Study on Analysis of integrating the ELD into 11 national legal frameworks

Final Report, 16 December 2013
Ref: ENV.A.1/ETU/2013/Ares No 1258127

EN

doi: 10.2779/69062

Catalogue number: KH-01-14-020-EN-N

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Study on Analysis of integrating the ELD into 11 national legal frameworks

Final Report

16 December 2013
Contract number: 070307/2013/659019/ETU/ENV.D.4

Recommended citation


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Executive Summary

This report is a legal analysis of the transposition of the Environmental Liability Directive (ELD)\(^1\) into the law of all the Member States except Croatia and the environmental law supplemented by the ELD in each of those Member States. The report updates and revises the legal analysis in the report by BIO Intelligence Service entitled Implementation challenges and obstacles of the Environmental Liability Directive\(^2\) (BIO Report).

The Annex to this report contains summaries of the transposition of the ELD, and the environmental law supplemented by it, in 11 Member States (Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Luxembourg, Malta, Slovakia and Slovenia). Part A of the Annex to the BIO Report contains equivalent summaries for 16 Member States (Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Spain, Sweden, and the United Kingdom).\(^3\)

The summaries were reviewed for accuracy by legal experts in each of the 27 Member States. The experts also added valuable insights and information to the analysis. The names of many of the experts who generously gave their time to share their expertise and insights are gratefully acknowledged at the end of this report.

The analysis in the BIO Report, confirmed by an examination of the further 11 Member States, reveals that the transposition of the ELD into the national law of Member States has not resulted in a level playing field. Instead, it has resulted in a patchwork of liability systems for preventing andremedying environmental damage across the EU. In some cases, the minimum standards set by the ELD have been interpreted differently by the various Member States, resulting in significant variations in implementation and enforcement of the transposing legislation. Variations have also resulted from the transposition of the ELD into a wide range of environmental liability legislation. Still further, variations in transposing legislation have been particularly pronounced, not merely because the ELD is a Directive and thus flexible as 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 in the transposition of the ELD into the national law of Member States have, in some cases, had a major impact on the way in which the ELD is implemented and enforced. The reports submitted to the European Commission by Member States pursuant to article 18(1) of the ELD show that some have applied it widely (Hungary, Poland), whilst others (Austria, Cyprus, the Czech Republic, Denmark, France, Ireland, Luxembourg, Slovakia, Slovenia) had yet to have a single ELD incident, although two of these Member States (Austria, Cyprus) had considered its potential application to

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incidents. The number of ELD incidents in other Member States varies from between one and 10 (Belgium, Bulgaria, Estonia, Finland, Lithuania, Malta, the Netherlands, Portugal, Romania, Sweden) to between 10 and 20 (Italy, Latvia, Portugal, Spain, the United Kingdom), to between 50 and 60 (Greece and Germany).

The review of the transposition of the ELD into the law of the 27 Member States did not reveal any single factor that accounted for the wide variance in the number of ELD incidents between Member States. The following factors appear, however, to have influenced – in some cases, heavily influenced – the higher number of incidents in some Member States, albeit that the factors are not common in all Member States with a higher number of incidents. The factors are:

- A developed register of ELD (and, in some cases, other environmental) incidents and a notification system for them;
- Publication of data on ELD incidents by governmental authorities;
- Broad access for interested parties, including environmental NGOs, to submit comments / observations on environmental / potential ELD incidents to competent authorities;
- Interested parties reacting to the broad access by submitting comments / observations on potential ELD incidents;
- An obligation for competent authorities to carry out preventive or remedial measures if the operator fails to do so;
- Repeal of existing legislation that would have overlapped with the legislation transposing the ELD; and
- A greater knowledge of the ELD by operators.

Another factor which appears to have influenced the number of cases is the state of development of environmental law in individual Member States. It appears that competent authorities in some Member States with well developed systems are continuing to enforce existing environmental legislation in lieu of the ELD whilst competent authorities in Member States with less well-developed systems are enforcing the ELD.

In respect of the number of cases, a survey of members of the Federation of European Risk Management Associations (FERMA) as part of a study by the Harvard Business Review indicated the following:

- 22% were knowledgeable or very knowledgeable about the ELD (mostly large companies);
- 56% of the organisations had been impacted by the ELD;
- 31% considered that the ELD has been instrumental in prompting environmental risk mitigation efforts; and

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4 Italy reported a total of 5,000 potential environmental incidents notified between 2007 and 2012, of which they reported 1,000 cases, and analysed 17 cases for the purposes of the ELD report. The figure of 17 cases is used above in this study.

52% had obtained insurance or other financial security for ELD and other environmental risks.

Notably, the companies that were surveyed were large companies. Of the 89 companies that responded to the survey, 72% had 1,000 or more employees, 41% had 5,000 or more; 65% had a physical presence in more than 1 country, and 42% had a physical presence in 11 or more countries.

The level of awareness and impact is almost inevitably lower for small-to-medium-sized companies except, perhaps, in those Member States that have introduced, or are introducing, mandatory financial security. In these Member States, businesses that carry out activities under Annex III of the ELD must consider whether they need evidence of financial security for preventing and remediating environmental damage (see section 3.2.1 below).

It is, however, too early to draw any firm conclusions on the wide variation in the number of incidents between Member States.

The review found the following major similarities and differences between existing environmental liability legislation, and the transposition of the ELD, in Member States.

► Existing environmental liability legislation

All Member States had some form of existing administrative liability legislation for preventing and remedying environmental damage although its development varied greatly from embryonic legislation in some Member States to highly developed systems in others.

All the legislation is statutory in nature although there is a large variance in its form.

➢ Harmonisation or fragmentation

In some Member States, there is an Environmental Code; in others there is a framework environmental law. In yet other Member States, there is fragmented legislation, which is generally enacted pursuant to specific environmental media, that is, land and water, as well as fauna and flora.

The transposition of the ELD into Member States with a formal, or informal, Environmental Code has tended to result in the most harmonised environmental legislation, although potentially significant differences still exist between the existing and the transposed legislation.

The transposition of the ELD into Member States with a framework environmental law has, in some but not all Member States, resulted in a high degree of harmonisation.

The greatest potential for overlaps between existing legislation and the transposing legislation exists in Member States with fragmented environmental legislation.

➢ Holistic or environmental media-specific approach

The ELD is environmental media-specific in that it imposes liability for preventing and remediating damage to land, waters defined by the Water Framework Directive, that is, surface, ground, transitional, and coastal waters, as well as damage to species and habitats protected by the Birds and Habitats Directive (and nationally-protected biodiversity in some Member States).

The ELD’s transposition into the law of some Member States contrasts with legislation based on a holistic approach. In particular, the difference in remedial measures for land
and remedial measures for water contrasts with those Member States that impose liability for preventing and remediating damage to land (soil) and associated groundwater.

In some Member States that have separate existing legislation that imposes liability for land damage and water damage, there appears to be a tendency to continue to apply that legislation in lieu of the legislation transposing the ELD, particularly when the existing legislation is well developed.

- **Biodiversity damage**

  None of the Member States has legislation that imposes liability for preventing or remedying damage to protected species and natural habitats that includes complementary and compensatory remediation, as in the ELD. Further, virtually all the existing legislation imposes primary liability only when there has been an unlawful act.

  In many Member States, this legislation is weak. The difference in the “trigger” for biodiversity damage in existing legislation and the “significance threshold” in the legislation transposing the ELD have resulted in a substantial difference between the two types of legislation.

- **Compensatory damages**

  The existing legislation in some Member States imposes liability for paying monetary compensation if a competent authority determines that it is not feasible to remEDIATE environmental damage.

  These provisions contrast with the ELD, which does not provide for such compensation and which also provides that a competent authority may decide that further remedial measures need not be carried out if their cost is disproportionate to the environmental benefits to be obtained. The ELD does not state whether the potential for further remedial measures to be carried out should be kept under review.

- **Liable persons**

  The ELD imposes strict liability for preventing and remediating environmental damage only on Annex III operators; it does not impose strict liability for preventing and remediating land and water damage on non-Annex III operators.

  In contrast to the ELD, virtually all existing legislation that imposes liability for preventing and remediating land and water damage imposes strict liability on all operators regardless of the activities carried out by them.

- **Standard of liability**

  The two liability systems in the ELD of strict liability for environmental damage (biodiversity, water and land) from Annex III activities and fault-based liability for environmental damage (biodiversity) from non-Annex III activities do not exist under the environmental legislation of most Member States in respect of current and future environmental damage. Instead, the standard of liability in virtually all Member States (and non-EU States) that impose liability for remediating recent environmental damage incidents is strict liability.

- **Scope of liability**

  The ELD is without prejudice to provisions of national law concerning cost allocation in cases of multiple party causation.
Most Member States have selected joint and several liability, with a minority selecting proportionate liability. Some Member States have selected hybrid systems.

The systems that have been selected tend to reflect existing environmental liability law.

- **Permit and state-of-the-art defences**

  It is extremely rare for the permit or the state-of-the-art defences to be included in existing environmental legislation. The permit defence may be included in legislation imposing fault-based civil liability on the basis that a person who complies with a permit is not at fault or negligent.

- **Other defences and exceptions**

  Exceptions and defences in existing Member State legislation for preventing and remediating environmental damage are rare.

  Defences that do exist tend to be for *de minimis* contamination or, in some Member States that impose liability on owners or occupiers for the remediation of land that was contaminated before they acquired it, the “innocent purchaser” defence. This defence provides that a person who acquires land that is contaminated is not liable if that person did not know, and should not have known, that the land was contaminated when it acquired it.

- **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 persons carrying out specified operations.

  Such a limitation tends to apply only to regimes that are specifically created as regulatory regimes for specified installations such as the Directive on integrated pollution prevention and control (2008/1/EC) and its successor, the Industrial Emissions Directive (2010/75/EU).

- **Limitation of liability to professional activities**

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

  In contrast, there is no such limitation of liability in the existing environmental law of most Member States; liability applies to all activities regardless of their professional nature although, as a matter of practice, the type of activities that tend to cause environmental damage are professional activities.

- **Limitations period**

  It is extremely rare for a Member State’s law on the prevention and remediation of environmental damage to include a limitation period; limitations periods apply mainly to claims for bodily injury and property damage.

  The few Member States that have limitations periods in some of their environmental liability laws may limit their application to damage to private, and not public, property.

- **Procedural variations in the transposition of the ELD**

  The variations in the legislation transposing the ELD 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, in particular, the legal mechanisms for challenging orders to prevent and remedy environmental damage.

Transposition of the ELD into national law

Some Member States have Environmental Codes, which facilitated integration of the legislation transposing the ELD into them.

Other Member States have framework environmental legislation into, or pursuant to, which the ELD was transposed. The transposition differed greatly depending on an individual Member State, from detailed revisions to the framework legislation itself, to transposing it as subsidiary legislation to the framework legislation.

Some other Member States have separate legislation that imposes liability for preventing andremedying land contamination, water pollution and, less frequently, harm to flora and fauna. Again, the transposition differed greatly depending on an individual Member State, from the enactment of primary or secondary legislation, stand-alone legislation or amendments to existing legislation.

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, or only, amended existing legislation, with the number of amendments varying significantly between the Member States. Further, in some Member States, existing legislation was repealed and superseded by the legislation transposing the ELD.

Degrees of complexity of the transposing legislation

Some Member States enacted complex and lengthy legislation to transpose the ELD, some enacted legislation that is largely a “copy out” of the ELD, whilst other Member States enacted very short transposing legislation.

The lengthier legislation tends to fill more of the gaps in the ELD (for example, access to third party property to carry out preventive and remedial measures), although this is not always the case because some Member States – explicitly or implicitly – apply 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 between 10 and 20 competent authorities; still others designated several hundred competent authorities. The number of competent authorities is, in some Member States, due to the federal system of government or devolved Administrations. Another factor in the designation of competent authorities in some Member States is policy considerations.

Member States that had separate nature conservation and environmental authorities have not tended to designate both authorities as competent authorities for the remediation of a single ELD incident despite the differences between the mechanisms used to remediate environmental damage and to restore damaged natural resources after the initial remediation up had been carried out.
Number of jurisdictions in Member States

In Germany, which has a federal system, legislation to transpose the ELD has been enacted at the federal level. In Austria and Belgium, which also have federal systems, transposing legislation has been enacted at the sub-national level. In the United Kingdom, each of the devolved Administrations has enacted separate legislation.

Publication of guidance and other documentation

Some Member States have published guidance to the transposing legislation. Other Member States have included many details concerning the prevention and remediation of environmental damage, including the quantification of such damage, in the transposing legislation itself. Such information is absent in other Member States.

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 have directed the publication of data on the implementation and enforcement of the transposing legislation.

Substantive variations in the transposition of the ELD

The substantive variations in the transposition of the ELD 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.

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. 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

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, with narrower or broader regimes applying to environmental damage.

In some Member States, this has resulted in the addition of persons with secondary liability under the transposing legislation; that is, the transposing legislation specifies persons that have secondary liability under the ELD when secondary liability would not have applied under existing national law.
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.

Application of national law concepts including the standard of liability, 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 the 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.

A small minority of Member States have concluded that the so-called “defences” in the ELD are defences to liability (in which case, an operator with a valid defence is not required to remediate environmental damage). Other Member States have interpreted the “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). The difference means that, in some Member States, there is a delay in remediating environmental damage. There is also the potential that environmental damage may not be remediated at all, due to a Member State having the option to decide not to carry out remediation if the liable operator is not found or is not financially viable.

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 “water bodies”, as defined in the Water Framework Directive (2000/60/EC). Due to the large size of water bodies in some Member States, this results in the potential for the ELD rarely being applied to water damage in some Member States compared to those in which the threshold for water damage is “waters”. It is too early, however, to determine whether this difference has resulted in fewer cases in Member States that have adopted the water bodies approach.6

A further 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.

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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, amongst 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.

Another difference between Member States is the translation of the ELD itself from its original English into other EU languages. For example, the term “significant”, which is used in all three definitions of “environmental damage”, has different translations. For example, the Latvian version uses the term *būtiska* for biodiversity and water damage, but the more qualitative term *nopietna* for land damage. The Bulgarian translation uses the word *съществен*, which means substantial, for biodiversity damage, *сериозен*, which means serious or grave, for water damage, and *значим*, which means significant, for land damage. The French translation uses the word *grave*, which means grave, in all three definitions.

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. A few Member States have transposed the ELD to facilitate the enforcement of the ELD; most have not done so.

Provisions in national legislation to fill gaps in the ELD

Some Member States have filled gaps in the ELD by including specific provisions in the transposing legislation; others have not done so. The gaps include 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 databases of ELD incidents.

Some Member States have not filled these gaps, especially Member States that adopted a copy-out approach to transposing the ELD. Other Member States supplement the transposing legislation with other legislation that fills the gaps, either explicitly or implicitly. Again, this has resulted in substantial differences in the transposing legislation between the Member States.
Chapter 1: Introduction

The ELD resulted in a major change to the legislation in Member States that imposes liability for preventing and remediating environmental damage. The ELD is the first EU legislation that has its principal basis in implementation in the polluter pays principle.\(^7\) Its purpose is “to establish a framework of environmental liability based on the ‘polluter-pays’ principle, to prevent and remedy environmental damage”.\(^8\)

The fundamental principle of the ELD is that an operator whose activity has caused an imminent threat of, or actual, environmental damage, is financially liable for the damage so as to “induce operators to adopt measures and develop practices to minimise the risks of environmental damage”.\(^9\) The ELD is thus based on the preventive principle, as well as the polluter pays principle, plus the precautionary principle.\(^10\)

In particular, the ELD aims to prevent and remediate environmental damage so as to lead to a reduction in the number of future contaminated sites, and to establish liability for environmental damage to species and natural habitats protected by the Birds and Habitats Directives (“biodiversity”) in order to reduce the loss of biodiversity in the EU.

The ELD does not supersede existing environmental legislation in the Member States. Instead, its role is to set minimum standards, with a high level of protection for the environment, to harmonise environmental legislation and to fill gaps in existing legislation.

Member States are obliged to transpose the ELD to ensure that the results that the ELD seeks to achieve are, in fact, achieved; it is not sufficient for Member States simply to take all practical steps to do so.\(^11\) National legislation must not contravene nor negatively impact on the ELD.\(^12\)

This report shows that the ELD has not resulted in harmonised legislation across the EU to prevent and remediate environmental damage. Further, although the ELD has filled critical gaps, it has not filled all the gaps in existing legislation, particularly in respect of liability for preventing and remediating biodiversity damage.

The report first examines the Member State law into which the ELD was transposed. This law, which has evolved over many years, is supplemented by the ELD. Supplementation

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\(^7\) ELD, recital 2; see European Commission press release, Environmental Liability: Commission welcomes agreement on new Directive (IP/04/246, 20 February 2004).

\(^8\) ELD, art. 1.

\(^9\) ELD, recital 2.

\(^10\) Raffinerie Mediterranee SpA (ERG) v Ministero dello Sviluppo Economico, para. 75 (CJEU, Case Nos. C-379/08, 380/08, 2010) (“operators are under a duty both to prevent and remedy environmental damage. Accordingly, in particular in accordance with the precautionary principle and as is apparent from recital 2 in the preamble to the [ELD], those operators must, first, take the preventive measures necessary to ensure that environmental damage does not occur”).


\(^12\) See Productores de Música de España (Promusicae) v Telefónica de España SAU, para 70 (CJEU, Case No. C-275/06, 2008) (“when implementing the measures transposing ... directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with ... fundamental rights or with the other general principles of Community law”).
was always going to be difficult because the ELD is the first EU legislation to impose liability for preventing and remediating the same environmental damage for which Member States had long imposed liability. The existing law has, thus, greatly influenced the procedural and substantive provisions of the ELD in each Member State.

The report next examines the legislation that transposed the ELD into national Member State law. The intent of the report is not to describe all the transposing legislation in the Member States but, rather, to show differences in that legislation between individual Member States.

Finally, the report briefly compares some key aspects of the existing and transposing legislation, noting their comparative stringencies.

The report covers the existing and transposing law of all Member States except Croatia. The report updates and revises the legal analysis in the report by BIO Intelligence Service entitled Implementation challenges and obstacles of the Environmental Liability Directive¹³ (BIO Report).

The Annex to this report contains summaries of the transposition of the ELD, and the environmental law supplemented by it, in 11 Member States (Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Luxembourg, Malta, Slovakia and Slovenia). Part A of the Annex to the BIO Report contains equivalent summaries for 16 Member States (Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Spain, Sweden, and the United Kingdom).¹⁴

The summaries were reviewed for accuracy by legal experts in each of the 27 Member States. The experts also added valuable insights and information to the analysis. The names of many of the experts who generously gave their time to share their expertise and insights are gratefully acknowledged at the end of this report.

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Chapter 2: Existing national environmental liability legislation

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

This chapter discusses the administrative environmental liability legislation that the ELD supplements. The discussion provides the background to understanding the setting for the transposition of the ELD and why its transposition is so varied between individual Member States. It also shows that concepts present in the transposition of the ELD into the law of various Member States are due, in some cases, to such concepts having already been present in existing environmental legislation.

2.1 Relationship between EU and national legislation concerning Directives

In order to set this chapter in context, the following is a brief overview of the relationship between EU and national legislation concerning Directives, in particular the ELD.

Directives may take many years to be adopted – if they are adopted at all. The process was particularly lengthy in the case of the ELD. The European Commission issued a Green Paper in 1993.\(^{15}\) It was not until 2002, however, following a White Paper,\(^{16}\) a Working Paper,\(^{17}\) and many background studies,\(^{18}\) that the European Commission submitted a proposal for a Directive that became the ELD to the European Parliament.

\(^{15}\) Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on Remedyng Environmental Damage. COM(93) 47 final (14 May 1993).


and the Council. The proposal for the ELD was subject to the co-decision procedure, with the first reading of the Directive by the European Parliament. After the final version of the Directive was agreed and adopted, it was published in the Official Journal of the European Union.

A Directive differs from a Regulation in that Member States must transpose a Directive into their national law by the date stated in the Directive. If a Member State fails to do so, as occurred with the transposition of the ELD, the European Commission commences infraction proceedings which may, unless the Member State enacts legislation that fully transposes the Directive, eventually result in the Commission bringing an action against the Member State in the Court of Justice of the European Union (CJEU).

Another key difference between a Regulation and a Directive is that a Regulation enters into force directly in the national law of a Member State, as written and adopted by the EU. A Directive, however, provides broad discretion to Member States as to the form in which they adopt it and the measures by which they implement it. As Article 288 of the TFEU provides: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". As described in this report, Member States transposed the ELD in many different forms, from primary legislation to secondary legislation to a mixture of both. Some Member States "copied out" the ELD; others transposed it by detailed legislation.

A Member State’s discretion in transposing a Directive is, however, limited. The legislation transposing the Directive must be of "sufficient precision and clarity to satisfy fully the demands of legal certainty" and must "ensure the full and complete application of the directive and allow harmonised and effective implementation of the rules which it lays down". As stated further by the CJEU:

"the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty .... The principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law".

The transposition process involves the Member State enacting legislation and designating one or more competent authorities to implement and enforce the Directive. As described in this report, some Member States designated one competent authority to implement and enforce the ELD; other Member States designated several; some Member States designated several hundred.

The designation of competent authorities does not end the duty of the Member State. The Member State also has a duty to ensure that competent authorities implement and

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20 Commission v United Kingdom, para 27 (CJEU, Case No. C-6/04, 2005).

21 Commission v Belgium, para 21 (CJEU, Case No. C-415/01, 2003).
enforce the legislation.²² Further, Member States must ensure that measures taken to implement and enforce a Directive are “applied with the same effectiveness and rigour as in the application of their national law”.²³ National law cannot set aside EU legislation.²⁴

2.2 Harmonisation or fragmentation

When the ELD was transposed, all Member States had some form of existing administrative liability legislation for preventing and remedying environmental damage. In many Member States, such as Austria, Denmark, Finland, France, Germany, the Netherlands, Sweden, and the United Kingdom, the law was highly developed for land and water damage, often as a result of its evolution over a large number of years. In other Member States, such as Bulgaria, Cyprus, Greece, Portugal, Romania, it existed to a greater or lesser degree but was less well developed.

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

Environmental law in some Member States is harmonised to a lesser or greater extent depending, in some Member States, on the existence of an Environmental Code or framework environmental law. In other Member States, the legislation is fragmented in that different legislation applies to different environmental media.

2.2.1 Environmental Code

Member States with a formal Environmental Code, such as France, Italy, and Sweden, and Luxembourg with an informal Environmental Code, tend to have the most harmonised environmental legislation. The codification of environmental laws into a single Code has been considered by other Member States. Estonia adopted the General Part of its Environmental Code in February 2011 and anticipates its introduction in about 1 July 2014; the Special Part of the Code is still in preparation. Preparation of drafts of a German Environmental Code, which began in the 1970s, still appears to continue, albeit not robustly. The Czech Republic, meanwhile, has ceased its consideration of the introduction of an Environmental Code.

The transposition of the ELD into an Environmental Code does not necessarily mean that transposition of the legislation transposing the ELD into the Code is necessarily

²⁴ See Queen v Secretary of State for Transport, ex parte: Factortame Ltd, para 23 (CJEU, C-213/89, 1990) (“Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule”).
seamless. For example, the interface between the legislation transposing the ELD and existing Swedish environmental law has not resulted in a seamless liability system for remediating land damage. Existing legislation applies when the threshold of "pollution damage" is exceeded; the legislation transposing the ELD applies when the threshold for "serious environmental damage [that] has been caused as a result of soil pollution" is exceeded; the differences between the two thresholds are problematic. 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 incidents that could potentially fall within either category.

2.2.2 Framework environmental law

Some Member States, such as Denmark, Finland, Latvia, Lithuania, Malta, the Netherlands, and Slovenia, have a framework environmental law. The transposition of the ELD into a framework environmental law does not necessarily ensure its harmonisation, as evidenced by its transposition into the Lithuanian Law on Environmental Protection, that country’s framework environmental legislation (as well as transposition into the Law on State Monitoring of Environmental Protection). In amending the Law on Environmental Protection, Lithuania adapted the provisions in the ELD, resulting in substantial differences between the provisions of the ELD and the provisions of the transposing legislation. In turn, this has led to ambiguities, both as to whether certain provisions of the amended Law on Environmental Protection fully transpose the ELD due to their different terminology, the scope of the transposed legislation, and applicable thresholds. Difficulties also arose in the transposition of the ELD into Danish law.

There are also differences between the framework environmental laws of various Member States. The framework law in Malta, the Environment and Development Planning Act, includes many broad environmental and spatial planning principles. In addition, it is enabling legislation to which the ELD, like many other laws, is subsidiary legislation. The legislation transposing the ELD into Maltese law is basically a copy out of the ELD.

2.2.3 Fragmented legislation

Member States, such as Austria, the Czech Republic, and the United Kingdom, have fragmented environmental legislation. Such legislation (which includes legislation for waste, water, and contaminated land) tends to result in overlaps between existing legislation and legislation transposing the ELD.

In Austria, environmental legislation is necessarily environmental medium-specific because the Federal Government has exclusive competency for water, the nine Länder have exclusive competency for nature conservation, and competency for land is shared between the Federal Government and the Länder depending on the type of activities that are carried out.
2.3 Holistic or environmental media-specific approach

The environmental legislation in some Member States has a holistic approach; in other Member States, it is environmental media-specific.

2.3.1 Holistic approach

Some Member States, such as Bulgaria, Hungary, Lithuania, Poland, and Slovakia, have general environmental legislation that imposes liability for preventing and remediating damage to all environmental media and flora and fauna.

The 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.

The existence of environmental legislation with a holistic approach has not precluded the subsequent enactment of environmental media-specific legislation, resulting in a hybrid approach. The Environment Act in Slovakia imposes liability on a person who causes "ecological harm", defined as the "loss or weakening of the natural functions of ecosystems caused by damage of its individual elements or by infringement of their internal bonds and processes as a result of human activity". In 2011, the Slovakian Government enacted the Act on Certain Measures in Relation to Environmental Burdens. The Act, which entered into force on 1 January 2012, refers to the definition of an "environmental burden" as pollution of a site by human activity which constitutes a serious threat to human health, rock, soil or groundwater, with the exception of environmental damage under the legislation transposing the ELD. The Act does not include liability for restoring damaged flora and fauna.

2.3.2 Environmental media specific approach

The environmental media specific approach tends to result in separate legislation controlling land damage and water damage.

- Soil contamination

The existing administrative liability legislation that is most developed concerns the remediation of soil contamination (also called land contamination or contaminated land). Member States with well-developed legislation to remediate soil contamination include Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Spain, Sweden and the United Kingdom. Ireland does not have a dedicated regime to remediate land contamination but, instead, applies other environmental legislation.

In many Member States, such as Austria and Sweden, this legislation includes liability for remediating and, to a lesser extent preventing, groundwater pollution due to its obvious linkage with soil contamination. In other Member States, such as the United Kingdom, different regimes apply.
In some Member States, the scope of liability differs depending on the time at which a pollution incident occurred. In the Netherlands, the scope of liability for remediating land contaminated before 1 January 1975 is based on the relativity principle under which the person causing the contamination must have been at fault in doing so and would or should have known that causing contamination would lead the State to suffer financial harm in the form of clean-up costs. If contamination was caused after 1 January 1975 and before 1 January 1987, the polluter and the owner are required to investigate and remediate it. On or after 1 January 1987, any person who carries out activities and who “knows or might reasonably have suspected” that the activities may cause soil to become contaminated, has a duty to take all reasonable measures to prevent the contamination. If contamination occurs, that person has a duty to remediate it.

In the Flemish Region of Belgium, the Soil Clean-up Statute differentiates between “new contamination” which occurred on or after 29 October 1995, and “historic contamination” which occurred before that date. New contamination must be remediated if applicable contaminant threshold levels are exceeded. Historic contamination must be remediated only if it poses a potential risk to human health or the environment.

The Danish Contaminated Soil Act also differentiates between the time at which 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 legislation on soil contamination may have a long history. For example, courts in Finland had construed provisions in the Waste Act of 1993 to impose liability for remediating contamination. Finland subsequently enacted more specific legislation to remediate contamination. The Finnish framework environmental law, the Environmental Protection Act (86/2000), as amended, is considered to be more extensive and stringent than the legislation transposing the ELD. For example, the person who may be liable for the damage is not limited to specified operators as in the ELD. Further, there is no statute of limitations in the Environmental Protection Act.

The Netherlands Soil Protection Act entered into effect on 1 January 1987. The Act is more stringent than the ELD and is so well developed that the Dutch Government anticipates that the legislation transposing the ELD will not, as a general rule, be applied to land damage. The only amendment to the Soil Protection Act by the transposing legislation was to clarify that it covers organisms and micro-organisms.

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 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.

Sweden has a single regime for remediating land contamination and water pollution, which also includes buildings and structures. 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 United Kingdom legislation for remediating contaminated land (England, Wales and Scotland, but not Northern Ireland) entered into force in 2000. 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 is retrospective as well as prospective; there is no limitation to the costs of remedial measures. 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. Liability for remediating water pollution under United Kingdom legislation is also strict and joint and several. The threshold for water damage is particularly low. There is no limitation on the types of persons who may be liable.

 Liability for water pollution in some Member States specifically extends to marine waters. For example, Danish legislation imposes strict liability on vessels and offshore installations to remediate environmental damage caused by them.

2.4 Biodiversity damage

Legislation in Member States to prevent and remediate damage to protected species and natural habitats 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. Germany is an exception to this general rule.

The legislation to prevent and remediate biodiversity damage is focused on penalties for unlawful damage to species and natural habitats under the Birds and Habitats Directives and nationally-protected species and natural habitats. There is, thus, no significance threshold for application of the national legislation; the applicable threshold is an unlawful act. Some Member States, such as Austria and the United Kingdom, have enacted legislation that imposes a requirement to restore damaged natural habitats. Such liability, however, tends to depend on a conviction for an unlawful act in damaging a protected species or natural habitat.

2.5 Compensatory damages

Some Member States, such as Estonia, Italy, Lithuania, and Spain, impose liability for paying monetary compensation if the competent authority determines that damage to
the environment cannot be remediated. This legislation is outside the legislation transposing the ELD.\textsuperscript{25}

In Spain, the Water Act provides that 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.

In Lithuania, a person who causes environmental damage, including damage to water, flora, fauna, protected areas, forests and fish resources, has a duty to reinstate the natural resource to its state prior to the damage if it is possible to do so. If it is not possible fully to reinstate the natural resource to its condition before the damage, the person who caused the damage must pay monetary compensation for the damage that cannot be repaired. The amount of the compensation is calculated using specified methodologies. As noted above, this legislation is outside the legislation transposing the ELD.

In Estonia, the Environmental Charges Act, together with secondary legislation, imposes charges for the emission of pollutants into the ambient air, surface water bodies, groundwater and soil, the disposal of waste into landfills or the environment, and the use of natural resources, such as hunting. The charges for unlawful damage are substantially higher than those for lawful damage. The Environmental Charges Act interacts with the legislation transposing the ELD. For example, if surface or ground water subject to legislation imposing liability for monetary compensation (under existing legislation or the Environmental Charges Act), is remedied pursuant to the transposing legislation, the person who caused the damage is not liable for monetary compensation. If the person who remedied the water damage has paid the monetary compensation, the competent authority deducts that amount of compensation from costs related to the preventive and remedial measures for which that person is liable, or reimburses it to the person causing the damage if the person who caused the damage has borne all the preventive and remedial costs itself.

\section*{2.6 Liable persons}

The ELD imposes strict liability for all environmental damage on Annex III operators and fault-based liability for biodiversity damage on non-Annex III operators.

In contrast, virtually no existing public / administrative legislation imposing liability for preventing and remediating environmental damage applies only to operators of specified activities; it applies to all persons regardless of the activity carried out by them. The specification of activities to which liability applies relates to regulatory regimes (such as the Industrial Emissions Directive (2010/75/EU) and its predecessor, the Integrated Pollution Prevention and Control Directive (2008/1/EC)) or tort regimes that impose civil liability for bodily injury and property damage (such as the German Environmental Liability Act).

Some Member States have imposed secondary liability under the legislation transposing the ELD on persons other than operators, often reflecting existing environmental law. This is particularly the case in liability systems for remediating contaminated land and associated groundwater. Liability for persons other than “polluters” is secondary in some

\textsuperscript{25} Italy initially included the compensation provisions within the legislation transposing the ELD but subsequently corrected this to bring the legislation into compliance with the ELD.
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 under the Classified Installations Act. 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 the owner.

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 recovery of its costs from the person who contaminated the land. The competent authority does not require the person who caused the contamination to carry out the remedial actions because that person has no legal title to the land and, therefore, no right to access 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 United Kingdom also imposes liability on the owner or occupier of contaminated land if the person who caused or knowingly permitted the contamination cannot be found. It is irrelevant whether the owner or occupier caused the contamination or even knew that it existed; its liability is based purely on its status as the owner or occupier of the contaminated land.

2.7 Standard of liability

The two liability systems in the ELD of strict liability for environmental damage (biodiversity, water and land) from Annex III activities and fault-based liability for
environmental damage (biodiversity) from non-Annex III activities are absent from virtually all the environmental legislation of Member States in respect of current and future environmental damage.

Some Member States apply fault-based liability to the remediation of historic contamination (generally with cut-off dates between fault-based liability and the introduction of 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 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 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 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 it 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.

2.8 Scope of liability

The scope of liability in existing legislation to prevent or remedy environmental damage tends to be joint and several liability. The legislation may also provide for an equitable apportionment of liability subject to a default of joint and several liability if liability cannot be apportioned.

Denmark is one of a small minority of Member States that impose proportionate liability for remediating contaminated land. The Danish Contaminated Soil Act provides that an 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

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equal shares. Further provisions specify when a notice may be served on only one person. A person who complies with a notice has a right of contribution against other liable persons. The complexity of the system for proportioning liability, however, has resulted in it rarely if ever having been used.

The United Kingdom imposes a mixture of modified joint and several, and proportionate, liability in its contaminated land regime. Modified joint and several liability is imposed, by applying a complex system of exclusion tests to determine which persons are liable for remediating the contamination. Proportionate liability is then applied to allocate liability between persons who have not been excluded from liability.

### 2.9 Permit and state-of-the-art defences

It is extremely rare for the permit or the state-of-the-art defences to be included in existing legislation to prevent or remediate environmental damage. 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 ( Environmental Code, Part IV), and the United Kingdom ( Water Resources Act 1991 and Part 2A of the Environmental Protection Act 1990).

Indeed, the United Kingdom rejected both defences when it adopted the regime to remediate contaminated land. The Government’s spokesman in the House of Lords stated that the state-of-the-art defence would be unworkable and would create the possibility of significant legislation, and that the permit defence would encourage regulatory authorities to impose more stringent conditions.

Also in the United Kingdom, the Court of Appeals has rejected the application of the permit defence to claims in nuisance.

Some Member States include a permit defence in their Civil Code due to claims for bodily injury and property damage under the Code being based on fault or negligence. That is, an operator who complies with a permit is not at fault or negligent in respect of a civil claim.

### 2.10 Other defences and exceptions

Exceptions and defences in existing Member State legislation for preventing and remedying environmental damage are rare. For example, there are no exceptions or defences to liability under the legislation for remediating contaminated land in Belgium, Spain or the United Kingdom.

Defences that exist tend to be for de minimis contamination or, in some Member States that impose liability on owners or occupiers for the remediation of land that was contaminated before they acquired it, the “innocent purchaser” defence. That is, a

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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.

In Sweden, there is a quasi-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 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. 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.

Also in Sweden, the owner of property that was polluted before the owner acquired it is
liable for its remediation if the operator whose activities caused pollution damage is
unable to carry out or pay for the remediation. The landowner's liability is subject to it
having known 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. The
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.

The Flemish Soil Clean-up Statute also provides for an innocent purchaser defence. The
defence applies to new contamination if:

- the owner or occupier did not cause the contamination;
- at the time at which the owner or occupier acquired the land or became
  in control of it, it did not know or should not have known that the land
  was contaminated; and
- no activity that could contaminate the land has been carried out at it
  since 1993.

The innocent purchaser defence applies to historic contamination if:

- the owner or occupier did not cause the contamination; and
- at the time at which the owner or occupier acquired the land or became
  in control of it, it did not know of should not have known that the land
  was contaminated.

The issue as to whether an owner or occupier knew or should have known that land was
contaminated is decided on a case-by-case basis.

The German Federal Soil Protection Act of 3 March 1998 provides for an "innocent
purchaser" defence if the former owner believed that the site was not contaminated
when it acquired it and this belief was worthy of protection in the light of applicable facts
and circumstances. The defence does not apply to current owners.

In some Member States, the innocent purchaser defence does not absolve the purchaser
of all liability. In Sweden, a landowner who is not an operator and who did not have, or
should not have had, knowledge of the pollution, may nevertheless be obliged 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.

2.11 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 such as the Directive on integrated pollution prevention and control (2008/1/EC) and its successor, the Industrial Emissions Directive (2010/75/EU). That is, some regulatory regimes include liability provisions that require an operator of activities specified in the legislation to remediate environmental damage caused by an activity that is carried out pursuant to the environmental permit for the activity. In contrast, it is rare for “pure” liability regimes, that is, liability regimes without any regulatory provisions, to narrow liability to operators of specified activities; any person may be liable under them.

Liability regimes in most Member States including Belgium, Denmark, Hungary, Sweden and the United Kingdom, do not have such a limitation.

2.12 Limitation of liability to professional activities

It is rare for legislation that imposes liability for preventing and remediating soil and water contamination, or restoring biodiversity damage to be limited to operators of professional activities.

An exception is 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 and Finnish Land Extraction Act is, however, not limited to professional activities.

2.13 Limitations period

It is rare for a limitations period to be included in legislation that imposes liability for the remediation of environmental damage. Limitations periods tend to be associated with civil law claims by third parties for bodily injury, property damage and economic loss.

Member States that do not have a limitations period for liability for remediating environmental damage include Belgium, Hungary, Ireland, Sweden, and the United Kingdom.

Denmark and Spain are exceptions. 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.
Chapter 3: Legislation transposing the ELD

Most Member States did not transpose the ELD until after the deadline in the ELD of 30 April 2007. Italy, Latvia and Lithuania and Hungary were exceptions, with Latvia including transitional provisions to apply to damage that occurred from 29 November 2006, when the transposing legislation entered into force, until 30 April 2007.

Some Member States that transposed the ELD after 30 April 2007 applied it retrospectively to 30 April 2007; others did not.

Table 1 sets out the effective dates of the transposing legislation for each of the 27 Member States.

The transposition of the ELD has not necessarily resulted in Member States extending its application to cover other environmental liabilities. France is considering introducing “ecological damage” into its Civil Code. Slovakia enacted detailed legislation for remediating land damage after it had transposed the ELD.

In some Member States, the supplementary nature of the ELD regime (that is, its application to national legislation when environmental damage exceeds “significance thresholds”) overlaps with already complex existing administrative environmental liability systems. Italy and Poland (two Member States with the most ELD cases as indicated in their Article 18(1) reports) repealed some legislation that would have overlapped with the transposing legislation.

The transposing legislation in Poland repealed provisions of the Environmental Protection Law Act in respect of the remediation of soil and subsoil damaged after 30 April 2007. 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 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 legislation on contaminated land and water pollution continues to apply.

The issue of the overlap with prior national environmental legislation has already arisen. For example, the contamination in Sicily, which was the subject of the Court of Justice of the European Union (CJEU) ELD cases, involves pollution that occurred before and after 30 April 2007.

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. Slovenia anticipated this potential. Its transposing legislation specifies that, due to the probability of previous pollution in an area where environmental damage represents a

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29 Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico (Case No. C-378/08, 2010); Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico (Cases Nos. C-379/08 and C-380/08, 2010).
risk to human health or the environment, this potential should be examined in order to remediate past pollution at the same time as land damage.

Table 1: Effective dates of legislation transposing the ELD

<table>
<thead>
<tr>
<th>Member State</th>
<th>Effective date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>The transposing legislation was published in each Land Law Gazette on the following dates, entering into force one day after publication</td>
</tr>
<tr>
<td></td>
<td>Burgenland: 11 January 2010</td>
</tr>
<tr>
<td></td>
<td>Carinthia: 30 September 2009 and 19 February 2010</td>
</tr>
<tr>
<td></td>
<td>Lower Austria: 5 August 2009</td>
</tr>
<tr>
<td></td>
<td>Salzburg: 30 June 2010</td>
</tr>
<tr>
<td></td>
<td>Styria: 10 February 2010</td>
</tr>
<tr>
<td></td>
<td>Tyrol: 21 January 2010</td>
</tr>
<tr>
<td></td>
<td>Upper Austria: 4 September 2009</td>
</tr>
<tr>
<td></td>
<td>Vienna: 1 September 2009</td>
</tr>
<tr>
<td></td>
<td>Vorarlberg: 2 February 2010</td>
</tr>
<tr>
<td>Belgium</td>
<td>Federal State GMO Order: 20 September 2007</td>
</tr>
<tr>
<td></td>
<td>Federal Marine Order: 19 November 2007</td>
</tr>
<tr>
<td></td>
<td>Federal Transport Order: published 9 November 2007; applies retroactively to 1 November 2007</td>
</tr>
<tr>
<td></td>
<td>Walloon Region – published 29 December 2007; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td></td>
<td>Flemish Region – published 12 February 2008; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td></td>
<td>Brussels-Capital Region – published 14 November 2008; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>29 April 2008</td>
</tr>
<tr>
<td>Cyprus</td>
<td>31 December 2007</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>17 August 2008</td>
</tr>
<tr>
<td>Denmark</td>
<td>1 July 2008</td>
</tr>
<tr>
<td>Estonia</td>
<td>16 December 2007</td>
</tr>
<tr>
<td>Finland</td>
<td>1 July 2009</td>
</tr>
<tr>
<td>Country</td>
<td>Date/Details</td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>France</td>
<td>27 April 2009</td>
</tr>
<tr>
<td>Germany</td>
<td>15 October 2007; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td>Greece</td>
<td>29 September 2009; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td>Hungary</td>
<td>30 April 2007</td>
</tr>
<tr>
<td>Ireland</td>
<td>1 April 2009</td>
</tr>
<tr>
<td>Italy</td>
<td>29 April 2006</td>
</tr>
<tr>
<td>Latvia</td>
<td>29 November 2006; transitional provisions apply until 30 April 2007</td>
</tr>
<tr>
<td>Lithuania</td>
<td>12 April 2005 (main transposing legislation 26 May 2006 (few additional provisions)</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1 May 2009</td>
</tr>
<tr>
<td>Malta</td>
<td>29 April 2008; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1 June 2008</td>
</tr>
<tr>
<td>Poland</td>
<td>30 April 2007</td>
</tr>
<tr>
<td>Portugal</td>
<td>1 August 2008</td>
</tr>
<tr>
<td>Romania</td>
<td>30 April 2007; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td>Slovakia</td>
<td>1 September 2007</td>
</tr>
<tr>
<td>Slovenia</td>
<td>26 July 2008</td>
</tr>
<tr>
<td>Spain</td>
<td>23 October 2007; applies retrospectively to 30 April 2007</td>
</tr>
<tr>
<td>Sweden</td>
<td>1 August 2007</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>England: 1 March 2009</td>
</tr>
<tr>
<td></td>
<td>Wales: 6 May 2009</td>
</tr>
<tr>
<td></td>
<td>Northern Ireland: 24 July 2009</td>
</tr>
<tr>
<td></td>
<td>Scotland: 24 June 2009</td>
</tr>
<tr>
<td></td>
<td>Gibraltar: 11 December 2008</td>
</tr>
</tbody>
</table>

The ELD was transposed into the national law of Member States in varying ways. The variations are of two major types: procedural and substantive.
3.1 **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.

3.1.1 **Administrative and judicial systems**

The administrative and judicial systems in Member States vary greatly. Whilst some Member States have administrative courts, others, such as the United Kingdom, do not. The structure of the judicial system affects the way in which challenges to orders (decisions) 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 with administrative courts such as Portugal, two separate proceedings are brought.

The structure of the administrative system also affects enforcement of the ELD regime. 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 some other Member States, including 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 the United Kingdom, which does not have administrative courts, an appeal from a remediation order is made to the Secretary of State.
3.1.2 Structure of environmental legislation

There is a significant variance in the structure of environmental legislation in Member States. As indicated above, 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 authorised 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 that 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.

Other Member States have main, or in some cases framework, environmental Acts. 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. Lithuania transposed the ELD by amending its framework environmental Act.

Malta also has a framework environmental (and spatial planning) Act. The transposition of the ELD into Maltese law resulted in yet another variation in that the ELD was transposed as subsidiary legislation (in the form of regulations) to that Act in accordance with the Maltese legislative framework.

Many Member States do not have an Environmental Code or framework environmental Act, but rather a smaller – or greater – number of primary or secondary pieces of legislation. Transposition of the ELD into the national law of many of those Member States has resulted, in some but not all Member States, in other legislation supplementing its provisions to fill all the gaps in the ELD.

For example, the legislation transposing the ELD into the law of the Czech Republic, Estonia, Finland, Greece, Latvia, the Netherlands, Portugal, Slovakia, Slovenia, and Spain, is supplemented by other legislation, especially legislation concerning administrative procedures and sanctions. The United Kingdom (England and Wales), meanwhile, specifically supplements the transposing legislation with legislative provisions to provide competent authorities with broad powers to inspect and investigate potential ELD incidents. The stand-alone nature of the transposing legislation, however, limits the application of other legislation to procedures for interested parties to judicially review a competent authority’s decisions, acts or failure to act. In Luxembourg, there is a gap in that neither the legislation transposing the ELD nor any other legislation specifies any offences or sanctions for breaching the provisions of the transposing legislation.

3.1.3 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 accompanied by a Decree, Order, Ordinance and/or Regulation. This was the case in Bulgaria, Denmark, France, Finland, Hungary, Latvia, Poland, Slovenia, Sweden, and Spain (see Table 2). For example, the transposing legislation in Spain consists of an Act, a Decree and a Ministerial Order. The Act authorises 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 authorised to adopt more stringent measures in specific areas but they have not done so.

In other Member States, there is a single stand-alone Act, Decree, Ordinance or set of Regulations. This is the case in Austria (Federal State and all Länder except Carinthia, Salzburg and Vorarlberg), Cyprus, Estonia, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, and the United Kingdom. In Portugal, the ELD was transposed in a single Decree-Law that did not amend other legislation. As with many other Member States, Portugal has since enacted amendments to the initial legislation (see the summaries for the transposing legislation in Member States and amendments to it).

In some Member States, such as Austria (Carinthia, Salzburg and Vorarlberg), the Czech Republic, Estonia, Denmark, Finland, France, Germany, Hungary, Latvia, Lithuania, the Netherlands, Poland, Slovakia, and Sweden, amendments – minor in some cases, extensive in others – were made to existing legislation to incorporate the ELD regime into existing regimes. The Danish transposing legislation, for example, amended 17 Acts, whilst the Polish transposing legislation amended five Acts in addition to the introduction of stand-alone legislation. Amendments made by the transposing legislation in the Czech Republic and the Netherlands, meanwhile, were minor.

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.30

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 the law of England and Wales. 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 were available on the Department’s website when the consultation took place.

30 No. 30 920, Voorstel van wet tot wijziging van de Wet milieubeheer in verband met de implementatie van richtlijn nr. 2004/35/EG (milieuansprakelijkheid).
Table 2 indicates the nature of the legislation enacted by 27 Member States to transpose the ELD. The table, which is necessarily simplified, includes only legislation enacted to transpose the ELD. A list of the legislation that transposed the ELD into the national law of the 27 Member States, and amendments to that law, is set out in the Appendix to this report. Further details are available in the summaries for each Member State.

### Table 2: Nature of legislation transposing the ELD

<table>
<thead>
<tr>
<th>Member State</th>
<th>Nature of Transposing Legislation</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Stand-alone Acts for Burgenland, Lower Austria, Styria, Tyrol, Upper Austria and Vienna</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Amendments to Acts for Carinthia, Salzburg and Vorarlberg</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>Federal Law amending the Law on protection of the marine environment, and a related Royal Order</td>
<td>The Federal Government has competency for waste transfer, matters affecting the territorial sea and the exclusive economic zone, and placing on the market of GMOs.</td>
</tr>
<tr>
<td></td>
<td>Royal Order concerning placing on the market of GMOs</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Royal Order concerning transportation and waste transfer</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Decree for the Flemish Region adding a new Title XV to the Decree of 5 April 1995 on environmental damage</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Decree for the Walloon Region amending the Environment Code and inserting a new Part VII on environmental liability</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ordinance for the Brussels-Capital Region setting out an environmental liability regime with minor amendments to the Ordinance of 25 March 1999 on environmental offences</td>
<td></td>
</tr>
</tbody>
</table>

[^31]: The table does not, for example, reflect differences in the primary and secondary legislation that transposed the ELD between Member States. In this respect, Estonia set out the thresholds for environmental damage in its primary legislation, whilst Hungary set them out in its secondary legislation. See Justice and Environment, ELD Survey on thresholds and assessment of the notion of damage in seven EU Member States, ELD News Edition 2013/2, p. 2 (2013). Available at [www.justiceandenvironment.org](http://www.justiceandenvironment.org)

[^32]: This table uses terms such as “Law”, “Act” and “Decree-Law” to reflect the terms used in the Member States.
<table>
<thead>
<tr>
<th>Country</th>
<th>Type</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>Stand-alone Act</td>
<td>Two stand-alone Regulations</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>Stand-alone Law</td>
<td></td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Stand-alone Act with small amendments to other Acts</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>Act amending provisions of 17 Acts</td>
<td>Seven Orders</td>
</tr>
<tr>
<td>Estonia</td>
<td>Stand-alone Act with amendments to four Acts</td>
<td>The amendments supplement the Act transposing the ELD; they were not necessary to transpose it</td>
</tr>
<tr>
<td>Finland</td>
<td>Stand-alone Act with amendments to five Acts</td>
<td>Decree</td>
</tr>
<tr>
<td>France</td>
<td>Stand-alone Law inserting a new title into the Environmental Code, with amendments to the Code and other laws</td>
<td>Decree</td>
</tr>
<tr>
<td>Germany</td>
<td>Stand-alone Act with amendments to other Acts</td>
<td>Germany subsequently repealed the amended Acts (Federal Water Act and Federal Nature Conservation Act) and enacted new Acts following constitutional reform in 2006</td>
</tr>
<tr>
<td>Greece</td>
<td>Stand-alone Decree</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>Stand-alone Act with amendments to four Acts</td>
<td>Four Decrees</td>
</tr>
<tr>
<td>Ireland</td>
<td>Stand-alone Regulations</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>Stand-alone Decree</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Legal Framework</td>
<td>Details</td>
</tr>
<tr>
<td>-----------</td>
<td>------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Latvia</td>
<td>Amendments to Law setting out basic principles of national environmental law, with transitional provisions</td>
<td>Two Regulations</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Amendments to framework environmental Law and amendments to Law on state monitoring of environmental protection</td>
<td></td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Stand-alone Law</td>
<td></td>
</tr>
<tr>
<td>Malta</td>
<td>Stand-alone Regulations under the framework environmental Law</td>
<td>Malta subsequently merged the framework environmental Law, namely the Environmental Protection Act with the Development Planning Act to form a single Environment and Development Planning Act; the Regulations transposing the ELD are secondary legislation to the new Act</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Stand-alone Act adding a new Title to the framework environmental Act, and minor amendments to another Act</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>Stand-alone Act with amendments to five Acts</td>
<td>Three Ordinances</td>
</tr>
<tr>
<td>Portugal</td>
<td>Stand-alone Decree-Law</td>
<td></td>
</tr>
<tr>
<td>Romania</td>
<td>Stand-alone Government Emergency Ordinance</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td>Stand-alone Act with amendments to six other Acts</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>Stand-alone Act adding a new sub-chapter to the framework environmental Act Rules</td>
<td></td>
</tr>
</tbody>
</table>
3.1.4 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 tends to include a substantial number of provisions that “copy out” 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. Finland enacted an Act and a Decree with specific provisions on preventing and remediing environmental damage, and by amending five environmental Acts.

The transposing legislation in Austria and Belgium is also lengthy due, in large part, to the inclusion of legislation for each Land and Region, respectively, as well as the Federal State. Although they are not Federal States, the transposing legislation in Hungary, Lithuania and the United Kingdom is also lengthy. In the case of the United Kingdom, separate legislation was introduced for England, Wales, Northern Ireland, Scotland, and Gibraltar.

At the other end of the spectrum are Member States such as Cyprus, Luxembourg, Malta, 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 authorised 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. Luxembourg’s transposing legislation is ten pages long.

The Netherlands 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.
The transposing legislation in Cyprus and Malta is 22 and 23 pages long, respectively. 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 by competent authorities and operators.

3.1.5 Number of competent authorities

The number of competent authorities designated by Member States varies widely (see Table 3). In some Member States, such as Austria, Germany, Slovenia, and the United Kingdom (England, Wales, and Scotland), several hundred competent authorities have been designated.

In other Member States, such as Ireland, Malta, Portugal, and the United Kingdom (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 designated a single competent authority, the Portuguese Environment Agency. In addition, it 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 system of Germany, the Länder designate competent authorities in their jurisdictions rather than the federal Government. Although Spain is not a Federal State, the Autonomous Communities designate competent authorities in their territories. In Austria, the competent authorities for water damage, for which the Federal Government has jurisdiction, are the district administrative authorities of each Länder (and the Municipal Executive of Vienna). These authorities are also the competent authorities for land and biodiversity damage.

In Finland, the competent authorities include regional centres. In France, the Préfet 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 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

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33 The Maltese legislation is in English and Maltese (Malti), with 23 pages for each version.
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 important 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 affect 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)\(^{34}\) 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 United Kingdom where the Marine Management Organisation (England and Wales) and Marine Scotland are competent authorities, although not for all environmental damage in the marine environment. Another example is the Coastal Authority in Denmark.

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. Finland is, however, rare in having designated a competent authority specifically 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 as in Greece, where the costs of which were not recoverable under the ELD regime.

**Table 3: Competent authorities in each Member State**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Competent authority(ies) in each Member State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>All Länder except Vienna: District administrative authority for each Land</td>
</tr>
</tbody>
</table>

\(^{34}\) There are 15 ELY Centres in Finland; 13 of which have environmental expertise.
<table>
<thead>
<tr>
<th>Country</th>
<th>Relevant Authorities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vienna</td>
<td>Municipal Executive</td>
</tr>
</tbody>
</table>
| Belgium     | Federal State: Federal Service for Public Health, Food Chain Safety and Environment (GMOs and transport, with possible advisory consultation of the Biosafety and Biotechnology Service for GMOs); Federal Service for Mobility and Transportation (transport)  
Walloon Region: Directorate-General for Natural Resources and Environment  
Flemish Region: Department of Environment, Nature and Energy  
Brussels-Capital Region: Brussels Environment (IBGE) |
| Bulgaria    | Minister for the Environment and Water;  
Directors of the Regional Environmental and Water Inspectorates;  
Directors of river basin directorates; and  
Directors of national parks |
| Cyprus      | Department of Environment of the general administration of the Ministry of Agriculture, Natural Resources and the Environment  
Department of Forests of the Ministry of Agriculture, Natural Resources and Environment for the areas of the publicly owned forests |
| Czech Republic | Ministry of Environment  
Environmental Inspectorate  
Provincial hygiene stations (provide expert opinions on risks to human health when requested), with executive supervision by the Ministry of Health  
Military district authorities for incidents in their areas, with executive supervision by the Ministry of Defence  
PLUS  
Relevant water authority (surface and ground water)  
Municipal authorities  
- with extended competence for conservation (protected species and natural habitats)  
- with extended competence for forestry (forests)  
- with extended competence for agricultural land (agricultural land)  
- district authority for mining  
- regional authority (Integrated pollution prevention and control / Industrial Emissions Directive) |
<p>| Denmark     | Minister for the Environment who may delegate powers to a government |</p>
<table>
<thead>
<tr>
<th>Country</th>
<th>Relevant Authorities/Inspections/Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estonia</td>
<td>Environmental Board, Environmental Inspectorate, Health Protection Inspectorate</td>
</tr>
<tr>
<td>Estonia</td>
<td>Must be notified if human health is affected</td>
</tr>
<tr>
<td>Finland</td>
<td>Centres for Economic Development, Transport and the Environment (ELY Centres)</td>
</tr>
<tr>
<td>Finland</td>
<td>Regional State Administrative Agencies (water)</td>
</tr>
<tr>
<td>Finland</td>
<td>Board for Gene Technology (GMOs)</td>
</tr>
<tr>
<td>Finland</td>
<td>Municipalities (supervisory authorities for environmental protection and water)</td>
</tr>
<tr>
<td>France</td>
<td>Prefects of Departments plus Prefect of Police for Paris</td>
</tr>
<tr>
<td>France</td>
<td>Ministry of Defence (military areas)</td>
</tr>
<tr>
<td>France</td>
<td>State representative for maritime affairs (marine)</td>
</tr>
<tr>
<td>Germany</td>
<td>Each Land designates competent authorities competent for nature conservation, water management, and soil protection</td>
</tr>
<tr>
<td>Greece</td>
<td>Ministry of the Environment, Energy and Climate Change (natural resources managed by public authorities, of environmental damage affected more than one area)</td>
</tr>
<tr>
<td>Greece</td>
<td>Decentralised Administrations (if environmental damage affects only one area)</td>
</tr>
<tr>
<td>Hungary</td>
<td>National Inspectorates for Environment, Nature and Water (main competent authority)</td>
</tr>
<tr>
<td>Hungary</td>
<td>National Park Directorates</td>
</tr>
<tr>
<td>Hungary</td>
<td>National Directorate of Water Management</td>
</tr>
<tr>
<td>Hungary</td>
<td>Directorates of Water Management</td>
</tr>
<tr>
<td>Hungary</td>
<td>National Institute for Environment PLUS Directorates of Disaster Recovery (supervised by National Directorate of Disaster Recovery)</td>
</tr>
<tr>
<td>Hungary</td>
<td>County policy administration services of public health (supervised by National Public Health and Medical Officer Service)</td>
</tr>
<tr>
<td>Hungary</td>
<td>Food Safety Office (fisheries and forestry)</td>
</tr>
<tr>
<td>Country</td>
<td>Main Authority</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Ireland</td>
<td>Environmental Protection Agency</td>
</tr>
<tr>
<td>Italy</td>
<td>Ministry for the Environment in collaboration with regional, provincial and local authorities</td>
</tr>
<tr>
<td>Latvia</td>
<td>State Environmental Service</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Ministry of the Environment, who designated Regional Environmental Protection Departments</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Environment Administration</td>
</tr>
<tr>
<td></td>
<td>Water and Forests Administration</td>
</tr>
<tr>
<td></td>
<td>Water Management Administration</td>
</tr>
<tr>
<td></td>
<td>PLUS member of the Government with responsibility for each Administration</td>
</tr>
<tr>
<td>Malta</td>
<td>Environment and Planning Authority</td>
</tr>
<tr>
<td>Netherlands</td>
<td>National, provincial and municipal bodies and water boards</td>
</tr>
<tr>
<td>Poland</td>
<td>Regional Directors for Environmental Protection</td>
</tr>
<tr>
<td></td>
<td>Ministry for the Environment (GMOs)</td>
</tr>
<tr>
<td>Portugal</td>
<td>Environment Agency</td>
</tr>
<tr>
<td></td>
<td>General Inspectorate for Agriculture, the Sea, the Environment and Spatial Planning, and Nature and Environment Protection Service of the National Republic Guard have inspection roles</td>
</tr>
<tr>
<td>Romania</td>
<td>County Environmental Protection Agency, which may co-operate with County Committees of the Environmental National Guard, Water Basin Divisions, Scientific Councils for Protected Natural Ranges, County Offices for Pedological and Agrochemical Studies, Forestry and Hunting Territorial Inspectorates, and the National Environmental Protection Agency</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Ministry of the Environment</td>
</tr>
<tr>
<td></td>
<td>PLUS</td>
</tr>
<tr>
<td></td>
<td>District offices at the seat of the region</td>
</tr>
<tr>
<td></td>
<td>District offices</td>
</tr>
<tr>
<td></td>
<td>Environmental Inspectorate</td>
</tr>
<tr>
<td></td>
<td>Environment Agency has information duties, including establishing and maintaining information system for the prevention and remedying of environmental damage</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Ministry of Agriculture and the Environment acting through the Environment Agency</td>
</tr>
</tbody>
</table>
### 3.1.6 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 and Belgium, the splitting of competencies between the Federal Government and the Länder and Regions, respectively, has increased the complexity of the transposing legislation due to the Länder and Regions 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 United Kingdom 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 adopted joint and several liability, Scotland adopted joint and several liability as a default if liability cannot be allocated on a proportionate basis.

Transposition of the ELD in Belgium is also complex. 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.

### 3.1.7 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 United Kingdom. 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.

Most Member States 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. Slovenia includes simplified theoretical examples of remediation measures, together with matrices and other guidance, in Annexes to its secondary legislation (Rules and Decree) transposing the ELD.

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 United Kingdom (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.

### 3.1.8 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.

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Publication of such data can, of course, 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.

Hungary and Poland have particularly broad regimes for including information about the implementation and enforcement of the ELD regime in public records as well as publicising its enforcement and implementation. This publication, which surpasses that of other Member States, may well be a factor in the much larger number of ELD incidents in those Member States than other Member States.

The United Kingdom formerly included information about ELD incidents on the website for the Department for Environment, Food and Rural Affairs. The incident reports are no longer published following a re-organisation of the Government’s website; they are now available on request to the Department.

3.2 Substantive variations

There are 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;
- Adoption of less stringent provisions;
- 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; and
- Provisions in national legislation to fill gaps in the ELD.

3.2.1 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.

Sixteen Member States 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, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Spain, Sweden, and the United Kingdom.

All the above Member States except Austria and the United Kingdom extended the ELD regime to nationally protected biodiversity throughout their jurisdiction. Austria extended biodiversity damage only in Vienna. 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.

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 July 2013: Austria 14.96%; Belgium 12.75%; Bulgaria 34.34%; Cyprus 28.37%; the Czech Republic 14.03%; Denmark 8.43%; Estonia 17.82%; Finland 14.42%; France 12.56%; Germany 15.47%; Greece 27.29%; Hungary 21.44%; Ireland 13.17%; Italy 19.03%; Latvia 11.52%; Lithuania 12.07%; Luxembourg 18.08%; Malta 13.35%; the Netherlands 13.82%; Poland 19.58%; Portugal 20.89%; Romania 22.63%; Slovakia 29.58%; Slovenia 35.52%; Spain 27.27%; Sweden 13.86%; and the United Kingdom 8.55%.  

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

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... 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 (Regions only; not the Federal Government), Cyprus, the Czech Republic, Denmark, Estonia (except GMOs), Finland, Greece, Italy, Latvia (except GMOs), Lithuania, Malta, Portugal, Romania, Slovakia, Spain, and the United Kingdom (except GMOs in Wales) (see Table 4).

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 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 term “compliance with legal obligations” appears to be broader, and is certainly vaguer, than compliance with a permit and related conditions in the permit defence.

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.37 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

37 No. 30 920, Voorstel van wet tot wijziging van de Wet milieubeheer in verband met de implementatie van richtlijn nr. 2004/35/EG (milieu-aansprakelijkheid) (in Dutch).
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. 38 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 United Kingdom (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 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 (Regions but not Federal Government), Cyprus, the Czech Republic, Estonia (except GMOs), France, Greece, Italy, Latvia (except GMOs), Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Spain, and the United Kingdom (see Table 4).

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.

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38 Guidelines for Title 17.2 of the Dutch Environmental Management Act: measures in the event of environmental damage or its imminent threat (English translation of original version dated 8 January 2008); available from http://ec.europa.eu/environment/legal/liability/eld_guidance.htm and www.infomil.nl (search for Handreiking milieuschade)
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.

Table 4: Adoption of the permit and state-of-the-art defences

<table>
<thead>
<tr>
<th>Member State</th>
<th>Permit defence</th>
<th>State-of-the-art defence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Belgium</td>
<td>Yes: Regions</td>
<td>Yes: Regions</td>
</tr>
<tr>
<td></td>
<td>No: Federal Government</td>
<td>No: Federal Government</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Denmark</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Estonia</td>
<td>Yes except for GMOs</td>
<td>Yes except for GMOs</td>
</tr>
<tr>
<td>Finland</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>France</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Germany</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Greece</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Hungary</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ireland</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Italy</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Country</td>
<td>Mandatory for GMOs</td>
<td>Mandatory for Wales</td>
</tr>
<tr>
<td>----------------</td>
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<td>---------------------</td>
</tr>
<tr>
<td>Latvia</td>
<td>Yes except for GMOs</td>
<td>Yes except for GMOs</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Luxembourg</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Malta</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Netherlands</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Poland</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Portugal</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Romania</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Slovakia</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Slovenia</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Spain</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sweden</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Yes except for GMOs in Wales</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**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”.

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. Cyprus, Denmark, Lithuania, and Slovenia considered whether to impose mandatory financial security but decided not to do so at that 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. Table 5 sets out the current status of the introduction of mandatory financial security for ELD liabilities.

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. Romania is still in the early stages of considering how to calculate the amount of financial security and the development of instruments to cover it.

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 EUR 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 EUR 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 EUR 300,000 and EUR 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 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, 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.

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 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 EUR 33,193.91 for the breach of transposing legislation concerning financial security, with a fine of up to EUR 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 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 was then postponed, albeit not officially. A draft of a Joint Ministerial Decision is being prepared and, following further pertinent regulatory input, is expected to be finalised and submitted to competent Ministers for signing in 2014. When the Joint Ministerial Decision is finalised, a proposal will be made for a transition period of two to three months before the Decision enters into effect.

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 (EUR 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.

The transposing legislation in Cyprus provides that the Ministerial Council may issue regulations concerning any issues not regulated by the provisions of the 2007 Law that encourage the development of financial security instruments and markets. The Ministerial Council has not issued any such regulations.

In 2008 and 2009, Cyprus consulted with financial security providers but decided not to introduce mandatory financial security at that time due, among other things, to difficulties in creating a market for environmental insurance to cover ELD liabilities in Cyprus due to the small size of the country, the small- to medium- size of most companies, the lack of interest in purchasing environmental insurance, the consequent high premiums, and the economic crisis.

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.
Table 5: Introduction of mandatory financial security

<table>
<thead>
<tr>
<th>Member State</th>
<th>Introduction of mandatory financial security</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>Entered into effect on 1 January 2011</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Considered the introduction of mandatory financial security in 2008 and 2009; decided not to introduce it at that time</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Entered into effect on 1 January 2013</td>
</tr>
<tr>
<td>Denmark</td>
<td>Considered whether to introduce mandatory financial security in 2006 but decided to wait until there was more experience in implementing the legislation transposing the ELD before making a decision</td>
</tr>
<tr>
<td>Greece</td>
<td>Enacted legislation to introduce mandatory financial security on 1 May 2010; expected to be brought into effect in early 2014</td>
</tr>
<tr>
<td>Hungary</td>
<td>Legislation to introduce mandatory financial security has not been finalised</td>
</tr>
<tr>
<td>Italy</td>
<td>The legislation transposing the ELD provides for mandatory financial security; no secondary legislation to bring the provisions into force has been issued</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Considered whether to introduce mandatory financial security; has not progressed this</td>
</tr>
<tr>
<td>Portugal</td>
<td>Entered into effect on 1 January 2010, but details are still being prepared</td>
</tr>
<tr>
<td>Romania</td>
<td>Considering the introduction of mandatory financial security</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Entered into effect on 1 July 2012</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Carried out two studies on the introduction of mandatory financial security in 2010 and 2012; decided not to introduce it at that time</td>
</tr>
<tr>
<td>Spain</td>
<td>Will introduce mandatory financial security in the near future; will then gradually phase it in</td>
</tr>
</tbody>
</table>

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

39 The status of mandatory financial security is stated as of 2 December 2013.
agricultural purposes” from the definition of a waste management operation under Annex III.

Austria (except Lower Austria), Bulgaria, Cyprus, France, Latvia, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia and the United Kingdom took the option in the ELD to exempt the spreading of such sewage sludge for agricultural purposes from waste management operations under Annex III.

Romania 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.

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).

Most Member States include 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 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.

The transposing legislation of Lithuania and the United Kingdom (England, Wales and Northern Ireland) do not include any provisions concerning cross-border environmental damage.
3.2.2 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, as 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). The definition of an “operator” in Hungary, Lithuania and Sweden is particularly broad, with the result that virtually anyone and everyone is subject to strict liability.

The transposing legislation in Estonia does not refer to an “operator”. Instead, the legislation provides that “[t]he person causing environmental damage … is an individual, due to whose activity or inactivity environmental damage or a threat thereof arises”. This definition, which is much broader than the definition of an operator under the ELD, includes any natural or legal, private or governmental, person that causes environmental damage. In addition, there is no need for the activity that caused the damage to be an “occupational activity” under the ELD. The activity may be a purely private or recreational activity.

The Finnish transposing legislation extends the definition of an “operator” to include, amongst others, a person in charge of a road, railway, port, airport or similar areas. Further, a person who is engaged in a professional activity “or who de facto controls” such an activity under the Nature Conservation Act may be liable under the ELD regime. Sectoral definitions also apply.

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. As in Poland, this is the same definition as in existing legislation.

The Lithuanian transposing legislation defines an “operator” by the term “economic operators”, which is defined as “users of natural resources and persons engaged in economic activities”. The term “economic activities” is defined as “economic and other activities affecting or likely to affect the environment”.

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The Polish transposing legislation 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. Despite the broad definition, strict ELD liability is limited to Annex III operators.

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. Such liability is not, of course, strict liability.

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, the term “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.

Denmark has adopted different definitions of “operator” in its transposing legislation depending on the legislation and its context. For example, the definition in the Act on Environmental Protection, the Soil Contamination Act, the Act on the Environmental Approval, etc. of Livestock Use is “the person who carries on or controls the occupational activity”. The definition in the Marine Environment Protection Act is “the person responsible for operating a ship, an aircraft, a platform or a pipe, provided this is an occupational activity”. The definition in the Environment and Gene Technology Act is the person responsible 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 GMO is the person responsible.
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).

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 transposing legislation in Estonia does not specify the scope of liability; national law applies. It is not clear, however, whether proportionate liability or joint and several liability apply because the applicable law, the Law of Obligations Act, provides for both types of liability.

The only Member States that have not adopted joint and several liability are Denmark, Finland, France, Slovakia and, 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. Table 6 sets out the scope of liability in each Member State.

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.

Although the transposing legislation in the Netherlands does not specify that joint and several liability applies, chapter 5 of the General Administrative Law Act, which sets out provisions on administrative enforcement, and case law under that Act does not rule it out.

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 transposing legislation in Scotland, 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.

The Slovakian transposing legislation applies proportionate liability with a default of joint and several liability. That is, the legislation provides that if multiple operators cause environmental damage, their liability is apportioned by their share in the damage. If the extent of each operator's share of the damage is not clear, the competent authority shall determine the appropriate allocation of liability. If allocation cannot be determined clearly or the authority’s decision would result in disproportionate cost, the operators are jointly and severally liable. The transposing legislation sets out procedures for proceedings to determine the extent of the share of multiple liable operators. Initiation of the proceedings does not suspend the duty of operators to carry out remedial measures.

Slovenia adopted proportionate liability with the proviso that if it is not possible to establish the liability of the individual operator, they are each severally liable.

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, Romania specifically provides for contribution actions, or another mechanism for recourse, against other liable operators. Some other Member States, such as Ireland,
Poland, and the United Kingdom, are silent on the applicable legal mechanism for such an action. In these Member States, therefore, the right of contribution depends 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 biodiversity 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 have been negligent.

Table 6: Scope of liability

<table>
<thead>
<tr>
<th>Member State</th>
<th>Scope of liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Belgium</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Yes with the proviso that when an imminent threat of, or actual, environmental damage is caused by successive operators, the last operator is liable but entitled to claim restitution against the other operators</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Denmark</td>
<td>Modified proportionate liability</td>
</tr>
<tr>
<td>Estonia</td>
<td>Unclear. The relevant national law that applies provides for both joint and several, and proportionate, liability</td>
</tr>
<tr>
<td>Finland</td>
<td>Modified proportionate liability</td>
</tr>
<tr>
<td>France</td>
<td>Proportionate liability</td>
</tr>
<tr>
<td>Germany</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Greece</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Hungary</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Ireland</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Italy</td>
<td>Proportionate liability (originally joint and several liability)</td>
</tr>
<tr>
<td>Latvia</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Country</td>
<td>Liability Type</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------------------------------------------------</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Malta</td>
<td>Joint and several liability applies only if it is expressly stipulated by a competent authority and liable operators</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Unclear. National law applies that does not rule out joint and several liability</td>
</tr>
<tr>
<td>Poland</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Portugal</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Romania</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Proportionate liability with a default to joint and several liability if allocation cannot be clearly determined or would result in disproportionate cost</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Spain</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>Sweden</td>
<td>Joint and several liability</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Joint and several liability</td>
</tr>
</tbody>
</table>

**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).

Lithuania requires an organisation to be established under the Law on Associations or the Law on Public Institutions.

Luxembourg requires an organisation to have been authorised pursuant to the Law concerning classified establishments, as amended, or the Law on the protection of nature and natural resources.

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, ramblers, 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 Environmental Protection Agency 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.

Similarly, in Latvia, the transposing legislation, which is not limited to the ELD regime, provides that "Every private individual and association, organisation and group of persons ... has the right ... to request that central and local government authorities, officials or private individuals put an end to any act or omission which is detrimental to the quality of the environment and damages human health or threatens their life, lawful interests or property" and "to provide central and local government authorities with information on activities or measures that affect or may affect the quality of the environment, as well as information on adverse changes observed in the environment which have resulted from such activities or measures".

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 has 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.40

A Member State cannot require an organisation to have individual rights in order to submit comments / observations to a competent authority. 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. Under the Maltese law of standing, however, a person must have a direct, personal and actual interest that would be affected by the authority’s decision.

► 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

40 See Djurgården-Lilla Värtans Miljöskydsförening v Stockholms kommun genom dess marknämnd (CJEU, Case No. C-263/08, 2009).
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 United Kingdom 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.

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 article 3 of Directive (2003/4/EC) on public access to environmental information.

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.

In Bulgaria, the competent authority has seven days following its receipt of comments / observations to consider the request. If the comments / observations are incomplete, the authority returns the application to the interested party, specifying the missing information. The interested party then has seven days to provide the missing information. If it fails to do so, the authority is not required to consider the comments / observations further.

► Manner of following up comments / observations by competent authorities

Bulgaria has detailed provisions for information to be provided to competent authorities, and for follow up actions. If a competent authority considers that information submitted by an interested party is sufficient, it must carry out an inspection of the site at which environmental damage has been caused within 14 days following receipt of the comments / observations. The on-site visit commences procedures to identify remedial measures that must be carried out.
Differences in rights of interested parties to challenge the decisions, acts or failure to act of competent authorities

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 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.

Right of interested parties to be parties to proceedings against an operator

Some Member States provide interested parties who have submitted comments / observations with the right to be parties to proceedings against an operator.

For example, 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.

Austria (except for Lower Austria) has similar legislation that provides a right to interested parties that submitted comments / observations to be parties to any proceedings concerning emergency remedial actions or remedial measures to which the comments refer. Interested parties that have declared in writing, within two weeks of publication of the main content of proposed remedial measures that they wish to be parties to such proceedings, are also entitled to be parties.

3.2.3 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;
Notification of an imminent threat of environmental damage regardless of the success of preventive measures; and
Protection of sites at which complementary remediation measures are carried out.

Some Member States have adopted broad definitions of operators (see Table 7 below). These include Estonia, Finland, Hungary, Lithuania, Poland and Sweden.

Table 7: Identity of operators under legislation transposing the ELD

<table>
<thead>
<tr>
<th>Member State</th>
<th>Operator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Essentially equivalent to the ELD</td>
</tr>
<tr>
<td></td>
<td>In addition, if an activity is no longer carried out and the former</td>
</tr>
<tr>
<td></td>
<td>operator can no longer be held liable, the owner or co-owner of the</td>
</tr>
<tr>
<td></td>
<td>land is liable to the extent that it approved or acquiesced in the</td>
</tr>
<tr>
<td></td>
<td>installation or measures from which the damage emanated and omitted to</td>
</tr>
<tr>
<td></td>
<td>take reasonable measures to prevent the damage</td>
</tr>
<tr>
<td>Belgium</td>
<td>Equivalent to the ELD</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Essentially equivalent to the ELD</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Equivalent to the ELD</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Equivalent to the ELD</td>
</tr>
<tr>
<td></td>
<td>In addition, a person to whom, under the Insolvency Act, decisive</td>
</tr>
<tr>
<td></td>
<td>economic power over the functioning of operating activities has been</td>
</tr>
<tr>
<td></td>
<td>delegated is also an operator</td>
</tr>
<tr>
<td>Denmark</td>
<td>An operator is defined in various ways under Acts concerning environmental protection, soil contamination, environmental approval of livestock use, marine environment protection, environment protection and gene technology, protection of the outer polders of the Tønder Marsh, and watercourses</td>
</tr>
<tr>
<td>Estonia</td>
<td>Very broad definition</td>
</tr>
<tr>
<td></td>
<td>A person, due to whose act or omission, an imminent threat of, or actual, environmental damage arises is liable regardless of whether the act or omission is an “occupational activity” under the ELD. Strict liability is imposed, however, only for operators of Annex III activities</td>
</tr>
<tr>
<td>Country</td>
<td>Definition</td>
</tr>
<tr>
<td>------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Finland</td>
<td>Equivalent to the ELD. In addition, an operator includes a person in charge of a road, railway, port, airport or similar area, and a person who carries out a professional activity under the Nature Conservation Act.</td>
</tr>
<tr>
<td>France</td>
<td>Essentially equivalent to the ELD.</td>
</tr>
<tr>
<td>Germany</td>
<td>Equivalent to the ELD.</td>
</tr>
<tr>
<td>Greece</td>
<td>Equivalent to the ELD.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Very broad definition. A “user of the environment“ is liable, therefore, anyone and everyone may be liable.</td>
</tr>
<tr>
<td>Ireland</td>
<td>Essentially equivalent to the ELD.</td>
</tr>
<tr>
<td>Italy</td>
<td>Essentially equivalent to the ELD.</td>
</tr>
<tr>
<td>Latvia</td>
<td>Equivalent to the ELD. In addition, a person who has applied for, as well as a person who holds, a permit is an operator.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Operators are “users of natural resources and persons engaged in economic activities”, which is defined as “economic and other activities affecting or likely to affect the environment, therefore, anyone and everyone may be liable.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Equivalent to the ELD.</td>
</tr>
<tr>
<td>Malta</td>
<td>Equivalent to the ELD.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Equivalent to the ELD.</td>
</tr>
<tr>
<td>Poland</td>
<td>An operator is “an entity which uses the environment“ by carrying out an activity that causes a risk of environmental damage. Such entities are entrepreneurs (persons involved in business activities aimed at agricultural production, animal husbandry and breeding, gardening, vegetable growing, forestry and inland fishing, and doctors in their own or specialist practices), educational and healthcare entities, and natural persons who use the environment by carrying out licenced activities.</td>
</tr>
<tr>
<td>Portugal</td>
<td>Equivalent to the ELD.</td>
</tr>
<tr>
<td>Romania</td>
<td>Equivalent to the ELD.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Equivalent to the ELD. In addition, a person under the Act on bankruptcy and restructuring to</td>
</tr>
</tbody>
</table>
whom the decisive economic power over the technical functioning of an activity has been transferred is liable

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Slovenia</td>
<td>An operator is a person who causes environmental damage</td>
</tr>
<tr>
<td>Spain</td>
<td>Equivalent to the ELD, with the person who has a government contract considered to be the operator in lieu of the governmental entity in respect of activities under the contract</td>
</tr>
<tr>
<td>Sweden</td>
<td>Operators are “[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 includes owners of land on which there is ongoing pollution from landfills, oil tanks, barrels, etc. Therefore, therefore, anyone and everyone may be liable, with a negligence standard for biodiversity damage for non-Annex III activities by farmers, foresters, fishermen, reindeer herders and road keepers</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Equivalent to the ELD</td>
</tr>
</tbody>
</table>

**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 (legislation has been proposed in Poland to include such a requirement but is still in the legislative process).

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.

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

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”.

As discussed in section 3.2.6 below, some Member States consider that the above provisions refers to damage to “waters” whereas others consider that there must be damage to a “water body”.

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 on the groundwater.

Application of strict liability beyond Annex III

Most Member States transposed the ELD by adopting the scope of strict and fault-based liability set out in the ELD itself.

Some Member States exercised their right under Article 193 of the TFEU and Article 16(1) of the ELD to transpose the ELD more stringently. These Member States did so in three ways; they included additional activities in Annex III, they imposed strict liability for biodiversity damage from non-Annex III activities, or they extended the definition of an operator to all (economic) operators in combination with non-transposition of Annex III. In addition, Latvia introduced negligence-based liability for land and water for non-Annex III operators (see Table 8).

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 proposal submitted by the European
Commission in 2013 to adopt a dedicated legislative instrument on invasive alien species.41

The Finnish legislation transposing the ELD 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 subject to strict liability.

France extended strict liability to the transport of oil in pipelines following the Coussouls de Crau oil spill, albeit that it did not do so by revising its legislation that transposed the ELD.42 Latvia extended strict liability for the transport of chemicals and oil in pipelines.

► Strict liability for biodiversity damage

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

► Strict liability for environmental damage

Lithuania and Hungary extended strict liability for all three categories of environmental damage to non-Annex III activities. Therefore, all operators who cause an imminent threat of, or actual, land, water or biodiversity damage are strictly liable in those Member States.

Sweden extended strict liability for all three categories of environmental damage to non-Annex III activities, with an exception for biodiversity damage 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.

Spain extended strict liability to preventive measures and emergency remedial actions for an imminent threat of, or actual, environmental damage from non-Annex III activities; negligence-based liability applies to remedial measures for non-Annex III activities.

► Table 8: Extension of strict liability beyond Annex III activities

<table>
<thead>
<tr>
<th>Member State</th>
<th>Extension of strict liability beyond Annex III activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>No</td>
</tr>
<tr>
<td>Belgium</td>
<td>The federal 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 *&lt;br&gt;The Brussels-Capital Region extended strict liability to the deliberate release into the environment, and the transport of, invasive alien species</td>
</tr>
</tbody>
</table>


42 Decree No. 2012-615 of 2 May 2012.
<table>
<thead>
<tr>
<th>Country</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>No</td>
</tr>
<tr>
<td>Cyprus</td>
<td>No</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Under Czech law transposing the ELD, “a causal link [is required in respect of a non-Annex III activity] between the operator’s operating activities carried out in contravention of legislation and the occurrence or imminent threat of environmental damage”; the legislation does not mention fault-based liability. That is, a non-Annex III activity must have been carried out in breach of legislation in order for the ELD to apply.</td>
</tr>
<tr>
<td>Denmark</td>
<td>No</td>
</tr>
<tr>
<td>Estonia</td>
<td>No</td>
</tr>
<tr>
<td>Finland</td>
<td>Strict liability exists for biodiversity damage from an activity related to damming or water abstraction.</td>
</tr>
<tr>
<td>France</td>
<td>Not specifically, but, following the rupture of an underground pipeline that spilled crude oil into the Coussousls de Crau nature reserve in August 2009, the French Government adopted Decree No. 2012-615 to extend strict liability to the transport of oil by pipeline. The Decree does not amend the legislation transposing the ELD in France.</td>
</tr>
<tr>
<td>Germany</td>
<td>No</td>
</tr>
<tr>
<td>Greece</td>
<td>Strict liability applies to non-Annex III activities as well as Annex III activities.</td>
</tr>
<tr>
<td>Hungary</td>
<td>Strict liability applies to non-Annex III activities as well as Annex III activities.</td>
</tr>
<tr>
<td>Ireland</td>
<td>No</td>
</tr>
<tr>
<td>Italy</td>
<td>No</td>
</tr>
<tr>
<td>Latvia</td>
<td>Strict liability applies to the operator of a petrol filling station or an oil storage facility and to the transportation of chemical substances or chemical products through pipelines. The legislation that transposed the ELD imposes liability for land damage and water damage, as well as biodiversity damage, from non-Annex III activities, as well as Annex III activities.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Lithuania has extended strict liability for activities beyond Annex III.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>No</td>
</tr>
<tr>
<td>Country</td>
<td>Status</td>
</tr>
<tr>
<td>-----------</td>
<td>--------</td>
</tr>
<tr>
<td>Malta</td>
<td>No</td>
</tr>
<tr>
<td>Netherlands</td>
<td>No; Title 17.2 of the Wm includes a provision for issuance of a General Administrative Order to include other activities under Annex III but such an Order has not been issued</td>
</tr>
<tr>
<td>Poland</td>
<td>Activities that require a permit to introduce gases or dust into the atmosphere are included in Annex III</td>
</tr>
<tr>
<td>Portugal</td>
<td>No</td>
</tr>
<tr>
<td>Romania</td>
<td>No</td>
</tr>
<tr>
<td>Slovakia</td>
<td>No</td>
</tr>
<tr>
<td>Slovenia</td>
<td>No</td>
</tr>
<tr>
<td>Spain</td>
<td>Spain extended strict liability 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</td>
</tr>
<tr>
<td>Sweden</td>
<td>Sweden imposes strict liability for non-Annex III activities Farmers, foresters, fishermen, reindeer herders and road keepers are liable for biodiversity damage only to the extent they are negligent in carrying out their operations</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>No</td>
</tr>
</tbody>
</table>

**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. 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.

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 of 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 United Kingdom, 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”.

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 could thus, be a difference in the scope of the exception in Finland and the Netherlands if “heavy rain” is equated with a “massive flood”.

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, Malta, Portugal, Romania, Slovakia, Slovenia, Spain, and the United Kingdom, 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 United Kingdom 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, Sweden and Lithuania have 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.

**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. Luxembourg provides a deadline of seven days from the imminent threat for the operator to carry them out, which would seem to be too long.

Other Member States, such as France, Poland, and the United Kingdom, 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.
The Bulgarian and Latvian transposing legislation also includes detailed procedures.

Protection of sites at which complementary remediation measures are carried out

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.

Latvia has partially filled this gap by including requirements to monitor and verify that remedial measures have been carried out effectively, including a requirement for a responsible operator to provide test reports of analyses by accredited laboratories and involving relevant specialists to check that remedial measures have been carried out pursuant to the competent authority’s instructions.

3.2.4 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”.

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

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43 Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico (Case No. C-378/08, 2010); Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico (Cases Nos. C-379/08 and C-380/08, 2010).
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. Table 1 sets out the dates on which the transposing legislation for Member States became effective, including Member States that applied the legislation retrospectively.

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.

► 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 initially 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 United Kingdom (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. Although, at first sight, this exception appears to be narrower than the exception in the ELD, the reverse is true. That is, the exception exempts damage caused by natural phenomenon that do not have an “inevitable and irresistible character” and for which, it would, therefore, be inutile to take any precautions. The exception, therefore, applies to damage caused by natural phenomenon that would not otherwise be exempt from the ELD.

► 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.

The United Kingdom has an exception for “damage caused in the course of commercial sea fishing if all legislation relating to that fishing was complied with”. Although conditions may exist to bring this exception within the ELD, as currently written, the exclusion appears to be out of compliance.

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.
3.2.5 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;
- 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 United Kingdom 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”.44

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 United Kingdom, 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.

In Raffinerie Mediterrane (ERG) SpA v Ministero dello Sviluppo economico, 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”. 45

Estonia adopted a rebuttable presumption in its legislation transposing the ELD. That is, a causal connection between an act or omission of and operator and environmental damage is assumed to have arisen when “it is probable that the damage has arisen during [an ELD Annex III] activity”. The operator then has the burden of proving that it did not cause the damage.

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 impose security over property or other guarantees to recover such costs whereas others, such as Bulgaria, the Czech Republic, Finland, France, Ireland, Latvia, Lithuania, and Slovakia 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 United

45 Raffinerie Mediterrane (ERG) SpA v Ministero dello Sviluppo economico, paras. 57-58 (CJEU, Case No. C-378/08).
Kingdom, all the jurisdictions except Scotland provide for financial security after an ELD incident has occurred.

Further, Bulgaria, the Czech Republic, and Slovakia have introduced mandatory financial security, thus lessening the need for *ex post* financial security. Bulgaria’s financial security legislation focuses on article 8(2) of the ELD.

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

The Danish transposing legislation requires a responsible operator to provide financial security to the Minister for the Environment to cover its obligations under that legislation. The amount of the financial 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.

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.
Estonian law provides that if the competent authority agrees to the repayment of costs in instalments, the authority may request the operator to provide security for such costs as a guarantee or mortgage for the benefit of the State pursuant to procedures in the Law of Obligations Act and the Law of Property Act. The value of the security must be at least 115 per cent of the sum that is payable in instalments. The competent authority may require the security to be increased or replaced if the security is no longer adequate to guarantee repayment.

► 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 Austria, the Czech Republic, Estonia, Ireland, Latvia, Lithuania, Slovakia, and the United Kingdom (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 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”.

3.2.6 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
waters 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, Luxembourg, Poland, and Spain consider that the threshold
applies to waters whereas Belgium (Flemish Region), Ireland, the Netherlands, and the
United Kingdom 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 implies that the damage must necessarily be to water bodies.46 Conversely, a communication from the European Commission concerning revisions at the Common Position stage refers to waters and not water bodies.47

**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]”

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46 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](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).

The so-called “defences” (which are not referred to as such) in the ELD are defences to costs. That is, an 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 is a vandal who cannot be found or is not financially viable, the operator has no recourse.

In respect of the permit and state-of-the-art defences, the operator may claim reimbursement of its costs for remedial action from the competent authority.

Most Member States, including Austria, the Czech Republic, France, Germany, Ireland, Luxembourg, the Netherlands, Poland, Slovakia, and Spain have transposed the “defences” as defences to costs. A small minority of Member States (Denmark and the United Kingdom (in respect of remedial measures but not preventive measures and emergency remedial actions)), consider that they are defences to liability. The position of some other Member States is unclear from their transposing legislation.

►  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).

Most Member States have interpreted the above 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, many 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, Greece, Italy, the Netherlands, Portugal, Spain, and the United Kingdom provide a competent authority with the power, but not the duty, to order the 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”.

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 the operator 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.

The transposing legislation in Slovenia does not mention emergency remedial 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, art 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, art 2(4)(b)).

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, art 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” if there is a significant adverse effect on reaching or maintaining the favourable conservation status of a protected species or natural habitat in any 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.

This issue is, however, made 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.

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” (arts 1(e), 1(i), 2).

The Birds Directive similarly refers to “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” (art 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” (art 1(e)).

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 conservation status relating to the natural range.

The transposing legislation of many Member States 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. The guidance for England and Wales states that the relevant range under the transposing legislation is the United Kingdom 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 United Kingdom and the stag beetle, for which the relevant range is only part of the United Kingdom. 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.

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.

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 United Kingdom (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.

The criterion for standing under Maltese law is a direct, personal and actual interest that would be affected by an authority’s decision.

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, art 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” (art 10). The
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.

### 3.2.7 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 or quantitative status or the ecological potential, as defined in [the Water Framework Directive (2000/60/EC)], of the waters concerned ... or the environmental status of the marine waters concerned, as defined in the [Marine Strategy Framework Directive (2008/56/EC)], in so far as particular aspects of the environmental status of the marine environment are not already addressed through [the Water Framework Directive]” (ELD, article 2(1)(b)). The second part of the definition was added by the Offshore Safety Directive (2013/30/EU).

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.

The transposing legislation in the United Kingdom (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.

The transposing legislation in Slovakia provides an operator with the right to request consultation with the competent authority if there is doubt as to whether an imminent threat of, or actual, environmental damage has occurred. There is a time limit of 60 days from the date the request is submitted to the competent authority to submit its written opinion on the consultation.

In some cases, the transposing legislation appears to be overly optimistic about the time needed to submit proposed remedial measures. The Bulgarian transposing legislation states that within 10 days of the occurrence of environmental damage, the operator shall propose necessary remedial measures to the competent authority, together with an estimate of their costs. The legislation includes other deadlines for remedial measures, such as the competent authority issuing a draft order identifying the remedial measures to be carried out by the operator within 30 days of receiving the operators proposal of necessary remedial measures.

### 3.2.8 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;
- 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; and
- Provisions prioritising claims for remediating environmental damage in insolvency proceedings.

#### Establishment of a register or database of ELD incidents

The transposing legislation of some Member States, such as Estonia, 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. Bulgaria provides access to a substantial amount of information on implementation of the ELD regime by publishing such data on the interest.

Other Member States, such as Cyprus, the Czech Republic, Germany, Malta, Lithuania, and Luxembourg do not mention registers or databases.
Some Member States publish reports of ELD incidents on government websites without the transposing legislation specifically providing for such compilation or publication.

The United Kingdom used to be one of these Member States until the registers were removed from the Department for Environment Food and Rural Affairs’ website during Government re-organisation of departmental websites. The register for 2009 incidents is available on an archived website (http://archive.defra.gov.uk/environment/policy/liability/); other incident reports are available from the Department on request.

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 the ELD. These range from administrative to criminal offences and sanctions. Some Member States, including Belgium (Brussels-Capital Region), France, Ireland, Slovakia, Slovenia, and the United Kingdom, created new offences and sanctions.

All offences in the ELD regime in Ireland and the United Kingdom are criminal; they include imprisonment as well as fines. In contrast, offences in other Member States such as Bulgaria, the Czech Republic, and Spain, are solely administrative.

The Netherlands, established 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. The Danish transposing legislation also 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 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 do not impose penalties against legal persons such as companies. Bulgarian law establishes administrative sanctions for breaching provisions of the legislation transposing the ELD and “property sanctions” against legal persons who breach it. The penalties include doubled fines / property sanctions for repeat offences. They also include fines against government officials who fail to carry out their duties, as well as experts who are appointed to prepare a report concerning remedial measures in ELD incidents that are difficult to determine or require additional analysis but who fail timely to submit the report.
Other Member States, such as Estonia, have different levels of fines depending on whether the offence is carried out by a natural or a legal person. Some Member States, such as Bulgaria and Slovakia, have increased levels of fines for repeated offences (recidivism). The Polish transposing legislation provides for fines, including daily fines.

Latvia has supplemented its legislation transposing the ELD by imposing liability for compensation (not fines) for harm to protected species and natural habitats. For example, the legislation provides for compensation of 5, 10 or 40 months minimum wages for the destruction or damage to individuals from specially protected species, depending on the classification of the species. Losses for damage to individuals from specially-protected species are multiplied by three if the damaged individuals are in specified nature reserves, national parks or biosphere reserves. Further, the amount of compensation for damages for the destruction or damage to specially-protected laying or brood birds is double for each individual pursuant to the classification of the birds.

Some Member States, meanwhile, such as Germany, Lithuania, Luxembourg, and Malta, do not mention offences and sanctions in their transposing legislation. In such cases, other legislation providing for such penalties may, but does not necessarily, apply. For example, in Germany, sanctions are provided for general legislation on administrative sanctions and the German Criminal Act which contains provisions on environmental crimes. In Lithuania, the Code of Administrative Offences, which applies to legal but not natural persons, applies in respect of legal persons. Natural persons may be liable under other legislation. Criminal penalties may also be imposed.

In Malta, however, in which the transposing legislation does not include any offences or penalties for breaching the legislation, the only applicable penalties in the enabling law are for obstructing an officer and for making a false declaration. In Luxembourg, neither the transposing legislation nor any other legislation provides for offences or penalties for breaching the transposing legislation.

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. In some Member States, it is not necessary to do so because of legislation that supplements the legislation transposing the ELD. 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 United Kingdom, 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 co-operate 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. 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 United Kingdom 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 Bulgaria, the Czech Republic, Denmark, Hungary, Ireland, Latvia, Poland, Slovakia, Spain, and the United Kingdom, 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 United Kingdom (England, Wales and Northern Ireland), they incorporate powers from other legislation. In other Member States, such as Denmark, Poland and the United Kingdom (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 Cyprus and Germany, do not refer to any power or duty of a competent authority to carry out inspections or investigations. Whilst relevant provisions often exist in other legislation, for example, in Malta, 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 United Kingdom (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 United Kingdom (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 United Kingdom (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 Cyprus, Denmark, Estonia, 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.

Bulgaria provides for a substantial amount of information on the ELD regime to be placed on website of the Ministry for the Environment and Water.

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.

Latvia requires operators to submit information concerning incidents to the Latvian Environmental, Geological and Meteorological Agency no later than three months after the occurrence of the imminent threat of, or actual, environmental damage. If the damage has not been completely remediated by that time, the operator must also submit information on measures taken up to that time, with further information to be submitted when the measures have been completed but at least once each year.
Provisions prioritising claims for remediating environmental damage in insolvency proceedings

The potential exists for an operator who has caused environmental damage to become insolvent. The ELD does not contain and provision that prioritise the insolvent operator’s assets over the claims of other creditors.

Some Member States have included such provisions in their legislation transposing the ELD.

In France, 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 transposing legislation in Slovakia provides that if an operator is insolvent, the payment of costs to the competent authority for preventive or remedial measures is a claim of a secured creditor and recovery under the law on bankruptcy and restructuring.

The transposing legislation in the Czech Republic contains procedures for the recovery of costs in insolvency proceedings if the operator becomes insolvent or is wound up.

The transposing legislation in Slovenia provides that a person who causes pollution under the ELD regime is also liable for its environmental effects in the event of bankruptcy or liquidation.
Chapter 4: Comparison of relative stringencies in existing and transposing legislation

The scope and nature of the existing environmental law for preventing and remediating environmental damage has had a major effect on the implementation and enforcement of the legislation that transposed the ELD.

A comparison of the existing legislation with the legislation transposing the ELD highlights significant differences. These differences indicate that some features of the ELD are likely – or may be considered – to be less stringent than existing legislation.

4.1 Enforcement of the legislation transposing the ELD

The transposing legislation in some Member States specifically states that the transposing legislation shall apply only when it is more stringent than existing national legislation.

The German transposing legislation specifically states that if other legislation contains more stringent provisions than its transposing legislation, the other provisions apply.

Similarly, Belgium (the Flemish Region) provides that the legislation transposing the ELD is without prejudice to more stringent provisions regarding occupational activities and applicable liability law. The Federal and Land law in Austria state that more extensive obligations that regulate the prevention or remedying of environmental damage and that are based on directly applicable EU law and national law that transposed such legislation is not affected by the legislation transposing the ELD.

The transposing legislation in Luxembourg also provides that it is without prejudice to legislation that has more stringent provisions for the prevention and remedying of environmental damage and is without prejudice to legislation that provides for an indemnification in case of environmental damage.

4.2 More stringent provisions in the ELD

Some provisions of the ELD are, without doubt, more stringent than existing legislation. The major provisions are the imposition of liability for complementary and compensatory remediation. No Member State imposes liability for complementary remediation for biodiversity damage under its existing legislation to the same extent as the ELD; the majority do not impose any liability for complementary remediation for biodiversity damage or water damage. Further, no Member State imposes any liability for compensatory remediation under its existing legislation.

Another provision that is more stringent than existing environmental legislation is the self-executing duty in the ELD that requires an operator who causes an imminent threat of, or actual, environmental damage to carry out preventive or remedial actions even before a competent authority requires it to do so. This provision does not exist in the existing environmental legislation of any Member State.

The provisions for “interested parties” ("enabled persons" in ELD language) to provide comments / observations and to request action also tend to be more stringent than
those in many existing Member State environmental legislation. The implementation of these provisions, is, of course, solely dependent on the interested parties themselves.

4.3 Less stringent provisions in the ELD

The review of the existing environmental law of 27 Member States indicates that the following provisions of the ELD tend to be less stringent than those of most environmental liability systems in Member States:

- Limitation of strict liability to specified operators;
- Limitation of liability to professional activities;
- Permit and state-of-the-art defences; and
- Limitation periods.

The Executive Summary comments on each of these provisions.

In addition, the following example of a water pollution incident under the law of England and Wales provides just one illustration of difficulties that competent authorities face in determining whether existing legislation is more or less stringent than the ELD.

Existing legislation in England and Wales includes the Water Resources Act 1991. That Act, among other things:

- applies strict liability to any person who causes the pollution, compared to the limitation of strict liability for water damage to Annex III operators in the legislation transposing the ELD;
- applies to all activities including recreational activities, compared to only occupational activities in the legislation transposing the ELD;
- does not have a permit or state-of-the-art defence, compared to both defences having been adopted by the United Kingdom in the legislation transposing the ELD;
- has no limitation period compared to a limitation period of 30 years under the ELD;
- applies to all waters, that is, surface, ground and coastal waters, compared to only water bodies in the legislation transposing the ELD;
- has a very low threshold that is exceeded even by an oil stain on water, compared to a significance threshold in the legislation transposing the ELD;
- 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 if the significance threshold is exceeded; and
- 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 restore protected species and natural habitats in the ELD of the significance threshold is exceeded), the Act has been enforced to require polluters to restock a river with fish, albeit without any requirement for compensatory remediation.

Guidance to the legislation that transposed the ELD, published by the 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". Application of the approach in this statement could be questionable in some situations. Under EU law, the provisions of a Directive must be implemented and enforced first. If any provisions of national law are more stringent than the legislation that transposed the ELD, they should then be implemented and enforced. National law cannot set aside EU legislation.

48 See Commission v United Kingdom, para 27 (CJEU, Case No. C-6/04, 2005) ("legislation relied upon by the United Kingdom ... is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty ... and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the directive and allow harmonised and effective implementation of the rules which it lays down").

49 See Queen v Secretary of State for Transport, ex parte: Factortame Ltd, para 23 (CJEU, C-213/89, 1990) ("Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule").
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Appendix: Legislation transposing the ELD into Member State law

Austria


- **Burgenland**: Act of 29 October 2009 on environmental liability with regard to the prevention and remedying of environmental damage (Burgenland) (Burgenländisches Umwelthaftungsgesetz – Bgld. UHG), Land Law Gazette for Burgenland No. 2/2010, issued on 11 January 2010


- **Lower Austria**: Environmental Liability Act of Lower Austria (NÖ Umwelthaftungsgesetz – NÖ UHG), Land Law Gazette of Lower Austria, 6200-0, No. 77/2009, issued on 8 May 2009

- **Salzburg**: 45th Act of 5 May 2010 amending the Environmental Protection and Environmental Information Act (Umweltschutz- und Umweltinformationsgesetz), Land Law Gazette of Salzburg, issued on 30 June 2010

- **Styria**: 10th Act of 17 November 2009 on environmental liability with regard to the prevention and remedying of environmental damage (Styrian Environmental Liability Act (Steiermärkisches Umwelthaftungsgesetz) – StUHG), Land Law Gazette of Styria, No. 6/2010, issued on 10 February 2010

- **Tyrol**: 5th Act of 18 November 2009 on liability in the event of damage to protected species and natural habitats and for certain land damage (Tyrol Environmental Liability Act – T-UHG), Land Law Gazette of the Tyrol, No. 2/2010, issued on 21 January 2010

- **Upper Austria**: 95th Act on environmental liability with regard to the prevention and remedying of environmental damage – Upper Austrian Environmental Liability Act (Oö UHG), Land Law Gazette for Upper Austria, No. 95/2009, issued on 4 September 2010

- **Vienna**: 38th Act on environmental liability with regard to the prevention and remedying of environmental damage in Vienna (Vienna Environmental Liability Act) (Wiener Umwelthaftungsgesetz) - Wr.

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50 The Appendix does not include all legislation, in particular secondary legislation, that transposed the ELD and subsequently amended the transposing legislation because amending legislation is still being enacted. The intent of the table is to provide an overview of the different ways in which the ELD has been transposed.
UHG), Land Law Gazette for Vienna, No. 38/2009, issued on 1 September 2009

- **Vorarlberg**: Act amending the IPPC Installations and Seveso II Installations Act, Land Law Gazette for Vorarlberg, No. 3/2010, issued on 2 February 2010

- **Belgium**
  - **Federal State**:
    - Royal Order of 3 August 2007 published in the Belgian Monitor of 20 September 2007, with regard to the prevention and remedying of environmental damage when placing on the market GMOs or GMO-containing products
    - Royal Order of 25 October 2007 published in the Belgian Monitor of 9 November 2007, on remedial measures following significant impairment of the marine environment and recovery of the costs of preventive, confinement and remedial measures
    - Royal Order of 8 November 2007 published in the Belgian Monitor of 9 November 2007, on the prevention and remedying of environmental damage resulting from road, rail, water or air transportation: alien plant species and alien animal species, and their carcasses following their import, export and transit; as well as wastes during their transit
  - **Walloon Region**:
    - Decree of 22 November 2007 published in the Belgian Monitor of 19 December 2007, which amended Book I of the Environment Code by inserting a Part VII on Environmental Liability with regard to the prevention and remedying of environmental damage
  - **Flemish Region**:
    - Decree of 21 December 2007 published in the Belgian Monitor of 12 February 2008, which complements the Decree of 5 April 1995 (general provisions on environmental policy) by adding a Title XV Environmental Damage
    - Decree of the Flemish government of 9 September 2011 for the regulation of the request for action
and the appeal procedure concerning the prevention and reparation of environmental damage, Belgian Official Gazette 13 October 2011 (to be superseded; see Decree of 19 July 2013 below)

- Decree of 19 July 2013 for the regulation of the information, prevention, containment and restoration duties concerning environmental damage, the request for action and the appeal procedure, Belgian Official Gazette 16 August 2013 (Besluit van 19 juli 2013 tot regeling van de informatie-, preventie-, inperkings- en herstelplicht inzake milieuschade, het verzoek om maatregelen en de beroepsprocedure, BS 16 augustus 2013)
  (This Decree will replace the Decree of the Flemish Government of 9 September 2011 when it enters into force on a date that has yet to be decided. The Decree contains mainly procedures for operators and the competent authority.)

- Brussels-Capital Region:
  - Ordinance of 13 November 2008 published in the Belgian Monitor of 14 November 2008, which sets out the new environmental liability regime

- Bulgaria
  - Act on Liability with Regard to the Prevention and Remediying of Environmental Damage (SG No. 43/2008)
  - The Act was amended by:
    - SG No. 32/2009, enacted and effective 28 April 2009
    - SG No. 35/2009 (amended in connection with amendment of the Disaster Protection Act), enacted and effective 12 May 2009
    - SG No. 77/2010 (amended due to closure of the Ministry of State Administration and Administrative Reform and the transfer from 1 September 2009 of regional administrations as second-tier authorities to the Council of Ministers), enacted and effective 1 October 2010
    - SG No. 98/2010 (amended in connection with amendments to the Health Act, which resulted in the establishment of the Regional Health
Directorate), enacted 14 December 2010, effective 1 January 2011

☐ SG No. 92/2011 (amended in connection with the closure of the Executive Agency on Soil Resources under the Minister for Agriculture and Food), enacted and effective 22 November 2011

☐ SG No. 14/2012 (supplemented PREDA to transpose the amendment to the ELD, which added the operation of storage sites pursuant to Directive 2009/31/EC on the geological storage of carbon dioxide to the list of legislation in Annex III), enacted and effective 17 February 2012

☐ SG No. 53/2012 (amended PREDA to add the carrying out of activities to export, import and transport waste within the meaning of section IV of chapter 5 of the Waste Management Act), enacted and effective 13 July 2012

- Regulation No. 1 of 29 October 2008 on types of preventive and remedial measures in the events provided for by the Prevention and Remediation of Environmental Damage (ZOPOESht) and on the minimum cost of such measures (SG No. 96/2008)

- Regulation concerning the public register of operators who carry out activities referred to in Annex 1 to Article 3(1) of the Prevention and Repair of Environmental Damage Act (approved by Council of Ministers’ Decree No. 317 of 12 December 2008 (SG No. 109/2008)

► Cyprus


- Order to determine that the Relevant authority for the areas of the Publicly owned forests is the Department of Forests of the Ministry of Agriculture, Natural Resources and Environment, dated 6 June 2008, Cyprus Official Gazette No. 4282. Subsidiary Administrative Act (Statutory Instrument) 212/2008

► Czech Republic

- Act No. 167/2008 Coll. of 22 April 2008 on the prevention and remedying of environmental damage and amending certain laws

► Denmark

- Act No 466 on the investigation, prevention and remedying of environmental damage of June 17, 2008, as amended

- Order No 572 on restricting the scope of the Merchant Shipping Act with regard to environmental damage (17 June 2008)
Order No 573 on reporting under the Marine Environment Protection Act (18 June 2008)

Order No 652 on criteria to determine the presence of environmental damage and on requirements to remedy certain types of environmental damage (26 June 2008)

Order No 657 on covering the costs of administration and supervision under the Environmental Damage Act (26 June 2008)

Order No 658 on obtaining statements regarding environmental damage, etc (26 June 2008)

Order No 789 on environmental damage, etc. to protected species or international conservation areas in connection with commercial fishing activities (24 July 2008)

Order No 875 on procedures for determining the presence of environmental damage or an imminent threat of environmental damage to protected species or international nature conservation areas in connection with the construction and expansion of ports and coastal protection measures and the establishment and expansion of certain installations in the Danish territorial sea (2 September 2008)

► Estonia

Act on Environmental Liability, proclaimed on 28 November 2007 with Resolution No. 203 of the President of the Republic of Estonia

► Finland

Act on the Remedyng of Certain Kinds of Damage to the Environment (383/2009) of 1 July 2009

Decree on the Remediation of Certain Environmental Damages (713/2009)

► France


Decree No., 2009-468 of 23 April 2009

► Germany

Act concerning the Prevention and Remedyng of Environment Damage of May 10, 2007, as amended

The Act has been amended by:

☐ Gesetz zur Ablösung des Abfallverbindungsgesetzes und zur Änderung weiterer Rechtsschreiben, of 19 July 2007 (Bundesgesetzblatt 2007, no 33, p.1-1462), Article 7

☐ Gesetz zur Neuregelung des Rechts des Naturschutzes und der Landschafftpflege, of 29
July 2009 (Bundesgesetzblatt 2009, no.51 p.I-2542), Article 16

- Gesetz zur Neuregelung des Wasserrechts, of 31 July 2009 (Bundesgesetzblatt 2009, no 51, p.I-2585), Article 14
- Gesetz zur Neuordnung des Pflanzenschutzrechts, of 6 February 2012 (Bundesgesetzblatt 2012, no 7, p.I-148), Article 7
- Gesetz zur Neuordnung des Kreislaufwirtschafts- und Abfallrechts, of 24 February 2012 (Bundesgesetzblatt 2012, no.10, p.I-212), Article 5
- Gesetz zur Demonstration und Anwendung von Technologien zur Abscheidung, zum Transport und zur dauerhaften Speicherung von Kohlendioxid, of 17 August 2012 (Bundesgesetzblatt 2012, no.38, p.I-1726), Article 3
- Act of 21 January 2013, Bundesgesetzblatt 2013, no. 3, p.I-95), Articles 4 and 7

► Greece

- The Act has been amended by:

► Hungary

- Act XXIX of 2007 on amendments to different environmental protection acts in respect of environmental liability
- Government Decree 90/2007 (IV.26.) on the rules for preventing and remedying damage to the environment
- Government Decree 91/2007 (IV.26.) on establishing the extent of damage caused to the natural environment and on the rules of compensation for damage
- Decree No. 92/2007 (IV.26.) on the amendment of Government Decree 219/2004 (VII.21) on the protection of groundwater
Ireland

- European Communities (Environmental Liability) Regulations 2008, SI 2008/547

- The Regulations have been amended by:

Italy

- Part VI (articles 299-318) plus Annexes 1-5 to Part VI of Decree 152 of the President of the Republic of 3 April 2006, published in Official Journal of the Republic No 88 of 14 April 2006

- The Decree was amended by:
  - Article 25 of Law No. 97 of 6 August 2013

Latvia

- The new Environmental Protection Law (Official Gazette 183, 15.11.2006)

- Regulation on the criteria to be used when assessing the significance of the effect of damage to species or habitats subject to special protection measures (Official Gazette 54, 30.03.2007), Regulation No. 213, Record No. 21, section N 32

- Regulation on preventive and remedial measures and a procedure for the assessment of environmental damage and the calculation of the costs of preventive, urgent and remedial (Official Gazette 78, 16.05.2007), Regulation No. 281, Minutes No. 25, section 31

- Amendments to the Environmental Protection Law (e.g. Official Gazette 107, 05.07.2007, etc.)

Lithuania

- Law No. IX-147, 24.03.05, Official Gazette, 2005, No. 47-1558 (12.04.05), Law amending and supplementing Articles 1, 2, 6, 7, 8, 14, 19, 26, 31, 32, 33 and 34 of and the Annex to and repealing Article 24 of the Environmental Protection Law and supplementing the law with articles 32(1) and 32(2) transposed most provisions of the ELD

- Law No. XI-858, 28.05.10, Official Gazette, 2010 No. 70-3472 (2010.06.17), Law amending and supplementing Articles 1, 7, 8, 9, the name of Chapter II and the Annex to and of the Environmental Protection Law
Law No. IX-147, 24.03.05, Official Gazette, 2005, No. 47-1558 (12.04.05), Law amending and supplementing Articles 1, 2, 6, 7, 8, 14, 19, 26, 31, 32, 33 and 34 of and the Annex to and repealing Article 24 of the Environmental Protection Law and supplementing the law with articles 32(1) and 32(2) transposed most provisions of the ELD

Law No. XI-858, 28.05.10, Official Gazette, 2010 No. 70-3472 (2010.06.17), Law amending and supplementing Articles 1, 7, 8, 9, the name of Chapter II and the Annex to and of the Environmental Protection Law

► Luxembourg

Law of 20 April 2009 relative to environmental responsibility concerning the prevention and remedying of environmental damage, Official Journal of the Grand-Duchy of Luxembourg, Recueil de Législation, A – No. 82, 27 April 2009, p. 968

The Law has been amended by:

☐ Law of 27 August 2012 relating to the geological storage of carbon dioxide (adding the storage of carbon dioxide, as amended by the ELD, to the list of Annex III activities)

► Malta


Subsidiary Legislation 504.85 has been amended by:


► Netherlands

Act of 24 April 2008 amending the Environmental Management Act in connection with the implementation of Directive 2004/35/EC (environmental liability)


► Poland

Act of 13 April 2007 on the prevention and remedying of environmental damage (2007 Act)

Ordinance of the Minister for the Environment of 4 June 2008 on types of remedial measures and on the conditions and manner in which they are carried out (issued on the basis of the 2007 Act)
Ordinance of the Minister of Environment of 30 April 2008 on assessment criteria for environmental damage (issued on the basis of the 2007 Act)

Act of 20 July 1991 on the Environmental Protection Inspectorate (chapter 4a introduced in 2007)

Ordinance of the Minister of Environment of 26 February 2008 on the register of imminent threats of environmental damage and environmental damages (issued under the Act on the Environmental Protection Inspectorate)

► Portugal

Decree-Law No. 147/2008 of 29 July 2008

Decree-Law No. 245/2009 of 22 September 2009 (changed the definition of water damage)

Decree-Law No. 29-A/2011 of 1 March 2011 (changed some requirements for financial security)

Decree-Law No. 60/2012 of 14 March 2012 (changed Annex III of Decree Law No. 147/2008 of 29 July 2008)

► Romania


The Government Emergency Ordinance has been amended by:


► Slovakia

Act No. 167/2008 Coll. of 22 April 2008 on the prevention and remedying of environmental damage and amending certain laws

The Act has been amended by:

- Act No. 514/2008 Coll. (adopted in relation to the management of waste from the mining industry)
- Act No. 515/2008 Coll. (related to the introduction of the Euro)
- Act No. 258/2011 Coll. (adopted in relation to the permanent storage of carbon dioxide in the geological environment, following the addition of
Directive (2009/31/EC) on the geological storage of carbon dioxide to Annex III of the ELD

- Acts 39/2013 Coll. (relating to the introduction of the mandatory financial security regime)
- 180/2013 Coll. (relating to the introduction of the mandatory financial security regime)

**Slovenia**
- Act amending the Environment Protection Act (ZVO-1B), Ur.l. št. 70/2008, 7 July 2008
- Rules on detailed criteria for determining environmental damage, Ur.l. RS, št. 46/2009
- Decree on the types of measures for remedying environmental damage, Ur.l. RS, nr. 55/2009

**Spain**
- Environmental Liability Act, Law 26/2007 of 23 October 2007, as amended
- Real Decreto-Ley 8/2011 of 1 July
- Ministry of the Environment and Rural and Marine Affairs, Royal Decree 2090/2008 of 22 December
- Ministerial Order ARM/1783/2011 of 22 June, published in BOE 2011 of 29 June, No. 154, sec. I, p.69142, Priority order and timetable for the publication of ministerial orders (setting out priority for order and timetable for the publication of ministerial orders that will set mandatory financial guarantees for each group of economic activities)

**Sweden**
- Amendment of the Environmental Code Act of 20 June 2007 (SFS 2007/660)
- Ordinance on serious environmental damage (2007/667)

**United Kingdom**
- **England:** Environmental Damage (Prevention and Remediation) Regulations 2009, SI 2009/153
  The English Regulations have been amended by:
  - Environmental Damage (Prevention and Remediation) (Amendment) Regulations 2009, SI 2009/327
  - Environmental Damage (Prevention and Remediation) (Amendment) Regulations 2010, SI 2010/587
- **Wales:** Environmental Damage (Prevention and Remediation Regulations) (Wales) Regulations 2009, SI 2009/995
Scotland: Environmental Liability (Scotland) Regulations 2009, SSI 2009/266

The Scots Regulations have been amended by:
- Environmental Liability (Scotland) Amendment Regulations 2011, SI 2011/116

Northern Ireland: Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009, SI 2009/252

The Northern Irish Regulations have been amended by:
- Environmental Liability (Prevention and Remediation) (Amendment) Regulations (Northern Ireland) 2009, SI 2009/361
- Environmental Liability (Prevention and Remediation) (Amendment) Regulations (Northern Ireland) 2011, SI 2011/210


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- Environmental Liability (Amendment) Regulations 2009, LN 81/2009
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Acknowledgements

This report would not have been possible without the kindness of many people who generously gave their time to share their expertise and insights. The help of the following people who helped in the overall report and the summaries for each Member State is gratefully acknowledged.

► Overall report
  ■ Blandine Chenot, BIO Intelligence Service, Paris, France
  ■ Chris Clarke, University College London, England
  ■ Mathew Hussey, OAMPS (UK) Ltd, England
  ■ Nigel Howorth, Partner and Head of Global Environment Group, Clifford Chance LLP, London, England
  ■ Shailendra Mudgal, BIO Intelligence Service, Paris, France
  ■ Simon White, XL Insurance Company PLc, England

► Austria
  ■ Birgit Schmidhuber, Koordination - Bürgerbeteiligung und Recht, ÖKOBÜRO - Koordinationsstelle österreichischer Umweltschutzorganisationen, (Co-ordination, Public Participation and Law, ÖKOBÜRO, Coordination office of Austrian Environmental Organisations), Justice & Environment, Vienna

► Belgium
  ■ Isabelle Larmuseau, LDR Environmental Lawyers, Ghent
  ■ Katherine Sales, BIO Intelligence Service, Paris, France
  ■ Robin Slabbinck, LDR Environmental Lawyers, Ghent

► Bulgaria
  ■ Kostadin Sirleshtov, Partner, CMS Cameron McKenna LLP, Sofia

► Czech Republic
  ■ JUDr. Petra Humlickova, Ph.D, Law Faculty, Charles University, Prague

► Denmark
  ■ Ludwig Krämer, Derecho y Medio Ambiente, Madrid, Spain

► Estonia
  ■ Kärt Vaarmari, Keskkonnaõiguse Keskus (Estonian Environmental Law Center), Tartu

► Finland
  ■ Jouko Tuomainen, Senior researcher, LL.Lic, Finnish Environment Institute, Helsinki
France
- Katherine Sales, BIO Intelligence Service, Paris, France
- Patricia Savin, Savin Martinet Associés Law Firm, Paris

Germany
- Ludwig Krämer, Derecho y Medio Ambiente, Madrid, Spain

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- Prof. Ioannis Rokas, Senior Partner, Rokas International Law Firm, Athens

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Ireland
- Brendan Foley, Environmental Protection Agency
- Kevin Forde, Environmental Policy and Awareness, Department of the Environment, Community and Local Government
- Dr Aoife Shields, Cork
- David Smith, Environmental Protection Agency

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- Lara Pace, Advocate, GANADO Advocates, Valletta

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- Edward Brans, Pels, Rijcken & Droogleever Fortuijn, advocaten en notarissen, The Hague

Poland
- Magdalena Bar, Jendrośka Jerzmański Bar & Partners. Environmental Lawyers, Wroclaw

Portugal
- Ana Salgueiro, Consulting for Sustainability, Lisbon
- Paula Rios, MDS Portugal, Lisbon
Romania
- Gabriela Badescu, Senior Associate, Voicu & Filipescu, Bucharest
- Georgiana Badescu, Managing Associate, Voicu & Filipescu, Bucharest

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- Stanislav Holec (associate), Clifford Chance LLP, Prague
- Emil Holub (partner), Clifford Chance LLP, Prague
- Michal Jendželovský (junior lawyer), Clifford Chance LLP, Prague

Slovenia
- Senka Vrbica, Environmental Adviser, Legal-information centre for NGOs - PIC, Ljubljana

Spain
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Sweden
- Prof. Jan Darpö, Uppsala University

United Kingdom
- Eddie Bailey, Department for Environment, Food and Rural Affairs, England
- Kim Bradley, Scottish Environment Protection Agency, Scotland
- Caroline Fielder, Environment Agency, England
- Edward Lockhart-Mummery, Department for Environment, Food and Rural Affairs, England