed that the national ELD transposing law is not useful because the pre-existing law was already adequate, with many pre-existing pieces of legislation being more stringent than the requirements under the ELD. In addition, in Germany, the ELD transposing legislation defines itself as subsidiary to better or equivalent standards included in other national laws. On the other hand, in Poland, as there was no adequate pre-existing regional and national law to treat environmental damage cases (except land damage), competent authorities use the ELD transposing legislation extensively. Moreover, in the opinion of some competent authorities in the UK, where there is much pre-existing legislation, the procedures under the ELD transposing legislation enable them to enforce the ELD legislation in respect to land damage more effectively than enforcing the more complex and lengthy procedures under pre-existing legislation for the same type of damage.

According to competent authorities in some Member States (e.g. France, Spain, Germany), the ELD regime can very well co-exist with other pre-existing national legislation. In a country like France for instance, a consulted authority is of the opinion that remedial measures taken under pre-existing national legislation (e.g. on classified installations for environmental protection, ICPE) can be as effective as those under the ELD transposing legislation; however, if the damage is significant, then the ELD regime would apply. According to other stakeholders, such an affirmation is not necessarily true for France given the jurisprudence established by civil courts in the *Erika* case, according to which the “ecological prejudice” – which may be viewed as equivalent to environmental damage under the ELD regime – may be compensated; a Bill was presented in the Senate in May 2012 to include the notion of “ecological prejudice” in the Civil Code⁶⁷.

In the end, for various stakeholders, what really matters is not what law or methods are applied but the outcome, i.e. how the environment benefits (e.g. the *Coussouls de Crau* case).

► Discrepancies between the ELD regime and pre-existing legal framework

The national transposing legislation of the ELD and the pre-existing legal framework related to environmental liability are different in some aspects in some Member States. In certain cases, these differences could represent a challenge or an obstacle for the application of the ELD regime.

In respect to the enforcement of pre-existing legislation rather than the ELD transposing legislation, it should be noted that in many if not most instances, the pre-existing legislation does

⁶⁷ This Bill is currently pending and is undergoing the normal legislative process. Further information is available at <http://www.senat.fr/dossier-legislatif/pp11-546.html>

not require a liable person to carry out complementary or compensatory measures. Thus, the application of pre-existing legislation to an incident that is within the scope of the ELD legislation may well result in a failure to properly enforce the ELD legislation.

For instance, in the case of Spain, comparing the national transposing legislation with the pre-existing legislation on polluted land (i.e. Ley 22/2011 and Real Decreto 9/2005), there is a discrepancy regarding the liable 'subject' in charge of remediation. In the national transposing legislation of the ELD, the subject in charge of remediating environmental damage is firstly the operator and secondly the administration; in the pre-existing legislation on polluted land, the responsible subject is firstly the person responsible for the damage, secondly the owner, and thirdly the person using the installations. However, according to the Spanish Technical Commission on the Prevention and Remediation of Environmental Damage, the definition of 'operator' under the ELD regime is very wide and, as such, there could be various liable operators within an installation. Consequently, in most cases the liable party under the ELD will be the same as the liable party under pre-existing legislation; but the ELD makes it easier for the administration to require a liable party to undertake the remediation of the environmental damage it has caused.

► Possible overlap of the ELD with existing legislation

There is a possible overlap of the ELD with existing specific legislation and the measures foreseen in them. This could lead to an overlap of responsibilities between competent authorities. For instance, in Ireland, a case of environmental damage was dealt with under the existing legislation on polluted land and handled by the local municipality. This specific case could have also been treated under the ELD regime by the competent authority.

In case of an overlap between the ELD and pre-existing national legislation, the issue of whether the ELD transposing legislation is seen as the primary law or subsidiary to other acts becomes relevant. In Germany, the ELD transposing legislation is considered subsidiary (article 1 of the German Environmental Damage Act) and will not be applied if a pre-existing national piece of legislation provides for the application of equivalent or more stringent standards.

► Lack of coordination between several related Directives

The whole legislative framework could be optimised through a better coordination of ELD with other related Directives such as IPPC - IED, SEVESO, Water Framework Directive, etc. This would be relevant notably in terms of pooling data (e.g. from River Basin Management Plans), which could be useful to determine the baseline condition in case of significant environmental damage.

However, one governmental authority pointed out that whether the criteria set out in, for example, the Water Framework or Habitats Directive, are used in connection with the ELD does not change the fact that the same criteria will be used by experts within the specific framework of these two directives. This authority thus highlighted that it would be more relevant to find ways of making better use of the existing criteria rather than finding new criteria that are not connected to the existing other directives.

3.2.8 Economic and financial environment

The state of the economic environment, the relationships between the business sector and public institutions, and the level of lobbying of the business sector can contribute (or not) to encouraging authorities to apply the ELD regime. The economic environment can play a key role in dealing with environmental issues as a priority. According to some stakeholders, the impacts of the current economic crisis are leading public and private actors to consider the environment as a secondary issue (e.g. in Spain, although this point of view is not shared by the Technical Commission on the Prevention and Remediation of Environmental Damage).

In the case of Spain, views may greatly vary depending on the stakeholders. Thus, according to legal experts, operators are facing difficulties to respect both obligations included in the ELD regime to carry out environmental risk analysis and take out insurance policies. Reasons are double: on the one hand, these obligations represent a certain cost for companies which some cannot afford in the context of economic crisis because of lack of liquidity and other priorities for funding and payment (e.g. salaries); on the other hand, financial instruments to cover risks of environmental damage are still under development and to date, there is not an adequate correspondence between environmental risks and existing financial instruments. This view is however opposed by stakeholders from the insurance industry, according to whom the insurance sector in Spain has developed products that fully cover the risk emerging from the ELD (environmental liability multinational programmes even being exported to other EU countries and overseas). In addition, it must also be borne in mind, as pointed out by the Spanish Technical Commission on the Prevention and Remediation of Environmental Damage, that the obligation to have mandatory financial guarantees is not enforceable yet as Spain decided to introduce it gradually and, in any case, there are specific and affordable financial instruments on the market.

However, in some Member States, such as the UK (London market), Germany and France, financial instruments have been developed from the beginning of 2007 to cover ELD risks. In Germany, a working group was set up to develop model terms and conditions (which are not binding), and was composed of environmental damage experts, insurance companies and risk engineers; explanatory documents were also drafted regarding how to deal with the model terms and conditions, and guidance was provided on 'significant adverse effect' and how to interpret it.

According to the French Federation of Insurance and the German Insurance Association (GDV), it is an advantage not to have mandatory financial instruments as it permits the insurance market to develop on a free basis, thereby allowing more flexibility. This view is also shared by Insurance Europe. The GDV representative indicated that the problem with mandatory insurance coverage is that it is always focussed on major losses, although many small and medium enterprises or small plants are interested in insuring their risk operations, which therefore requires adaptability of the insurance products to provide insurance cover for a fair price. Most operators falling under the ELD have some kind of ELD insurance coverage. Some industrial groups, such as the Ad-Hoc Industry Natural Resource Management Group and the Federation of European Risk Management Associations (FERMA), share the view that the ELD should not impose mandatory financial security, but the market for ELD insurance should be allowed to develop on its own.

'Integrated' insurance policies have been developed (e.g. in the UK and France), which allow, in the same financial instrument, to cover not only environmental liability risks, regardless of the

triggering event (thus including ELD-related risks), but also risks related to civil liability issues, first-party damage and business interruption. These insurance policies are available throughout the EU. It was reported that the financial consequences of environmental damage may indeed be more severe with regards to economic consequences for the operator than with regards to the costs of remediating the damage (e.g. with a French case in Biganos, where the accidental release of black liquor into a river led to an interruption of the plant's activity for several weeks).

3.2.9 Main challenges and obstacles for the application of the ELD

As a conclusion, the major challenges and obstacles for the application of the ELD that result from the empirical and legal analyses are in the fields of the conditions of application of the ELD, expertise and knowledge, and the legislative environment.

Conditions of application:

- Difficulty in assessing when damage to a natural resource exceeds the threshold for biodiversity damage, water damage and land damage;
- Lack of effective mechanisms to encourage comments and observations from environmental NGOs and other interested parties in many Member States.

Expertise and knowledge:

- Large number of competent authorities in some Member States, making it difficult for them to gain experience or expertise of the ELD;
- Lack of detailed knowledge – and sometimes lack of any knowledge – of the ELD by many stakeholders in all Member States (environmental NGOs, competent authorities, operators, insurance brokers, etc.);
- Lack of guidance documents in many Member States to assist in understanding the legislation that transposed the ELD (environmental NGOs, competent authorities, operators, etc.).

Legislative environment:

- Wide variation between the legislation transposing the ELD between Member States which has led to a patchwork of environmental liability regimes across the EU;
- Difficulty in determining when the ELD applies or when existing national environmental legislation applies, that is, which legislation is more stringent;
- Overlaps in preventive and remedial measures between the ELD and Annex III legislation leading competent authorities to apply existing legislation rather than the ELD;
- Determining the interface between biodiversity damage under the ELD and the Birds and Habitats Directives;
- Conflict in the ELD between requirements to prevent environmental damage “without delay” and emergency remedial actions “immediately” versus the

lack of specificity of thresholds for an imminent threat of, and actual, environmental damage.

Chapter 4: Recommendations for an effective application of the ELD

From the analysis of the practices carried out in Member States to apply the ELD regime, some best practices have been identified to share and uncertainties to solve and recommendations to develop initiatives, both aiming at supporting the practical implementation of the ELD.

4.1 Best practices to be shared and developed

Best practices were identified that contribute to increasing awareness among stakeholders and supporting the development of competent authorities' expertise and knowledge. Such practices include the development of specific tools which support the implementation of the ELD.

► Increase awareness

In several Member States, workshops and conferences have been organised to increase stakeholders' awareness. For instance, in Spain, the General Directorate of Environmental Quality and Assessment and Nature of the Ministry of Agriculture, Food and Environment is carrying out workshops and other dissemination activities, to raise and increase the awareness level of all parties involved in the implementation of the ELD regime, including NGOs, individuals, and the general public. At regional level, the Aragonese Council of Chambers of Commerce and Industry organised a training session for companies on the application of the ELD regime in September 2011.

► Support competent authorities

Actions to support competent authorities to handle the ELD have been carried out in some Member States. For instance, in Spain, at the General Directorate of Environmental Quality and Assessment and Nature of the Ministry of Agriculture, Food and Environment, a team can provide external technical support to the competent authorities for handling environmental damage cases, if such cases arise. In addition, technical courses and workshops are organised to disseminate this information, and make it available. In Germany, one case was reported to the consultants in which the ELD transposing legislation was used and the successful application of the ELD regime was favoured by the fact that one person within the competent authority had attended a seminar on how to use the ELD. In France, when environmental damage occurs, the competent authorities (*Préfet* and related agencies such as DREAL) may request the technical and legal support of the relevant division at the Ministry of Environment (it occurred notably in the case of the *Coussouls de Crau* environmental damage). The same applies in Germany.

Initiatives are being implemented to establish networks and a cooperative working environment between stakeholders. In Ireland, the national Environmental Enforcement Network gathers and mobilises the collective resources and expertise available nationally to co-ordinate a consistent and more effective approach to the enforcement of environmental legislation. It gathers participants from several institutions including the Environmental Protection Agency, local

authorities, government departments, the Northern Ireland Environment and Heritage Service, the Fisheries Boards, and the Health Service Executive. In Spain, a coordination body was created through the Technical Commission on the Prevention and Remediation of Environmental Damage. It plays an important role as an agency for technical cooperation and collaboration among the competent authorities (i.e. General State Government and the Autonomous Communities) in the implementation and application of the ELD legislative framework in Spain.

► Tools to support implementation of the ELD

Some national authorities have drafted guidelines to facilitate the implementation of the ELD into national law (e.g. Denmark, Finland, Ireland, Portugal, the Netherlands, the UK, and France as well as some guidance in Spain and the Walloon Region in Belgium) and provide background information to the competent authorities and/or operators, sometimes available on their website (e.g. the Scottish Government website, the Hungarian REMEDE website, the Dutch Infomil website). For instance, in Denmark, a guidance document was developed in 2008, which includes *“guidelines about the concept of environmental damage and about making decisions about whether environmental damage or imminent threat of such damage are present, and who is liable for the damage or threat”*. In Spain, there is a section devoted to environmental liability in the webpage of the General Directorate of Environmental Quality and Assessment and Nature of the Ministry of Agriculture, Food and Environment, with an e-mail address that can be used for any kind of consultation related to ELD. In France, the authorities are working on equivalency methods following the REMEDE project, and guidance on such equivalency methods was published in 2012 (the elaboration of this guidance included stakeholders, such as employers’ associations, the insurance sector, the general public, etc.). In order to ensure circulation of this guidance document, a training kit was prepared and a national seminar was organised in September 2012 (with 130 participants, including French authorities, industrials, insurers, legal practitioners, environmental NGOs and scientific experts).

In Spain, the General Directorate of Environmental Quality and Assessment and Nature provides guidance documents for helping operators to fulfil the obligations they have as established in Law 26/2007. An example is the MORA economic evaluation tool. The webpage of the Ministry includes all the relevant information. In 2009, in the Aragonese autonomous community, the federation of SMEs and the Aragonese government elaborated a guide for SMEs to support them in the application of the ELD.

Private initiatives also exist, which provide information on the ELD regime to stakeholders, and notably the operator community. A relevant example is the ELD Practice Exchange website set up by the Ad-hoc Industry Natural Resource Management Group.⁶⁸

► Tools to notify and register environmental damage cases

The transposing legislation of a few Member States, such as Ireland, directs the relevant authority to establish a national register of ELD incidents. In Ireland, there is an on-line submission system for the notification of cases of environmental damage. In the UK, Defra has compiled a summary of the environmental incidents that are reported by the competent

⁶⁸ See <http://www.eueldpracticeexchange.com/>

authorities.⁶⁹ In Poland, the Chief Inspector for Environmental Protection maintains the register of imminent threat to, and actual damage to the environment. The register contains extensive information on environmental damage such as, for instance, the type, description, place and date of the occurrence or detection of the imminent threat of or actual environmental damage, and the description of the undertaken preventive or remedial action and the achieved environmental effect.

► Tools to promote the taking out of ELD insurance policies

In Germany, the insurance industry developed an Internet-based system to incentivise operators to take out ELD insurance coverage (ZÜRS⁷⁰). This tool takes the form of a geographical information system with interactive maps, which include environmental data (e.g. location of protected areas) freely available from European and German authorities; it is for instance possible to find the location of a chemical plant on a map and to observe the environment at this location. This tool was successfully used by insurance companies to convince operators of the reality of existing environmental risks, in view of the environmental surroundings of their operation site(s), and therefore of the necessity to have insurance against such risks. It is also worth noting that such a risk assessment tool was also developed in Austria (eHORA⁷¹), although Austria is outside the scope of the empirical part of this study.

Insurance Europe organised workshops (in 2007, 2008 and 2009) to raise awareness about the ELD. In 2009, it published a practical guide aimed at raising ELD awareness for underwriters and claims handlers: "Navigating the Environment Liability Directive".⁷² Guiding publications were also issued at national level such as "Environmental Risks: Insured or Not?"⁷³ published by the UK International Underwriting Association in 2010, supported by the Association of British Insurers. In France, tools were also developed to raise awareness of operators, such as e.g. pedagogical leaflets explaining environmental risks.

4.2 Uncertainties to be resolved

This study has shown the wide variation between Member States in their transposition of the ELD and their implementation and enforcement of the liability system created by it. The study has also shown that transposition of the ELD has not created a level playing field or a harmonised system of liability but, rather, a patchwork of liability systems for preventing and remediating environmental damage across the EU. In this respect, it should be noted that the ELD (as legislation based on article 192 of the TFEU) was not adopted to create a level playing field (harmonisation of national legislation) for economic operators. It was adopted to establish an

⁶⁹ it is available on request from eld@defra.gsi.gov.uk

⁷⁰ See <http://www.gdv.de/tag/zuers-geo/>

⁷¹ See <http://www.hochwasserrisiko.at/>

⁷² Available at http://www.insuranceeurope.eu/uploads/Modules/Publications/1240585425_eld-best-practice-guide-update.pdf

⁷³ Available at http://www.insuranceeurope.eu/uploads/Modules/Publications/1240585425_eld-best-practice-guide-update.pdf

equal form of minimum protection for the environment which should be as high as possible. Due, however, to different interpretations of language in the ELD by Member States, the “minimum” level differs widely between Member States.

A Directive necessarily results in flexibility and, thus, differences in Member State legislation. In addition, differences in the transposition of the ELD were always going to be more pronounced due to the many optional provisions in it.

Further, the ELD is the first environmental liability system to be introduced by the EU. As such, it supplements the liability systems of Member States that have been developed and evolved over long periods of time. It was inevitable that supplementation of those regimes would be difficult particularly because no existing legislation includes the self-executing provisions of the ELD that require operators to prevent environmental damage even before a competent authority is involved.

► Widely varying liability systems

Whilst harmonisation was, therefore, never intended or, indeed, feasible, the variations in Member State legislation, in some cases, have resulted in vastly different liability systems. Further, the interpretation of some of the provisions of the ELD by Member States have resulted in the thresholds for land damage, water damage and biodiversity damage differing between Member States. Still further, operators in some Member States have a duty to remediate environmental damage and seek recovery of their costs whilst operators in other Member States can challenge their liability for incurring such costs, with the result that environmental damage may not be remediated until the appeals process is finished if then.

The sanctions for breaches of the transposing legislation are also widely varied; some Member States impose relatively low administrative fines; other Member States impose criminal sanctions including imprisonment. The incentive to comply with the ELD regime may well thus vary between the Member States.

► Clash between self-executing provisions and determination of environmental damage

Perhaps even more crucially, there needs to be a resolution of the clash between the ELD’s self-executing provisions and the determination of whether environmental damage has occurred, and thus whether the ELD has been triggered. Resolution of this issue is fundamental to the ELD’s effective implementation and enforcement. That is, an operator cannot fulfil the duty under the ELD to carry out preventive measures “without delay” (ELD, article 5(1)) and to carry out emergency remedial actions “immediately” (ELD, article 6(1)(a)) when it does not know, at that time, whether the ELD applies. As indicated in section 1.2.8 above, it may take several months to determine whether biodiversity damage or water damage has occurred.

► Difficulties in enforcement

The study has also shown difficulties encountered by competent authorities in implementing and enforcing the ELD regime. It is not a simple task to decide whether to enforce the ELD regime in lieu of existing national legislation because of the difficulties inherent in determining which regime is the most stringent.

Whilst virtually no existing national legislation imposes liability for complementary and compensatory damage, the existing legislation generally does not include the exceptions and

defences in the ELD. Further, the existing legislation, which generally imposes strict liability, generally does not require the competent authority to determine whether the person causing environmental damage is carrying out an Annex III activity; there is often no such limitation on the identity of a liable person.

► Relationship with the IPPC / IED and other Annex III regimes

There is obviously a close relationship between the implementation and enforcement of the ELD and that of the IPPC / IED regime. In this regard, it is noteworthy that France, which has applied the IPPC / IED regime to over 6,000 installations (which are part of the 500,000 classified installations for environmental protection -ICPE-) including many smaller facilities, does not have a single ELD incident. It is also noteworthy that the UK, which also applies its IPPC / IED regime to smaller facilities, has had only one incident at an IPPC installation (which was considered not to be an ELD incident).

It, therefore, seems possible if not probable that competent authorities are requiring operators of IPPC / IED installations (and operators under some other Annex III activities) to prevent and remediate environmental damage under their environmental permits pursuant to the terms and conditions of those permits rather than applying the ELD regime. The ELD regime, however, is intended to complement the IPPC / IED regime, not to be a little-used alternative to it.

► Relationship with the Birds and Habitats Directives

The implementation of the ELD regime in respect of biodiversity damage indicates various problems. These include, importantly, the determination of the threshold for biodiversity damage. In the UK (Wales), for example, the potential for the disturbance of bats which may (or may not) have been in a school building that was to be re-roofed was considered to be an imminent threat of environmental damage.⁷⁴ The report of the incident, however, did not indicate whether the disturbance could have met the significance threshold of the ELD, given that a single building was involved.

A further problem is the lack of understanding by many stakeholders of the “significance” threshold under the ELD and a tendency to misperceive it as a “severity” threshold (see section 1.3.1 above).

The purposes of the ELD and the Birds and Habitats Directives are significantly different (see section 1.3.13 above). Further, most protected species and natural habitats have not attained favourable conservation status, especially outside Natura 2000 sites. This makes it more difficult to determine the threshold at which biodiversity damage occurs, as well as its restoration.

In addition, cases may well arise in which the protected species or natural habitat is subject to a management agreement under the Habitats Directive. In such a case, the imposition of liability for preventing or remediating biodiversity damage will be particularly difficult to enforce because the restoration of the species or habitat may be publicly funded.

⁷⁴ See Department for Environment, Food and Rural Affairs, Incidents returns summary 2010; available from <http://www.defra.gov.uk/environment/quality/environmental-liability/>

In addition, the lack of existing national legislation that imposes liability for preventing and remediating biodiversity damage in many Member States, means that biodiversity will continue to be lost by many “small harms”.⁷⁵

As indicated above, a primary reason for adopting the ELD was to impose liability for biodiversity damage in order to halt the loss of biodiversity in the EU (see recital 1, noting that “the loss of biodiversity has dramatically accelerated over the last decades”). As early as 2001, the Commission referred to what would become the ELD as an instrument to “cover damage to biodiversity”, considering that this was “an important additional step forward”.⁷⁶ Resolution of the liaison between the ELD and the Birds and Habitats Directives is, therefore, crucial to ensure that the ELD fulfils its purpose.

4.3 Potential future actions

The following actions that could assist in strengthening implementation and enforcement of the ELD to prevent and remedy environmental damage. These proposed actions are not intended to replace actions already implemented by various stakeholders; they are intended to supplement them (e.g. many associations – such as FERMA – have been involved in educating risk professionals on the consequences of the ELD within their organisations; and Insurance Europe has published a guide to raise ELD awareness for underwriters and claims handlers) and to resolve uncertainties related to the legislative aspects.

- ▶ Conditions of ELD application
 - Draft technical guidance to support competent authorities in determining significant environmental damage;
 - Clarify the threshold for biodiversity damage in the ELD and study solutions to make the threshold more operational for competent authorities;
 - Clarify the threshold for water damage to ensure consistency of the implementation and enforcement of the ELD in Member States;
 - Clarify the determination of when diffuse water pollution that is linked to individual operators occurs;
 - Ensure that the implementation and enforcement of the ELD fulfils its objectives by, among other things, ensuring that implementation and enforcement of the ELD reflects the polluter pays principle, preventive principle and the precautionary principle inherent in it;
 - Provide guidance on the meaning of the “significance” threshold for biodiversity damage;

⁷⁵ Owen, Dave (2012). Critical Habitat and the Challenge of Regulating Small Harms, Florida Law Review, vol. 64, pp. 141, 189-191

⁷⁶ Communication from the Commission to the Council and the European Parliament – Biodiversity Action Plan for the Conservation of Natural Resources para. 5 (COM/2001/0162 final, 52001DCo162(02)).

- Consider ways to ensure that the ELD is more effective in halting the loss of biodiversity in the EU;
 - Resolve the conflict between the ELD's self-executing provisions and the determination of an imminent threat of, and actual, environmental damage by developing guidance.
- ▶ Expertise and knowledge
- EU and competent authorities
 - Encourage operators and other stakeholders to use and attend training materials and workshops on the ELD, respectively
 - All stakeholders:
 - Increase awareness of involved parties (operators, municipalities, environmental NGOs, insurers) by organising workshops and seminars and drafting publications;
 - Focus on similarities in ELD practices in the EU Member States, to develop unified ELD practice regimes, and provide education and training to all stakeholders;
 - In addition to training materials, organise training events for all, which allow for interaction with experts who have practical knowledge and experience of the methods for assessing environmental damage.
 - For operators:
 - Provide technical support to the operators that have obligations under the environmental liability regime;
 - Provide guidelines for operators for helping in the assessment of the significance of the environmental damage that may occur;
 - Encourage pro-activity of operators through the promotion of a risk management culture (which already exists in certain companies);
 - Increase awareness of existing and applicable products offered by the insurance sector to cover ELD risks. The taking-up of such products by operators would then enable insurers to gather risk data from a larger segment of the community and, as a result, to further develop applicable insurance products for a wider variety of risk portfolios.
 - For insurers and providers of other financial security instruments:
 - Provide guidance documents;
 - Educate persons in the insurance industry, such as some brokers, who are not fully aware of the ELD and liabilities under it and the lack of cover for such liabilities in public insurance policies.

- For competent authorities:
 - Provide technical guidance to clarify the meaning of significant environmental damage within the scope of the ELD, and make recommendations for its practical implementation;
 - Develop ELD training material to assist competent authorities in addressing existing knowledge and experience gaps;
- Promote the development of databases for the collection of data on the quality of environmental elements (i.e. land, biodiversity, water);
- ▶ Organisation and governance
 - Promote the creation of coordination bodies
 - Assist Member States in facilitating mechanisms to encourage environmental NGOs and other interested parties to comment and provide observations on the ELD
- ▶ Resources
 - Provide resources for investigation assessments where it is not possible to recover the costs, when the result of such an assessment prevents the application of the ELD regime;
 - Provide alternative funding to deal with cases when the polluter pays principle does not work.
- ▶ Tools
 - Promote the development of tools to notify environmental damage;
 - Create a comprehensive and accessible register at EU level to provide information to competent authorities, operators and other stakeholders;
 - Promote the development of tools to assess the significance of environmental damage;
 - Develop financial tools and instruments to assess environmental risks;
- ▶ Legal environment
 - Clarify the overlap between preventive and remedial measures under the ELD and Annex III regimes in order to encourage the use of the ELD when it applies;
 - Clarify the relationship between the implementation and enforcement of the ELD and the implementation of the Birds and Habitats Directives and its consequences for the application of both regimes;
 - Support competent authorities in implementing and enforcing the legislation that transposed the ELD in their Member States perhaps by the development of EU guidance on key aspects of the ELD, as discussed in this report;
 - Strengthen coordination (i.e. ensure greater coordination) of the ELD with other related Directives such as IPPC-IED, SEVESO, Water Framework

Directive, etc. This could be done through the coordination of the corresponding Experts Groups / Working Groups.

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