Implementation challenges and obstacles of the Environmental Liability Directive

ANNEX – PART A: LEGAL ANALYSIS OF THE NATIONAL TRANSPOSING LEGISLATION

European Commission – DG Environment
16 May 2013
# Table of content

<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>BELGIUM</td>
<td>5</td>
</tr>
<tr>
<td>DENMARK</td>
<td>33</td>
</tr>
<tr>
<td>FINLAND</td>
<td>63</td>
</tr>
<tr>
<td>FRANCE</td>
<td>87</td>
</tr>
<tr>
<td>GERMANY</td>
<td>113</td>
</tr>
<tr>
<td>GREECE</td>
<td>133</td>
</tr>
<tr>
<td>HUNGARY</td>
<td>151</td>
</tr>
<tr>
<td>IRELAND</td>
<td>175</td>
</tr>
<tr>
<td>ITALY</td>
<td>197</td>
</tr>
<tr>
<td>NETHERLANDS</td>
<td>215</td>
</tr>
<tr>
<td>POLAND</td>
<td>235</td>
</tr>
<tr>
<td>PORTUGAL</td>
<td>265</td>
</tr>
<tr>
<td>ROMANIA</td>
<td>285</td>
</tr>
<tr>
<td>SPAIN</td>
<td>303</td>
</tr>
<tr>
<td>SWEDEN</td>
<td>335</td>
</tr>
<tr>
<td>UK</td>
<td>357</td>
</tr>
</tbody>
</table>
Implementation challenges and obstacles of the Environmental Liability Directive
1. Existing national environmental legislation

Since the constitutional reform in 1980, the federal State of Belgium has only limited jurisdiction over environmental matters. In respect of the ELD, these matters are waste transfer, matters affecting the territorial sea and the exclusive economic zone, and the placing on the market of genetically modified organisms (GMOs).

The three Regions, each of which has a separate legislature, executive body and administrative agencies, are responsible for the remaining environmental matters in Belgium in respect of the ELD.

The Regions are:

- Walloon Region;
- Flemish Region; and
- Brussels-Capital Metropolitan Region (Brussels-Capital Region).

The federal State transposed the ELD in respect of waste transfer, matters affecting the territorial sea and the exclusive economic zone, and the placing on the market of GMOs by a separate Order for each matter. Amendments were also made to the Civil Code concerning the period of limitation for the recovery of costs by a governmental authority and civil protection.

Each of the Regions transposed the ELD into their domestic legislation by single Orders (in the case of the Flemish Region and the Walloon Region) and a single Ordinance (in the case of the Brussels-Capital Region). Prior to the transposition of the ELD by the Flemish Region, a study was carried out by Ghent University Law School and government officials to determine actions required to transpose the ELD appropriately and effectively.¹

2. Existing regimes for preventing and remediating environmental damage

Prior to the transposition of the ELD, legislation existed in Belgium for preventing and remediating soil contamination, surface and ground water pollution, and preventing and remediating marine waters and biodiversity in the marine environment.

- Water pollution

The federal State is responsible for waters of the territorial sea and the exclusive economic zone.

The federal Act on the protection of the marine environment, which was adopted on 20 January 1999, includes provisions for preventing and remediating damage and restoring environmental disruption. The term “damage” is defined as “any damage, loss or prejudice suffered by an identifiable natural or legal person as a result of degradation of the marine environment, whatever its cause”. The term “environmental degradation” is defined as “the negative impact on the marine environment, insofar as it does not amount to damage”.

A person, including a ship owner, who adversely affects the marine environment as the result of an accident or the breach of applicable legislation, is strictly liable for remediating the damage and restoring damaged natural resources. Liability is joint and several.

There is a defence to liability if the damage was caused solely by:

- War, civil war, or terrorism;
- A natural phenomenon of an exceptional, unavoidable and irresistible nature;
- The intentional act or omission of a third party with the intent to cause harm; or
- Negligence or other prejudicial act by an authority responsible for navigational aids.

The liable person must reimburse governmental authorities for their reasonable remediation costs and costs resulting from environmental disruption. In addition, a person who suffers damage is authorised to seek compensation from a liable person.

The three Regions are responsible for water management including surface and ground water pollution. Groundwater pollution is governed by the legislation on contaminated land.

**Flemish Region**: the legislation governing surface water pollution is the Law of 26 March 1971 on the protection of surface waters, together with implementing Decrees.

**Walloon Region**: the legislation governing surface water pollution is set out in Book II of the Environmental Code (that is, the Water Code), and the Decree of 11 March 1999 relating to environmental permits and its implementing Decrees.


- Land contamination

Each of the three regions has enacted its own legislation on contaminated land.

---

Flemish Region:

The Flemish Region introduced the Soil Clean-up Statute on 22 February 1995. The current statute, the Flemish Soil Clean-up Statute, is described below.

The Flemish 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 cleaned up if applicable contaminant threshold levels are exceeded. Historic contamination must be cleaned up only if it poses a potential risk to human health or the environment. If new and historic contamination are both present at a site, the contamination is treated as new contamination unless the person responsible for cleaning it up can differentiate between contamination that was caused prior to 29 October 1995 and contamination that was caused after that date.

The contaminant threshold levels for soil and groundwater were established by the Vlarebo Decree, the current version of which is the Order of 14 December 2007.

All transfers of land in the Flemish Region on or after 1 October 1996 require a soil certificate from the Flemish Waste Agency (OVAM). A transfer of land includes various transactions including a disposal of the freehold, entering into a lease of more than nine years, and a merger or demerger of the company that owns the land.

In other words, to obtain a soil certificate, an exploratory soil survey must be carried out. Unless OVAM considers, during a 60-day consideration period, that the survey indicates the need for remedial measures, the transaction may proceed. If remedial measures may be needed, a descriptive soil survey must be carried out. If the survey indicates that remedial measures are required, the transaction can proceed only if an undertaking is given to OVAM that the remediation will be carried out, OVAM approves the remediation plan, and adequate financial security for the remedial works is provided to OVAM. The soil certificate provides information about the environmental condition of the land.

The holder of the permit or licence for a facility or operations on the contaminated land or the person who is required to file an environmental notification is responsible (but not necessarily liable, see below) for remediating the contamination. If there is no such person on the contaminated land or such a person can show that it was not liable for the contamination, the owner of the land is responsible for remediating the contamination unless that person can show that another person is in control of the land.

The owner and occupier of the land have an “innocent purchaser” defence. The innocent purchaser defence applies to new contamination if:

- The person did not cause the contamination;
- At the time at which the person acquired the land or became in control of it, the person did not know or should not have known that it 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 person did not cause the contamination; and

At the time at which the person acquired the land or became in control of it, the person did not know of should not have known that it was contaminated.

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

The person who caused the contamination is liable for its remediation and the related investigatory and other measures described above. Liability is joint and several. If the contamination is new contamination or has been caused due to an activity that is subject to an environmental permit, strict liability applies. If the contamination is historic contamination, the civil tort liability rules in effect when the contamination was caused apply.

If the person who is liable for remediating soil contamination is different from the person who carried out the remediation, the person who carried out the remediation may seek recovery of part or all of its costs from the person who caused the contamination.

**Walloon Region:**

The Walloon Region introduced the Soil Decree on 1 April 2004. The current statute, the Walloon Soil Management Decree of 5 December 2008, provides for the registration of potentially contaminated land, requirements to remediate soil contamination, and liability for remediation.

An operator of a site, or any other person with control over it, must notify the competent authority if contamination at the site exceeds an applicable concentration level or migrates off-site.

As with the Flemish Region, a soil survey has to be prepared when land is transferred. A transfer includes various transactions including a disposal of the freehold to the land, entering into a long lease (over nine years), and the cessation of potentially polluting activities. The requirements for soil surveys were made available on 1 January 2013.

Until 2010, polluted soil was considered waste and was, therefore, subject to the Waste Decree.\(^3\)

The person who is responsible for remediating the contamination is the person who applies for the soil certificate. This person is not necessarily the same person as the person who is liable for remediating the contamination.

The person who is liable for remediating the contamination, regardless of when it was caused, is:

- The party that caused the contamination provided that person was at fault (primary liability);
- The operator of activities subject to environmental permitting requirements if the party that caused the contamination cannot be identified or has insufficient funds for the remedial measures (secondary liability); or

---

The owner of the land, the ground lessee, the owner of the usufruct, or the lessee, if the above persons cannot be identified or have insufficient funds (tertiary liability).

There are various exemptions to liability including the ownership of land to which contaminants have migrated from another site.

The governmental authority may require a financial guarantee for the costs of remediating environmental damage. The mechanisms include a bank guarantee, a bank deposit, a security bond and a mortgage bond.

**Brussels-Capital Region:**

The Brussels-Capital Region introduced the Ordinance on the management of contaminated land on 13 May 2004. The current Brussels Clean-up statute entered into effect on 5 March 2009. The competent authority is *Bruxelles Environnement*, known as the IBGE, which maintains a register of soil and water quality of all land in the Brussels-Capital Metropolitan Region. Land is divided into five categories. Category 0 is potentially contaminated land, categorised as such due to potentially polluting activities having been carried out on it. Category 1 is land that is not contaminated. Category 2 is land that is contaminated but at which the intervention thresholds are not exceeded. Category 3 is land that exceeds the intervention threshold levels but risks from the contamination have been mitigated to an acceptable level. Category 4 is land that exceeds the intervention threshold levels and for which risk management or remedial measures are ongoing or required.

The Brussels Region requires an investigatory soil survey to be carried out for Category 0 land for various specified transactions. The transactions include the sale of the freehold, a long lease, and mergers and other corporate transactions. If the survey reveals contamination that exceeds an intervention level, a phase II survey must be carried out. If this survey reveals contamination that may pose a risk, a risk assessment must be carried out. The risk assessment indicates the risk management or remedial measures that must be carried out.

A soil certificate, containing details of the environmental condition of the land, is required for all transfers subject to the statute. The surveys and risk management or remedial measures should be completed before the transaction takes place. Earlier transfers are allowed under circumstances such as financial security for remediation costs being provided.

The person who is responsible for carrying out risk management and remedial measures is the person who caused the contamination or the person who owns or operates the site.

The contamination may be “single”, “mixed”, or “orphan” contamination:

- Single contamination is contamination that was caused by the operator of the land or the holder of a legal interest in the land or, for contamination caused after 20 January 2005, a clearly identified person;
- Mixed contamination is contamination that was caused by different persons including the operator of the land and the holder of specified rights in it or, for contamination caused after 20 January 2005, a clearly identified person;
Orphan contamination is any contamination that is not single or mixed contamination.

The operator of the land is liable for remediating orphan contamination that was caused after 20 January 2005. The holder of a legal interest in the land is liable for remediating orphan contamination that was caused before 20 January 2005, or if there is not an operator of the land.

The standard for remediation is the removal of all contamination if the liable person is the person who caused it. A lower standard of remediation to an acceptable level applies if another person is liable.

If the person who is liable for remediating soil contamination is different from the person who carried out the remediation, the latter may seek recovery of part or all of its costs from the liable person.

- Restoring biodiversity damage

Prior to the transposition of the ELD, liability for preventing and remediating biodiversity damage existed for the marine environment.

In addition, the law on nature conservation, which is now under regional competence, contains provisions regarding the prevention and remediation of damage to species and natural habitats protected by the Birds and Habitats Directives.

- Other liability systems for remediating environmental damage

The main provisions for civil liability in Belgium are articles 1382 and 1383 of the Civil Code. Under these articles, a person may bring a claim for compensation against a person who caused damage to that person by its fault or negligence.

Article 1384 of the Civil Code provides that a person who is responsible for a defect in a product is strictly liable for harm caused by it. Contaminated land has been considered to be a defect as has pollution resulting from a defective installation.4

Article 544 of the Civil Code provides a cause of action for nuisance, for which proof of fault is not required.

Pursuant to the Act of 12 January 1993, an environmental NGO in Belgium that meets specified criteria may request the President of the Court of First Instance to order the cessation of an activity that breaches, or presents a serious threat of breaching, environmental legislation. The specified criteria are that the primary aim of the NGO is environmental protection, it has been actively involved in protecting collective environmental interests, and has been in existence as a legal entity for at least three years.5

The Royal Decree of 21 February 2005 regulating the deliberate release into the environment and the placing on the market of genetically modified organisms (GMOs) or derived products

---


5 See Peter De Smedt, Legal tools to encourage citizen participation in environmental enforcement in the Flemish Region (Belgium), Ninth International Conference on Environmental Compliance and Enforcement, pp. 564, 539 (2011)
establishes civil liability. A person who deliberately releases GMOs must make a declaration that they will be liable for “all damages caused to human or animal health, to goods or to the environment as a result of trial testing”.\(^6\)

**Interface between the existing national liability regimes and the ELD regime**

The legislation in Belgium differs from the ELD (and its transposing legislation) in many respects including the following:

- There is no liability for compensatory or complementary remediation in the existing legislation;
- The defences to liability are more limited in the existing legislation;
- The permit defence and the state-of-the-art defence do not apply in the existing legislation;
- There is no statute of limitations in the existing legislation;
- The ELD regime applies only if the damage is caused by an activity listed in Annex III of the ELD;
- Liability under the existing legislation is not limited to an operator but includes owners, operators and occupiers of contaminated land who are liable due to their status as such owners or occupiers;
- Liability is retrospective as well as prospective in the existing legislation;
- The existing legislation for remediating soil and groundwater contaminated is more sophisticated and detailed than liability for land damage under the legislation transposing the ELD; and
- The legislation transposing the ELD is not triggered by the transfer of land and does not contain any requirements for soil certificates.

### 3. Integration of ELD into existing national legal framework

**Transposing legislation**

**Federal State:**

- Royal Order of 3 August 2007 published in the Belgian Monitor of 20 September 2007, with regard to the prevention and remediing of

---

environmental damage when placing on the market GMOs or GMO-containing products (GMO Order)\(^7\)

- 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 (Marine Order)

- 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 (Transport Order)

**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 (Walloon Decree)

**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 (Flemish Decree)

**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 (Brussels-Capital Ordinance or Ordinance)

Amendments to existing national environmental law

The abovementioned legislation amended various existing legislation, in particular the following.

**Federal State:** Federal Law of 25 April 2007 modified various legislative provisions; in particular it inserted an article 2277ter in the Civil Code (on the statute of limitations for cost recovery proceedings launched by public authorities) and the law of 31 December 1963 on civil protection.

**Walloon Region:** the Walloon Decree amended Book I of the Environment Code (see above).

**Flemish Region:** the Flemish Decree amended the Decree of 5 April 1995 (see above).

\(^7\) The Federal State is the competent authority for the placing on the market of GMOs. That is, the GMO Order covers occupational activities consisting in the placing on the market of GMOs. The “Report to the King” attached to the Royal Order, confirms that the federal authority is competent regarding the placing on the market of GMOs but not their deliberate release.
Brussels-Capital Region: the only amendments in the Brussels Ordinance are to the Ordinance of 25 March 1999 on environmental offences.

- Authorisation in legislation for other governmental entities to issue rules and regulations

The Laws and Decrees allow the King (federal) or the Government (Regions) to execute such Laws and Decrees and to provide details of such aspects. For example, in the Flemish Region, the Governmental Order of 9 September 2011 (Belgian Monitor of 13 October 2011, which entered into force on 23 October 2011) concerns the request for measures and the appeal procedures. A second Government Order concerning duties of information, prevention and remediation is currently in preparation. That Order will absorb the first Order.

- Relationship to other legislation

Flemish Region: the Flemish Decree specifically states that it is without prejudice to more stringent provisions regarding occupational activities, and without prejudice to applicable liability law, the right of access to a judge and legislation containing rules on the conflict of jurisdiction.

Brussels-Capital Region: the Brussels Ordinance specifically states that it is without prejudice to:

- more stringent legislation with regard to the prevention and remedying of environmental damage caused by one of the occupational activities with the scope of the ordinance;
- legal provisions regulating access to justice, imposing exhaustion of administrative remedies before judicial proceedings may be brought forth and containing rules on conflicts or jurisdiction;
- any provisions of national regulations concerning cost allocation in cases of multiple party causation (see article 9 of the ELD); and
- federal legislation on civil protection, fire, emergency medical assistance and the prevention of major accidents.

The Brussels Ordinance also states that it does not bar the enactment of appropriate measures in relation to situations where double recovery of costs could occur as a result of concurrent action by a competent authority under the Ordinance and by a person whose property is affected by the environmental damage (see ELD, article 16(2) and recital 29).

- Guidance and other documentation

The Walloon Region has published guidance in Belgium’s official journal. This guidance is also available on www.environnement.wallonie.be. Forms for members of the public who wish to report environmental damage and operators who wish to request cost recovery or exemptions, are also available from www.wallonie.be/fr/search/node/responsabilité environnementale.

4. Effective date of national legislation

Federal State: The GMO Order entered into force on 20 September 2007; there is no provision regarding retroactive application.

The Marine Order entered into force on 19 November 2007; there is no provision regarding retroactive application.
The Transport Order entered into force on 9 November 2007, but applies retroactively to an imminent threat of, or actual, environmental damage that occurred on or after 1 November 2007, except when it derives from a specific activity that took place and finished before that date.

**Walloon Region:** the Walloon Decree entered into force on 29 December 2007; liability applies retrospectively to 30 April 2007.

**Flemish Region:** the Flemish Decree entered into force on 30 April 2007. (The Decree says it enters into force on 30 April 2007; it was published in the B.M. of 12 February 2008.)

**Brussels-Capital Region:** the Ordinance formally entered into force on 14 November 2008; liability applies retrospectively to 30 April 2007.

## 5. Competent authority(ies)

The competent authorities are as follows.

**Federal State:** The competent authority for the GMO Order is *Service public fédéral Santé publique, Sécurité de la Chaîne alimentaire et Environnement* (Federal service for Public Health, Food Chain Safety and Environment), with possible advisory consultation of the *Service de Biosécurité et Biotechnologie* (Biosafety and Biotechnology Service).


The competent authority for the Transport Order is *Service public fédéral Mobilité et Transports* (Federal service for Mobility and Transportation).

**Walloon Region:** the competent authority is the environmental administration of the Walloon region, namely the head of the Directorate-General for Natural Resources and Environment (*Direction générale des Ressources naturelles et de l’Environnement*), and his delegate(s).

**Flemish Region:** the competent authority is the Department of Environment, Nature and Energy.

**Brussels-Capital Region:** The competent authority is the *Institut Bruxellois pour la Gestion de l’Environnement* (IBGE).

## 6. Operators and other liable persons

**Federal State:** The definition of an operator in the GMO Order and the Transport Order is the same as in the ELD, including the holder of a permit or authorisation. There is no definition of an operator in the Marine Order.

**All Regions:** The definition of an operator is the same as in the ELD.

  - Secondary liability (e.g., parent company)

**All jurisdictions:** The transposing legislation does not mention the secondary liability of a parent company or other person.
Death or dissolution of responsible operator

All jurisdictions: The transposing legislation does not mention the effect of the death or dissolution of a responsible operator.

Person other than an operator who may be liable

Federal State: The transposing legislation does not impose liability on any person other than an operator, with the exception of the Marine Order, pursuant to which the owner of the ship may also be liable.

All Regions: The transposing legislation does not impose liability on any person other than an operator.

7. Annex III legislation

Federal State: The Marine Order does not contain an annex or other reference to Annex III activities. The Transport Order includes the transport of invasive alien species as an Annex III activity.

Walloon Region: Annex I of the Walloon Decree is mainly a copy out of Annex III to the ELD.

Flemish Region: Annex IV to the Flemish Decree is a copy out of Annex III to the ELD.

Brussels-Capital Region: Annex III to the Ordinance is mostly a copy out of Annex III to the ELD. The Ordinance does not include installations subject to authorisation concerning air pollution.

Rebuttable presumption that operator’s activity caused environmental damage

All jurisdictions: The transposing legislation does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

Additional “occupational activities” subject to strict liability

Federal State and Walloon Region: The transposing legislation does not impose strict liability on any additional occupational activities.

Flemish Region: The transposing legislation does not impose strict liability on any additional occupational activities.

Brussels-Capital Region: The Ordinance adds the deliberate release into the environment, and the transport, of invasive alien species.

Spreading of sewage sludge for agricultural purposes

All jurisdictions: The spreading of sewage sludge for agricultural purposes is not exempted from Annex III activities.

8. Standard of liability for non-Annex III activities

All jurisdictions: The standard of liability for non-Annex III activities is fault or negligence.
9. **Exceptions**

- Applicable to imminent threat of environmental damage as well as environmental damage

**Federal State:** The exceptions apply to an imminent threat of, and actual, environmental damage except for the Marine Order, which applies to actual environmental damage only.

**All Regions:** The exceptions apply to an imminent threat of, and actual, environmental damage.

- Differences with exceptions in the ELD

**Federal State:** The GMO Order does not include marine and nuclear conventions, which are not applicable.

The Marine Order does not include the following exceptions:

- Damage caused by an act of armed conflict, etc.;
- Damage caused by a natural phenomenon of exceptional, inevitable and irresistible character;
- Damage to the marine environment arising from an incident in respect of which liability or compensation falls within the scope of the international Convention of 10 October 1989 on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels; and
- The right of the operator to limit his liability in accordance with national legislation implementing the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI) of 1988.

The exceptions in the Transport Order are a copy out of the exceptions in the ELD.

**Flemish and Brussels-Capital Region:** the exceptions are mostly a copy out of the ELD.

**Walloon Region:** The exceptions do not include activities related to defence.

- Diffuse pollution exception

**Federal State:** The diffuse pollution exceptions are a copy out of the ELD except that the exception in the Marine Order applies to actual damage to the marine environment provided there is a cause-and-effect relation between the damage and the activities of the ship owner or the operator

**All Regions:** The diffuse pollution exceptions are a copy out of the ELD.

10. **Joint and several liability**

**All jurisdictions** adopted joint and several liability.

- Mechanism for contribution between liable operators

**All jurisdictions:** The transposing legislation does not specify a mechanism for contribution between liable operators. There is no existing legislation to fill this gap.
11. **Limitation period**

**Federal State:** neither the GMO Order nor the Marine Order specifies a limitation period.

**All Regions:** The limitation period is 30 years, the same as in the ELD.

12. **Defences**

- **Defences to liability or costs?**

  **Federal State:** The defences in the GMO Order are defences to costs. The Order states that the operator must pay to prevent or remediate an imminent threat of, or actual, environmental damage. The GMO Order further provides that the federal ministers in charge of environment and public health shall set the rules and procedures to enable the operator to recover the costs incurred. The defences in the Transport Order are defences to costs. The Transport Order has similar language to the GMO Order except that it refers to the federal ministers in charge of mobility, environment and public health.

  The Marine Order does not refer to any defences.

  **Walloon Region:** the third-party and compulsory order defences are defences to costs. The permit and state-of-the-art defences are defences to liability because the competent authority can suspend an operator’s duty to carry out such measures.

  In the case of defences provided for in article 8(3) of the ELD (third party and compulsory order defences), the Decree establishes a “cost recovery procedure” (*demande de remboursement*), whereas for Article 8(4) defences (permit and state-of-the-art defences), the Decree establishes an “exemption procedure” (*procédure d’exonération*).

  **Flemish Region:** the defences are defences to costs (see new article 15.5.1 of the Decree of 5 April 1995). The appeal of an order does not have a suspensive effect. Concerning the responsible third party defence, the Decree adds that such ELD defence applies provided that the third party is not the operator’s legal predecessor, representative or agent. In addition, the Decree provides that defences do not apply to land damage (article 15.5.2), as defined under the Decree (see below).

  **Brussels-Capital Region:** the defences are defences to costs. The provisions are a copy out of article 8(3) and (4) of the ELD.

  - **If defences to liability; suspension (or not) of remediation notice during appeal**

  **All jurisdictions:** the legislation does not provide for a suspension of a remediation notice during an appeal. But note the ability of a competent authority to suspend the duty to carry out measures in the Walloon Region.

  - **Permit defence**

  **Federal State:** None of the Orders adopted the permit defence. The Marine Order does not apply to previously identified damage to the marine environment which results from activities of the ship owner or operator concerned which have been expressly authorised by the Minister, in accordance with applicable law.
All Regions: All the Regions adopted the permit defence.

State-of-the-art defence

Federal State: None of the Orders adopted the state-of-the-art defence.

All Regions: All the Regions adopted the state-of-the-art defence.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
- Extension of biodiversity to nationally protected biodiversity

All jurisdictions: The Federal State and all the Regions have not extended biodiversity protection under the ELD to nationally protected biodiversity.

Biodiversity damage in the exclusive economic zone

Federal State: The Federal State, which has jurisdiction over marine waters, has declared an exclusive economic zone and the right to exploit it for minerals. Liability for biodiversity damage under the ELD therefore applies to that zone.

Water or water body

Federal State: It is not clear whether the GMO Order and the Transport Order require environmental damage to waters under the Water Framework Directive or a water body under that Directive. This issue does not apply to the Marine Order due to its application to marine waters only.

All Regions: The environmental damage must be to a surface water body or a body of groundwater under the Water Framework Directive. *See 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).*

14. **Thresholds**

Water damage

All jurisdictions: the threshold for water damage is the same as that in the ELD.

Biodiversity damage

All jurisdictions: the threshold for biodiversity damage is the same at that in the ELD.

National biodiversity damage

All jurisdictions: the threshold for biodiversity damage is the same at that in the ELD.
Land damage

**Federal State and Brussels-Capital Region:** the threshold for land damage is the same at that in the ELD.

**Walloon Region:** The threshold for land damage is the same as that in the Soil Decree of 2008. As in the Flemish Region, therefore (see directly below), the remediation threshold is higher than that in the ELD and soil pollution with a threshold lower than the ELD is also remediated to a higher level than required by the ELD.

**Flemish Region:** the Decree defines land damage as "new land contamination exceeding clean-up (assainissement) standards complying with" the decree of 27 October 2006 on land clean-up and protection.

The clean-up standards for new land contamination in the Flemish Region are more severe than the threshold under the ELD and, therefore, lower. The ELD uses the same concept as that for historic land damage (that is, before 1995); remediation is required only if there is a severe negative risk for human health.

15. **Standard of remediation**

- **Land**
  - **Federal State:** not applicable.
  - **Walloon Region:** see section 14 above.
  - **Flemish Region:** the Flemish Decree provides that land remediation is carried out in compliance with the "relevant provisions" of the Decree of 27 October 2006 on land clean-up (assainissement) and protection.
  - **Brussels-Capital Region:** Annex I(3) of the Brussels-Capital Ordinance provides that the remediation objectives, the identification of remedial measures and the choice of remedial options are determined in accordance with the Ordinance regarding management and clean-up (assainissement) of contaminated land. Annex I(3) further provides that land damage is assessed in accordance with that Ordinance.

- **Biodiversity**
  - **Primary remediation**

- **All jurisdictions:** the standard of remediation for biodiversity damage is the same as that in the ELD.
  - **Complementary and compensatory remediation**

- **All jurisdictions:** the standards for complementary and compensatory remediation are the same as the ELD.

- **Water**
  - **Primary remediation**

- **All jurisdictions:** the standard of remediation for water damage is the same as that in the ELD.
Complementary and compensatory remediation

All jurisdictions: the standards for complementary and compensatory remediation are the same as the ELD.

16. **Format of determination of environmental damage**

The transposing legislation does not specify any particular format for a determination of environmental damage.

17. **Powers and duties of competent authority**

- Inspections, investigations, studies and analyses

All jurisdictions: The transposing legislation does not refer to any power or duty of a competent authority to carry out inspections, investigations, studies or analyses.

- Information orders

Federal State: The competent authorities may require the operator to provide information when there is an imminent threat of, or actual, environmental damage. In addition, the Marine Order authorises the competent authority to require the ship owner or the operator to provide additional explanations or information regarding the work plan proposal or the proposal for remedial measures (see below); they must comply with such request within 15 days of receiving it.

All Regions: The competent authorities may require the operator to provide information when there is an imminent threat of, or actual, environmental damage.

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

All jurisdictions: Competent authorities have the power, but not the duty, to require an operator to carry out preventive measures.

- Power or duty to require an operator to carry out remedial actions

All jurisdictions: Competent authorities have the power, but not the duty, to require an operator to carry out remedial actions.

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

Federal State: Competent authorities have the power, but not the duty, to require an operator to carry out remedial measures.

Walloon Region and Flemish Region: Competent authorities have the duty to require an operator to carry out remedial measures.

Brussels-Capital Region: Competent authorities have the power, but not the duty, to require an operator to carry out remedial measures.

- Power or duty of competent authority to carry out preventive measures

All jurisdictions: Competent authorities have the power, but not the duty, to carry out preventive measures.
Power or duty of competent authority to carry out remedial measures

**Federal State:** Competent authorities have the power, but not the duty, to carry out remedial measures. In addition, the Marine Order provides that the competent authority has the power unilaterally to decide to stop the implementation of the work plan (see below), and to note (constater) the significant impairment of the marine environment and to take the necessary remedial measures if (1) the ship owner or the operator does not comply with the legislation or the work plan, (2) new information requires the immediate intervention of the authorities, (3) carrying out the implementation of the work plan will not result in the necessary remedial measures (article 15). The competent authority has the power to take remedial measures also when the ship owner or operator (1) does not notify a work plan, or notify an incomplete or insufficient work plan, (2) does not notify his acceptance of the work plan proposed by the competent authority, or (3) is not identified.

**All Regions:** Competent authorities have the power, but not the duty, to carry out remedial measures.

Form of preventive order

**All jurisdictions:** The transposing legislation does not provide for a particular format for a preventive order.

Form of remediation order

**Federal State:** The transposing legislation does not provide for a particular format for a remediation order.

The Marine Order, however, sets out a detailed process for issuing the order for remedial measures. The competent authority must notify to the ship owner or operator a request for the definition of remedial measures. Within 60 days of said notification, the ship owner or the operator must notify a work plan proposal to the competent authority; the Marine Order details what the work plan proposal must include (see article 11, section 2). Within 60 days of the notification of the work plan proposal, the competent authority notifies a work plan to the ship owner or the operator (which enters into force the following day), who then must, within 15 days, notify their acceptance of the work plan to the competent authority (the work plan must notably include a time limit and a schedule for the elaboration of the proposal for remedial measures, see article 13).

A comité d’accompagnement is established; it is composed of one or several members of the competent authority and possibly of a third party it will appoint. Consultations must be organised at least three times over six months (duration of the work plan) between the work plan coordinator (identified in the work plan proposal) and the comité d’accompagnement.

If the real or scientific grounds on which the work plan is based are modified, the competent authority may modify the work plan, after having consulted the ship owner or the operator.

The proposal for remedial measures is elaborated under the supervision of the work plan coordinator. The Marine Order provides details as to what must be included in each proposal for remedial measures (art.17). The ship owner or the operator must notify the remedial measures proposal to the competent authority within 10 days following expiration of the time limit set for the elaboration of the proposal. Within 60 days of this notification, the competent authority must
take a decision on the choice of remedial measures and its reasons for it, and notify it to the ship owner or the operator (article 19 specifies what the notification must include). The Marine Order also includes a copy out of ELD Annex II, 1.3.3.

**Walloon Region:** The Decree does not provide for a particular format for a remediation order. The Walloon Decree, however, provides that before taking a decision on remedial measures, the competent authority must inform the operator by mail of its intention to prescribe such measures. The operator has twenty days (which could be shortened in case of emergency) from the sending of said mail to present his observations. After that, the authority may prescribe remedial measures.

**Flemish and Brussels-Capital Region:** The transposing legislation does not provide for a particular format for a remediation order.

- **Appeal against preventive or remediation order**

  **Federal State:** The Marine Order only provides that the competent authority's order requiring the undertaking of remedial measures will specify the time and remedies (voies de recours) at the disposal of the ship owner or operator.

  **Walloon Region:** the operator may appeal against a decision requiring remediation. The Decree only provides that when the decision is notified to the operator, he shall at the same time be informed of how and within which timeframe he may appeal the decision.

  **Flemish Region:** the operator may appeal against a decision requiring remediation before the Flemish Government; it must be done by certified mail within 30 days upon receiving the contested order. The Flemish Government then has 15 days to rule on the admissibility of the appeal; if the appeal is declared admissible, the Flemish Government has 90 days to render its decision (in the absence of any such decision, the appeal will be deemed dismissed). The appeal has no suspensive effect.

  **Brussels-Capital Region:** the Ordinance only provides that when the decision is notified to the operator, he shall at the same time be informed of how and within which timeframe he may appeal the decision.

- **Sanctions for delay in complying with preventive or remediation order**

  **All Regions:** The transposing legislation does not specify any particular sanctions for a delay in complying with a preventive or remediation order. See section 23 below regarding offences and sanctions.

- **Formal consultees on contents of preventive orders and remediation orders**

  **Federal State:** the GMO Order provides that in order to define preventive and remedial measures, the competent authority must consult the SBB (Service de Biosécurité et Biotecnologie), which has an advisory role. The Marine Order provides that the competent authority may choose to be assisted of any person, natural or legal, public or private, it deems necessary.

  **All Regions:** the transposing legislation does not provide for any formal consultees on the contents of preventive orders and remediation orders. As with other Member States, however, the competent authority invites comments / observations from persons on whose land remedial
measures are to be carried out as well as interested parties. In the Walloon Region, local authorities in the area where remedial works are to be carried out must also be invited to submit comments / observations.

- **Recovery of implementation and enforcement costs**

**Federal State:** The definitions of costs in the GMO Order and the Transport Order are a copy out of the ELD.

The definition of costs in the Marine Order is slightly different from that under the ELD. Under the Marine Order, “costs” means costs which are justified for the undertaking of preventive, containment or remedial measures; including the costs of assessing impairment to the marine environment, an imminent threat of such impairment, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection, indirect costs, and monitoring and supervision costs.

The recovery of costs applies to remedial, preventive or containment measures, whether they were taken in Belgian territorial waters or beyond. Each authority that has jurisdiction over sea matters (*compétence en mer*) must report on the costs of the measures it has taken. Competent authorities with jurisdiction over sea matters may bring a cost recovery action against the ship owner or the operator. Such authorities send the cost recovery request to the ship owner or the operator, requiring that they deposit the claimed amount on an account specified by them.

**Walloon Region:** the definition of costs in the Walloon Decree is a copy out of the ELD. The operator bears the full costs of preventive and remedial measures. If the operator has not provided any financial guarantee (the competent authority may require the operator to do so), the authority recovers the costs from the operator, unless the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified.

**Flemish Region:** the definition of costs in the Flemish Region is a copy out of the ELD. The costs recovered by the competent authority are to the benefit of the *Fonds MiNa*, that is, a fund is financed by environmental taxes, environmental fines, etc. Money from the fund is used for many kinds of measures to implement Flemish environmental policy.

The Flemish Region may recover the costs through a *contrainte* or *dwangbevel*) endorsed by the competent authority and declared enforceable. The *contrainte* is notified to the operator, who then has 30 days from the day he receives it to lodge an objection before the Flemish Region; such objection has a suspensive effect. The Flemish Region recovers the costs via security over property or other appropriate guarantees (including a legal mortgage).

**Brussels-Capital Region:** the definition of costs in the Ordinance is a copy out of the ELD. The operator bears the costs of preventive and remedial measures. If the operator has not provided any financial guarantee (the competent authority may require the operator to do so), the authority recovers the costs from the operator, unless the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified. The competent authority may recover the costs from the operator or the third party who has caused the imminent threat of, or actual, damage.
Deadline for competent authority to seek recovery of costs

**All jurisdictions:** Competent authorities have five years from the date of completion of preventive and remedial measures to recover costs incurred by them in carrying out those measures. If the operators or third parties are identified at a later date, the five year limitations period commences on the date on which an operator or third party is identified.

### 18. **Duties of responsible operators**

#### Preventive measures

**All jurisdictions:** an operator has a duty to carry out preventive measures.

#### Remedial actions (emergency actions)

**Federal State:** an operator has a duty to carry out emergency remedial actions. However, the Marine Order does not contain any specific provisions in this regard.

**All Regions:** an operator has a duty to carry out emergency remedial actions.

#### Remedial measures

**All jurisdictions:** an operator has a duty to carry out remedial measures.

#### Duty to notify / provide information when imminent threat of environmental damage occurs

**Federal State:** the GMO Order and the Transport Order provide that an operator has a duty to inform the competent authority when there is an imminent threat of environmental damage; the notification provisions are a copy out of the ELD. This duty is the same for environmental damage.

The Marine Order does not contain any provisions in this respect or for the notification of environmental damage.

**Walloon Region:** in addition to the competent authority, the operator must notify the local authorities (*collège ou collèges communaux*) on whose territory the remedial measures will have to be implemented. This duty also applies to notifications of environmental damage.

**Flemish Region:** the operator has a duty to notify/provide information of all relevant aspects of the situation when an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator (copy out of the ELD).

**Brussels-Capital Region:** the operator has a duty to notify/provide information of all relevant aspects of the situation when an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator (copy out of the ELD).

#### Entity to which notification should be provided

**Federal State:** the competent authority to which notification should be provided under the GMO Order is the *Service public fédéral Santé publique, Sécurité de la Chaîne alimentaire et Environnement* (Federal public service for Public Health, Food Chain Safety and Environment).
The competent authority to which notification should be provided under the Marine Order is the Direction générale Environnement du Service public fédéral Santé publique, Sécurité de la Chaîne alimentaire et Environnement ("DG Environnement").

The competent authority to which notification should be provided under the Transport Order is the Service public fédéral Mobilité et Transports (Federal public service for Mobility and Transportation).

Walloon Region: notification must be provided to the head of the Directorate-General for Natural Resources and Environment and to the collège(s) communal(aux) of the municipality(ies) on whose territory the measures must be carried out.

Flemish Region: notification must be provided to the Department of Environment, Nature and Energy.

Brussels-Capital Region: notification must be provided to the competent authority(ies) (which is (are) not precisely identified in the Ordinance).

19. Access by responsible operators to carry out measures on third-party land

Federal State: None of the three Royal Orders have specific provisions regarding access to third-party land.

Walloon Region: the Walloon Decree does not provide details as to access by the operator to third-party land to carry out measures.

Flemish Region: the Flemish Decree does not provide details as to access by the operator to third-party land to carry out measures.

Brussels-Capital Region: the Ordinance does not provide details as to access by the operator to third-party land to carry out measures.

20. Interested parties

Federal State: interested parties may submit comments / observation under the Marine Order only in respect of environmental damage, not an imminent threat of such damage.

Walloon Region and Flemish Region: interested parties may submit comments / observation only in respect of environmental damage, not an imminent threat of such.

Brussels-Capital Region: interested parties may submit comments / observations in respect of an imminent threat of, and actual, environmental damage.

Qualification criteria for “sufficient interest”

Federal State: the Marine Order does not provide precise qualification criteria for “sufficient interest”, but provides that it may include “notably the legal persons within the meaning of article 2 of Law of 12 January 1993 on a right of action in the field of environment protection”.

Neither the Transport Order nor the GMO Order mentions qualifications for a sufficient interest.
Walloon Region: organisations (associations) for the protection of the environment have a sufficient interest if they have legal personality, include protection of the environment in their statutory objectives and prove that their actual activity complies with this statutory objective.

Flemish Region: the Flemish Decree does not refer to having “sufficient interest” but refers instead, to an “interest”.

Brussels-Capital Region: the Ordinance does not refer to having “sufficient interest” but refers instead, to an “interest”. Any organisation (association) working in favour of the protection of the environment in the Brussels Capital Region is deemed to have an interest provided: (i) it is a non-profit organisation, (ii) it existed prior to the date of the imminent threat of, or actual, environmental damage, (iii) protection of the environment is its statutory objective, and (iv) the interest invoked in the request for action falls within the statutory objective as it appears at the date of the imminent threat of, or actual, damage.

Method of notifying interested parties of planned remedial measures

Federal State: the Marine Order provides that the competent authority must inform the ship owner or the operator of the request for action and invite him to provide information and explanation (within 30 days of receiving the competent authority’s notification). The competent authority must inform interested parties of its decision to accede to or refuse the request for action (and the reasons for it) within 90 days of receiving the said request for action.

Walloon Region: the Walloon Decree provides that in addition to the operator, the competent authority must inform the following persons of its intention to require preventive or remedial measures, who will then have 20 days (which may be shortened in case of emergency) to present their observations: interested parties, landowners on whose property the measures must be implemented, and collèges communaux on which the piece of land is located.

Flemish Region: the Flemish Decree provides that the competent authority shall invite interested parties, persons on whose land the remedial measures must be implemented and the operator to submit comments/observations, which the authority will have to take into account.

Brussels-Capital Region: the Ordinance provides that the competent authority shall invite interested parties and persons on whose land the remedial measures must be implemented, to submit comments/observations, which the authority will have to take into account.

Information to be provided to competent authority

Federal State: the Marine Order states that the request must include relevant information and data.

Walloon Region: the request must include relevant information and data. If the request for action is formulated in a manner that is too vague or too general, the competent authority must invite the interested party, no later than one month (or two months depending on the complexity of the matter) following receipt of the request, to further precise his request and helps him to this end in an adequate manner.

Flemish Region and Brussels-Capital Region: the request must include relevant information and data.
Challenges to competent authority’s decision

**Federal State:** The three Orders do not include specific provisions regarding challenges to the competent authority’s decision by interested parties. However, an administrative review procedure before the Council of State allows a person to challenge the substantive or procedural legality of decisions, acts (section 1) or omissions (section 3). The procedure is set out in the Co-ordinated laws on the Council of State of 1973. The Council of State is not part of the judiciary, but has an independent status.

**Walloon Region:** the interested party may challenge the competent authority’s decision before the Walloon Government within 10 business days upon receiving the notification of the competent authority’s decision or, when the authority is silent, within 10 days following expiry of the time limits set for cost recovery or cost exemption actions brought forth by the operator. The Walloon Government shall render its decision no later than 90 days following receipt of the appeal. This decision is notified to the interested party; the notification indicates how and within which timeframe an appeal may be brought against such decision.

**Flemish Region:** there are no specific provisions concerning challenges to the competent authority’s decision by interested parties. However, the persons mentioned in article 15.6.1 of DABM XV: section 1 can appeal against the decision of the competent authority; see articles 15.6-3, 15.7-1.

**Brussels-Capital Region:** interested parties may challenge the competent authority’s decision before the Environment College (Collège d’Environnement), whose decisions may in turn be challenged before the Government.

Duty on competent authority to respond to person making comments

**Federal State:** the GMO Order provides that the competent authority shall, as soon as possible, inform the person who submitted observations of its decision to accede to or refuse the request and shall provide the reasons for it. It is a copy out of the ELD.

The Marine Order and the Transport Order provide that the competent authority must inform interested parties of its decision to accede to or refuse the request for action (and the reasons for it) within 90 days of receiving the request for action.

**Walloon Region:** the competent authority must acknowledge receipt of the request within 10 business days of receiving it. The competent authority shall inform the person who submitted comments/observations of its decision to accede to or refuse the request and shall provide the reasons for it, “as soon as possible and no later than one month following receipt of the request” or within two months if the scope and complexity of the matter so require. The Decree also provides that the competent authority must inform the interested party before prescribing remedial measures, who then has 20 days to present comments/observations. However, the Decree does not provide that the decision imposing remedial measures on the operator should also be notified to the interested party.

**Flemish Region:** the competent authority must inform interested parties as soon as possible and in any case within 30 days of its decision to take, or no take, measures and provide the reasons for such a decision. The competent authority shall invite the interested party to submit
comments/ observations regarding planned remedial measures; such comments/ observations will then have to be taken into account.

**Brussels-Capital Region**: the competent authority shall inform the person who submitted observations of its decision to accede to or refuse the request and shall provide the reasons for it, “as soon as possible and no later than one month following receipt of the request”. The Ordinance provides that the relevant modalities will be established by the Government.

- Inclusion of interested party in any proceedings by the competent authority against an operator

**All jurisdictions**: There are no provisions for the inclusion of interested parties in any proceedings by the competent authority against an operator.

An environmental NGO, however, has the right to ask a court to order an operator to cease carrying out an activity that breaches, or presents a serious threat of breaching, environmental legislation (see section 2 above).

### 21. Public access to information regarding environmental damage and related measures

The transposing legislation does not provide for public access to information regarding environmental damage and related preventive, containment or remedial measures. As with other Member States, legislation transposing Directive 2003/4/EC on public access to environmental information applies.

### 22. Charges on land / financial security after environmental damage

**Federal State**: the Marine Order provides that when submitting his work plan proposal, the ship owner or the operator must include evidence of an appropriate bank guarantee granted by a bank established in Belgium or an appropriate guarantee declared admissible by the authorities and signed by a Protection and Indemnity Club.

**Walloon Region**: when the competent authority decides to take the necessary measures itself, it may require the operator to provide a caution or any other appropriate security listed in the Decree (an irrevocable guarantee provided by a financial institution, a sum deposited with the *Caisse de dépôt et de consignation*, a deposit (*cautionnement*) or a mortgage).

**Flemish Region**: The Flemish Region may recover the costs through a *contrainte* or *dwangbevel* endorsed by the competent authority and declared enforceable. The *contrainte* is notified to the operator, who then has 30 days from the day he receives it to lodge an objection before the Flemish Region; such objection has a suspensive effect. The Flemish Region recovers the costs via security over property or other appropriate guarantees (including a legal mortgage). On the basis of the enforceable *contrainte*, the Flemish Region has the benefit of a general lien on the operator’s real estate and may burden the operator’s property (located in the Flemish Region) with a legal mortgage. The decree also provides that the Flemish Government may accept other forms of financial security.
Brussels-Capital Region: the provision refers to "security over property or other appropriate guarantees", which is a copy out of ELD. The Ordinance further provides that the Government shall determine the financial guarantees that are considered to be appropriate.

23. Offences and sanctions

Federal State: the legislation transposing the ELD does not mention offences and sanctions.

The Law of 20 January 1999 concerning the protection of the marine environment: articles 49-60 contain the relevant sanctions, of which there are many different ones.

Walloon Region: the legislation transposing the ELD does not mention offences and sanctions.

The Decree of 5 June 2008 concerning the investigation, prosecution and remediation of environmental offences applies. There are four categories of offences, each with different sanctions:

- (1° category) imprisonment between 10 and 15 years and a fine between €100.000 and €10,000.000;
- (2° category) imprisonment between eight days and three years and a fine between €100 and €1.000.000;
- (3° category) imprisonment between eight days and six months and a fine between €100 and €100.000; and
- (4° category) a fine between €1 and €1.000.

Flemish Region: the legislation transposing the ELD does not mention offences and sanctions.

Articles 16.6.1-16.6.10 of the Decree of 5 April 1995 (general provisions on environmental policy) apply. The articles contain different criminal offences and sanctions, which also apply to the environmental damage Decree. The standard sanction is imprisonment between one month and two 2 years and/or a fine between €100 and 250.000.

Brussels-Capital Region: the Ordinance created new criminal offences and sanctions. The main offences are as follows:

- A penalty of one year imprisonment and/or a €62.5 to €625 fine for the operator’s failure (i) to comply with an obligation to provide information regarding preventive and remedial measures, (ii) to provide the information requested when it has been repeatedly invited to do so, and (iii) to provide adequate financial security for recovery of costs by the competent authority; and
- A penalty of one year imprisonment and/or a €625 to €62,500 fine for the operator’s failure (i) to perform the preventive and remedial measures imposed by the competent authority, (ii) to comply with its obligations to take preventive and remedial measures, (iii) to comply with instructions given to it by the competent authority, and (iv) to comply with its obligation to submit the potential remedial measures to the competent authority for approval.
Directors and officers liability for breaching legislation

**All jurisdictions:** The transposing legislation does not mention directors’ and officers’ liability for breaching the legislation.

Publication of penalties

**All jurisdictions:** The transposing legislation does not mention the publication of penalties.

24. **Registers or data bases of incidents**

**Federal State, Walloon Region and Brussels-Capital Region:** The transposing legislation does not mention any registers or data bases of incidents of ELD incidents.

**Flemish Region:** The competent authority must submit a biennial report to the Flemish Government (see section 28 below).

25. **Cross border damage in another Member State**

**Federal State:** the GMO Order and the Transport Order indicate the procedures for cross-border environmental damage; the procedures are largely a copy out of the ELD. The Marine Order does not indicate such procedures.

**All Regions:** The transposing legislation provides for co-operation in the event of cross border damage in another Member State.

26. **Financial security**

**All jurisdictions:** The Federal State and the Regions have decided not to impose mandatory financial security.

27. **Establishment of a fund**

**Federal State:** None of the three Orders provide for the establishment of a fund.

**Walloon Region:** The Walloon Environmental Code sets out provisions on an environmental fund. Although the fund was not established under the ELD transposing legislation, monies recovered under the ELD regime are paid into the fund. One of the missions of the fund is environmental rehabilitation and compensation.

**Brussels-Capital Region:** the transposing legislation does not provide for the establishment of a fund.

**Flemish Region:** the Decree does not establish a fund, but provides that the costs recovered from the operator will benefit the Fonds MiNa (see section 17 above).

28. **Reports**

**Federal State:** neither the GMO Order nor the Transport Order mentions any reports. The Marine Order provides that each authority that has jurisdiction over sea matters (compétence en
mer) must report on the costs of the preventive, containment or remedial measures it has taken. Article 23 of the Marine Order details the information to be included in the report.

**Walloon Region and Brussels-Capital Region:** neither the Walloon Decree nor the Ordinance mentions any reports.

**Flemish Region:** the Flemish Decree provides that the competent authority must submit a biennial report to the Flemish Government, which shall include at least the following information:

- Measures taken to promote the development of financial security instruments and markets, and their results;
- Cases of environmental damage, type of environmental damage, dates when the environmental damage occurred or was discovered;
- Results of remedial measures;
- Results of appeals;
- Valuation of additional administrative costs that must be borne annually by the public authority;
- Assessment of defences, in particular regarding the application of the state of scientific and technical knowledge; and
- The non-application of the request for action procedure in the case of an imminent threat of environmental damage.

### 29. Information to be made public

**All jurisdictions:** The transposing legislation does not specify any information to be made public. As with other Member States, Directive (2003/4/EC) on the right to environmental information applies.

### 30. Provisions concerning genetically modified organisms

**Federal State:** the Federal State has competence for the placing on the market of GMOs; the relevant provisions are described above.

### 31. Key features and differences in legislation transposing the ELD and existing legislation

In Belgium, the ELD has been transposed by four different competent authorities: the three Regions and the Federal Government. The legislation transposing the ELD has, as a general rule, rarely strayed far from the core obligations of the ELD with the result that the scope of the legislation in each of the three Regions is very similar. In cases of trans-regional environmental damage, a co-operation mechanism is applied.
In each Region, existing regimes covering the prevention and remediation of surface and ground water pollution and biodiversity damage were already in place. With the transposing ELD legislation, these were rendered more stringent, in particular, with regard to the additional remediation measures in the ELD for water and biodiversity.

The Regions had already developed their own contaminated land regimes which contain, by and large, a higher degree of remediation than that provided for by the ELD. For example, unlike the ELD, the legislation in all three Regions is retrospective as well as prospective. The owner and occupier of contaminated land may be liable as well as the person who caused the contamination. Further, liability differs in the three Regions depending on the time at which the pollution incidents causing the contamination took place.
1. **Existing national environmental legislation**

The main environmental legislation in Denmark is the Environmental Protection Act (EPA), which is framework legislation that is supplemented by regulations and guidelines issued by the Ministry of Environment and the Danish Environmental Protection Agency. The main Act providing for the remediation of contamination is the Contaminated Soil Act, No. 370 of 2 June 1999, as amended (CSA).\(^9\) The CSA imposes liability on a person who causes damage to “soil which due to human impact may harm groundwater, human health or the general environment”. Prior to the transposition of the ELD, Denmark did not have legislation that imposed liability for remediating biodiversity damage.

The ELD was transposed by an Act dealing with the investigation, prevention and remedying of environmental damage (Lov nr. 466 of 17 June 2008), an Act that amended over 15 existing Acts, and seven Ministerial Orders.

2. **Existing regimes for preventing and remediating environmental damage**

   - Water pollution
   - Land contamination

The initial legislation to impose liability for remediating contaminated land in Denmark was the Contaminated Sites Act, No. 420 of 13 June 1990, and the Environmental Protection Act, No. 358 of 6 June 1990. The Contaminated Sites Act was superseded by the CSA.

As noted above, the CSA imposes liability on a person who causes damage to “soil which due to human impact may harm groundwater, human health and the general environment”. The term “soil” includes materials that form part of the soil. This interpretation resulted from a 2010 decision of the Danish Supreme Court, in which it concluded that incineration residues that were spread on the ground were soil contamination that was capable of adversely affecting human health and the environment.

The CSA came into effect on 1 January 2001. It applies to any activity that causes damage with the exception of spreading fertilisers, pesticides, sludges, etc for agricultural use. The limitation period for liability is 30 years from the “termination of the production method or use of the plant which caused or could cause the contamination”.

Two categories of “polluters” are liable under the CSA. They are:

---

\(^9\) The SCA is also known as the Land Pollution Act.
The person who carried out an activity or who used the plant from which the contamination originates at the time of the original contamination; and

Any other person who caused the contamination due to their reckless conduct or conduct which leads to stricter liability provisions under other legislation.

A person who is the operator of a commercial or public installation that has caused contamination is strictly liable under the CSA for complying with a notice to investigate contamination that occurred after 1 January 1992. Such a person is also strictly liability for complying with a notice to remediate contamination that occurred after 1 January 2001. Prior to those dates, a competent authority may issue an investigation or remediation notice, respectively, only if it proves that the recipient of the notice was negligent according to the standards that applied at the time of the contamination or that the contamination was intentional. There is no requirement for the person on whom an investigation or remediation notice is served to own the contaminated land provided the contamination occurred after 1 January 2000.

If a person who owns or occupies contaminated land and knew or should have known that an investigation or remediation notice had been issued when it acquired the land, the new owner or occupier is bound by the notice.

A person who is otherwise liable under the CSA has a defence to complying with a remediation order in the event of war, civil unrest, nuclear damage or natural disaster. A second defence applies in the event of fire and criminal damage provided that the harm was not caused by the polluter’s reckless conduct or conduct subject to strict liability under other legislation. The CSA also contains an exception to liability for de minimis contributors to the damage.

The owner of contaminated land is not liable for its remediation under Danish law (Rocwool case, U 1991.674H).

Liability under the CSA is proportionate. That is, a competent authority may serve a notice on all liable persons, with each person bearing a proportionate share of liability in relation to their contribution to the damage. If the competent authority cannot allocate the shares proportionately, it may allocate them in equal shares. Further provisions specify when a notice may be served on only one person. The complex details of the system for proportioning liability, however, have resulted in it rarely if ever having been used.

A person who complies with a notice has a right of contribution against other liable persons.

There are specific regulations for owners of home heating oil tanks with a capacity of less than 6,000 litres. The owner of such a tank is strictly liable only if the contamination occurs after 1 March 2000. A mandatory joint insurance scheme, which is operated by the oil companies that supply home heating oil, applies to these home heating oil tanks, owners of such tanks are automatically covered by the scheme.

If soil contamination occurs that is not covered by the CSA or if groundwater is polluted other than is covered by the CSA, the EPA applies. Liability under the EPA is subject to negligence or
intentional conduct. The types of contamination that may be governed by the EPA include contamination that occurs outside the time periods during which the CSA applies.

The CSA established a national publicly available registration scheme for sites which may be, or are, contaminated. By 2012, 28,000 potentially contaminated sites and 14,000 actually contaminated sites had been inventoried. The regions are responsible for registering, investigating and remediating these sites, with support from the Environmental Protection Agency. Seven thousand registered sites have been prioritised following risk assessments, of which 2,000 sites are being remediated. The focus of the registration system is residential property and groundwater (which supplies approximately 95% of drinking water in Denmark). Under amendments to the SCA in 2007, the criteria for surveying land were increased so that lightly contaminated land is no longer surveyed and registered.10

Registration of a site on the inventory subjects it to various restrictions including a requirement to apply for permission to change the use of the site to a more sensitive use or to develop it.

Since 1993, a homeowner whose residence may be contaminated has a right to request further investigation of the potential contamination within two years of the registration provided that the homeowner did not cause the contamination or know about it at the time of acquisition. A homeowner whose residence is registered as being contaminated has a right to public funding of the remedial works, although there is a waiting time of around 10 years for such funding.

There is a further clean-up programme for petrol filling stations operated by the Danish Petroleum Association. The programme, which began in 1995, was funded by a 0.5 cents levy on a litre of petrol. That programme is now essentially complete.

If an owner or occupier knows that its land is contaminated, that person has a duty to notify the local council under section 21 of the EPA.

The following are some key differences between the existing Danish environmental liability legislation and the legislation that transposed the ELD:

- The threshold for land damage under the existing legislation is much lower than the threshold under the legislation transposing the ELD;
- The existing legislation applies to nearly all operations in contrast to Annex III in the ELD;
- Liability under the existing legislation is focused on contaminated land, although it also includes the remediation of water pollution;
- Liability under the existing legislation is retrospective as well as prospective, although it includes cut-off dates for the application of strict liability; and
- There are no provisions under the existing legislation for “interested parties” to submit comments.

10 See Order No 1519 on the definition of lightly contaminated soil (14 December 2006).
Finally, the legislation transposing the ELD was not expected to have a huge impact in Denmark, being expected to result in between five to 15 cases of an imminent threat of, or actual, environmental damage each year.\(^{11}\)

- **Restoring biodiversity damage**

Denmark did not have any legislation that imposed liability for remediating and restoring biodiversity damage prior to the ELD.

- **Other liability systems for remediating environmental damage**

Other liability systems for remediating environmental damage in Denmark include the Marine Environmental Protection Law of 1980, which imposes strict liability on vessels and offshore installations to remediate environmental damage caused by such operations. The Environmental Damage Compensation Act imposes strict liability for damage to third parties from pollution, noise and vibrations from activities listed in an Annex to the Act. This Act, however, is civil, not administrative liability.

### 3. **Integration of the ELD into existing national legislation**

- **Transposing legislation**

Act No 466 on the investigation, prevention and remedying of environmental damage of June 17, 2008, as amended (EDA). The EDA does not apply in the Faroe Islands and Greenland but may be put into effect in whole or in part in them with variations dictated by special circumstances there.

Act amending the Act on environmental protection and various other Acts of 17 June 2008

- **Amendments to existing national environmental law**

The Act amending the Act on environmental protection and various other Acts of 17 June 2008 made amendments to the following Acts:

- Environmental Protection Act (sections 73a – 73j of chapter 9a)
- Contaminated Soil Act (sections 38a – 38j of chapter 4a)
- Livestock Approval Act (sections 54a – 54i of chapter 5a)
- Marine Environment Protection Act (sections 47a – 47k of chapter 14a)
- Water Supply Act (sections 68 – 68h of chapter 11a)
- Act on the Environmental Approval of Livestock Use
- Environment and Gene Technology Act (sections 25a – 25i of chapter 3)
- Nature Conservation Act (sections 77a – 77h of chapter 11a)
- Woodlands Act (sections 59a – 59i of chapter 8a)

---

- Hunting and Game Management Act (sections 53a – 73k of chapter 8a)
- Act on the protection of the outer polders of the Tønder Marsh (sections 37a – 37i of chapter 9a)
- Watercourse Act (sections 60a – 60j of chapter 11a)
- Raw Materials Act (sections 33a – 33j of chapter 7a)
- Act on Fisheries and Fish-Farming
- Merchant Shipping Act
- Ports Act
- Coastal Protection Act

In addition, the following Orders have been made:

- 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)

Authorisation in legislation for other governmental entities to issue rules and regulations

EDA: the Minister for the Environment shall:

- issue regulations governing how biodiversity damage shall be remedied;
■ lay down rules on the conditions and criteria to be taken into account when deciding when an imminent threat of, or actual, environmental damage exists;

■ Order on criteria to determine the presence of environmental damage and on requirements to remedy certain types of environmental damage, issued on June 28, 2008; and

■ “lay down rules on the provision of security, including the apportionment of the obligation to provide security when there are several persons responsible for environmental damage, on the calculation and subsequent adjustment of the size of the security and on the release of the security”.

EDA: the Minister for the Environment may:

■ lay down rules, after consultation with the Minister for Justice, on access to public and private property, sites and means of transport in order to supervise or carry out tasks under the EDA or rules issued pursuant to it;

■ lay down rules on announcements concerning appeals against draft decisions by eligible persons, including interested parties;

■ lay down rules on the right of appeal against decisions made by other government departments (competent authorities), including the municipal council or the regional council, delegated by the Minister with the rules specifying any decisions that cannot be appealed against;

■ lay down rules, after consultation with the Minister involved, on the exercise of powers of other governmental departments (competent authorities);

■ lay down rules on the treatment of cases by the municipal council or the regional council including rules on penalties in the form of fines and the potential for an increase to up to two years imprisonment in certain circumstances (see section 23 below);

■ lay down rules on the obligations of the municipal council or the regional council to provide information to use in assessing circumstances covered by the EDA within their jurisdictions and the fact that the information must be submitted in a particular form including rules on penalties in the form of fines and the potential for an increase to up to two years imprisonment in certain circumstances (see section 23 below);

■ lay down rules on the obligations of the responsible person to provide information on measures under the EDA including any requirement to submit the information in a particular form and also that decisions made under the rules cannot be brought before
another administrative authority including rules on penalties in the form of fines and the potential for an increase to up to two years imprisonment in certain circumstances (see Offences and sanctions below);

- lay down rules on payment to cover the costs connected with the Minister’s administration and supervision under the EDA;

- lay down detailed rules on payment of interest in connection with non payment or late payment of the Minister’s administration and supervision costs. Interest will be charged from the due date at a monthly rate of 1.3% for each month from the first day in the month in which the costs are to be paid, subject to a minimum charge of DKK 50;

  - Order covering the costs of administration and supervision under the Environmental Damage Act, issued on 26 June 2008; and

- lay down detailed rules on the composition and activities of the Environmental Appeals Board in connection with the handling of cases under the EDA.

Environmental Protection Act: the Minister for the Environment may:

- lay down rules stating that the municipal council must issue a draft decision with a view to obtaining a binding opinion from the Minister for the Environment regarding whether there is an imminent threat of, or actual, environmental damage, and issue rules stating that appeals against the binding opinion may be lodged only as part of an appeal against a decision concerning the provision or security or notice for preventive or remedial measures; and

- lay down rules on publication of decisions concerning cross-border environmental damage.

SCA: the Minister for the Environment may:

- lay down rules stating that the municipal council and the regional council must issue a draft decision with a view to obtaining a binding opinion from the Minister for the Environment regarding whether there is an imminent threat of, or actual, environmental damage, and issue rules stating that appeals against the binding opinion may be lodged only as part of an appeal against a decision concerning the provision or security or notice for preventive or remedial measures; and

- lay down rules on publication of decisions concerning cross-border environmental damage.
Act on Fisheries and Fish-Farming: the Minister for Food, Agriculture and Fisheries shall:

- lay down rules on the prevention and notification of environmental damage or an imminent threat of environmental damage to protected species and international nature conservation areas in connection with commercial fishing activities including: an operator’s duty to notify and provide information on an imminent threat of, or actual, environmental damage; the issuing of orders to submit information needed for the assessment of an imminent threat of, or actual, environmental damage including orders to carry out studies, etc; and appeals against decisions including persons who can lodge an appeal
- Order on environmental damage etc to protected species or international nature conservation areas in connection with commercial fishing activities, issued on 24 July 2008.

Merchant Shipping Act: the Minister for Economic and Business Affairs may:

- lay down rules that the Act shall not apply to an imminent threat of, or actual, environmental damage that is covered by section 47c of the Marine Environment Protection Act
- Order restricting the scope of the Merchant Shipping Act with regard to environmental damage, issued on 24 June 2008.

Relationship to other legislation

If the Minister for the Environment has new information that shows, on a balance of probabilities, that the imminent threat of, or actual, environmental damage was not caused by the person who appeared to be liable for preventing or remedying it, the Minister shall forward the new information to the competent authority with a view to the case being dealt with again under the rules of the legislation under which the decision that an imminent threat of, or actual, environmental damage was made.

Guidance and other documentation

The Environmental Protection Agency and the Agency for Spatial and Environmental Planning have published Environmental Liability Directive Guidelines (1 July 2008) (Guidance).

4. Effective date of national legislation

1 July, 2008

---

The Guidance is available by clicking on the link at http://ec.europa.eu/environment/legal/liability/eld_guidance.htm
5. **Competent authority(ies)**

The Minister for the Environment shall supervise compliance with the EDA, rules issued pursuant to it, and compliance with decisions under it.

The Minister may delegate the exercise of the powers conferred by the EDA to a government authority set up under the Ministry or, after consultation with the Minister involved, other governmental authorities.

The competent authority in connection with an imminent threat of, or actual, environmental damage from commercial fishing activities is the Directorate of Fisheries.

The competent authority in connection with an imminent threat of, or actual, environmental damage from the establishing and expansion of fixed installations including ports in Danish territorial waters is the Danish Coastal Authority.

Municipal authorities and, to a lesser degree, regional authorities have large environmental competences. For this reason, Article 43(4) of Lov 466 provides that the Minister may empower local or regional authorities to implement measures which, according to Lov 466, the Minister has to take.

6. **Operators and other liable persons**

ELD: “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”.

EDA: “the person who carries on or controls the occupational activity”.

The definition of “operator” in the transposing legislation differs, depending on the legislation and its context.

- Act on Environmental Protection, Soil Contamination Act, Act on the Environmental Approval, etc. of Livestock Use: “the person who carries on or controls the occupational activity”
  - “In cases involving the use for agricultural purposes of waste materials and fertilizers, including livestock manure, and the use of pesticides or biocides”: the person that used the substances “in the course of their occupational activities unless that person can prove that the use was in accordance with the instructions for use, and that the user did not act recklessly when using the substance”; if the above applies, the operator is the person who produced or imported the waste materials, livestock manure or other fertilizer, pesticides or biocides unless “the producer or importer can prove that the harmful
effect of pollution following the use of waste materials or livestock manure was not due to a fault with the product, and that there was no reckless conduct in connection with production or import”.

- **Marine Environment Protection Act:** “the person responsible for operating a ship, an aircraft, a platform or a pipe, provided this is an occupational activity”
  - the operator is always liable for an imminent threat of, or actual, environmental damage no matter how it occurs.
  - if, however, the operator cannot be identified or is unable to pay, the owner of a ship may be liable for reimbursing a municipal council and the Minister for the environment for control and rehabilitation measures.
  - until the operator of a ship has provided a security for the obligations under the EDA, the Minister for Defence may order the owner of the ship to provide the security and may decide to detain the ship until the security has been provided.

- **Water Supply Act:** “the person who carries or controls the occupational activity”
  - the person responsible is the person carrying on water abstraction, ground water drainage or any other occupational activity which lowers the groundwater level.

- **Environment and Gene Technology Act**
  - 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 – the permit defence is not available to such producers or importers.

- **Act on the protection of the outer polders of the Tønder Marsh**
  - the person who is responsible for notifying unlawful conduct is “the person who at any given time owns or uses a property”.

- **Watercourse Act**
The person who is responsible for notifying unlawful conduct is “the person who at any given time owns or uses a property”.

- Secondary liability (e.g., parent company)

The legislation does not mention secondary liability.

- Death or dissolution of responsible operator

The legislation does not mention the effect of the death or dissolution of a responsible operator.

- Person other than an operator who may be liable

The owner of a ship may be liable in certain circumstances; see Marine Environment Protection Act.

The person who produces or imports waste materials, livestock manure or other fertilizer, pesticides or biocides may be deemed to be the operator in certain circumstances; see Act on Environmental Protection.

7. **Annex III legislation**

- Rebuttable presumption that operator’s activity caused environmental damage

The legislation does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

- Additional occupational activities subject to strict liability

The dumping of dredged-up seabed material is the dumping of waste, which comes under Annex III no 2 of ELD. The legislation refers, however, specifically to such dumping.

- Spreading of sewage sludge for agricultural purposes

The legislation does not mention the spreading of sewage sludge for agricultural purposes.

8. **Standard of liability for non-Annex III activities**

ELD: standard of liability for non-Annex III operator is “fault or negligent”.

Danish legislation: standard of liability for non-Annex III operator is fault or negligence.

Article 12 of Law 466 provides that the person liable is any person who is addressed by an administrative decision under Article 2; this Article enumerates a long list of Danish environmental Acts. Under Article 5, it is said that the Act concerns measures taken in the context of a professional activity (*erhversmaessig aktivitet*). Article 5(2) specifies that professional activity is any activity that is linked to economic activity, business or action (*virksomhed*) whether private or public and independently whether it is made for economic benefit or not.

There is nothing in the above provisions which mentions any form of negligence.
9. **Exceptions**

- Application to imminent threat of environmental damage as well as environmental damage

The transposing legislation applies to environmental damage or an imminent threat of such damage.

- Differences with exceptions in the ELD
  - Exception 1
    ELD: “an act of armed conflict, hostilities, civil war or insurrection” (includes terrorism)
    EDA: “war or civil unrest”.
  - Exception 2
    ELD: “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”.
    EDA: “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”.
  - Exception 3
    Exception for Nuclear Conventions will add further Conventions when they have been implemented into Danish law.
  - Exception 4
    There is an exception for a person who uses pesticides or biocides according to their instructions and is not reckless (see above).

- Diffuse pollution exception
  ELD: applies “to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators”.
  EDA: exception for “diffuse pollution where it is not possible to establish the connection between the damage and the actions or omissions of the individual polluter”.

10. **Joint and several or proportionate liability**

Modified proportionate liability applies as follows.

Notices to provide information and carry out investigations and to prevent or remediate environmental damage may be issued to all persons who caused the imminent threat of, or actual, environmental damage. Each notice “shall take into account the share of the combined damage or threat of damage for which the person concerned is responsible. If it is not possible to assess the respective shares of responsibility for the damage or threat of damage of several responsible persons, the Minister shall base the notices on the attribution to the responsible
persons of equal shares of responsibility for the damage or threat of damage, including those parts which cannot with certainty be attributed to one or more responsible persons”.

There is a *de minimis* exception to such notices, that is, notices “may not be issued to a responsible person if it may be presumed that only an insignificant share of the responsibility can be attributed to the person concerned”.

“If the responsible persons who are issued notices ... cannot agree to comply with the notices jointly, a new notice to carry out investigations or preventive or remedial measures may be issued to the responsible person who may be presumed to have caused the largest share of the damage or threat of damage”.

“If the Minister for the Environment has given notice that equal shares of responsibility for the damage or threat of damage should be attributed to the responsible persons, and if the responsible persons cannot agree to comply with the notices jointly, notices to carry out investigations or preventive or remedial measures may be issued to the responsible person or persons who are in control of the property or properties affected. If no responsible person is in control of the property or properties affected, the notice may be issued to all of the responsible persons”.

Mechanism for contribution between liable operators

“Any person who is obliged to carry out a notice ... may ask for the costs to be covered by the other responsible persons to the extent that the costs of complying with the notice can be attributed to their share of the damage and the other responsible persons were or could be the subject of a notice under this Act”.

11. **Limitation period**

The limitation period is 30 years from the date of the emission or event that led to an imminent threat of, or actual, environmental damage unless the law’s general rules on limitation mean that a later date applies.

12. **Defences**

Defences to liability or costs?

The defences are defences to liability.

The responsible person does not have an obligation to prevent an imminent threat of, or actual, environmental damage do not apply if that person can prove that the damage:

- was caused by a third party and occurred despite appropriate safety measures being in place; or
- resulted from compliance with compulsory regulations laid down by a public authority unless the regulations result from orders or instructions caused by the responsible person’s own activities.

(see below for permit defence)
If defences to liability; suspension (or not) of remediation notice during appeal

Appeals under the (1) Nature Conservation Act, (2) Hunting and Game Management Act, (3) Watercourse Act, (4) Order on environmental damage etc to protected species or international nature conservation areas in connection with commercial fishing activities, and (5) Order 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 Danish territorial waters shall suspend the relevant decisions unless the Nature Protection Board of Appeal decides otherwise.

According to Article 51, a judicial appeal on a decision of the administration or on the submission of a financial guarantee, shall have suspensive effect. The Ministry or the court may in particular cases decide that the appeal shall not suspend the execution.

Permit defence

The obligation to limit the extent of environmental damage and prevent further environmental damage does not apply if the person responsible can prove that the damage “was caused by an emission or event expressly authorised by and fully in accordance with the conditions of an authorisation or with rules so detailed that they may be deemed equivalent to express authorisation, and which do not result from the reckless conduct of the person responsible”.

“Reckless conduct” equates to gross negligence in English law.

Producers or importers of waste materials, livestock manure or other fertiliser, pesticides or biocides are not entitled to assert the permit defence.

State-of-the-art defence

Denmark has not adopted the state-of-the-art defence.

13. Scope of environmental damage

Percentage of land area covered by Birds and Habitats Directives (Natura 2000)
8.94%

Extension of biodiversity damage to nationally protected biodiversity

Denmark has not extended the ELD to nationally protected biodiversity.

Biodiversity damage in the exclusive economic zone

Liability extends to biodiversity damage in the exclusive economic zone.

The transposing legislation specifically applies to an imminent threat of, or actual, environmental damage to protected species of international conservation areas by commercial fishing activities. The competent authority in connection with such an imminent threat of, or actual, environmental damage is the Directorate of Fisheries.
Water or water body

Environmental damage to surface water and groundwater must be to a body of water covered by the Environmental Objectives Act.

The Marine Environment Protection Act states that, in addition to substances, materials and micro-organisms being introduced into the sea or air (including hazardous substances and products, plant protection products, products containing biocides, oil and chemical pollution of the sea, ports and coastal areas of Danish territorial waters), causing an imminent threat of, or actual, environmental damage, an imminent threat of environmental damage may also be caused by noise or vibrations.

14. Thresholds

Water damage

The threshold for water damage under the Danish legislation is the same as the ELD, provided that damage to surface water and groundwater is to a body of water covered by the Environmental Objectives Act.

The threshold for damage to marine waters is any discharge of substances and materials which may affect Danish territorial waters or cause an imminent threat of, or actual, environmental damage.

Biodiversity damage

Biodiversity damage is assessed by reference to the conservation status of the protected species or international nature conservation area at the time of the damage including its recreational value.

National biodiversity damage

Damage to nationally protected areas is not covered.

Land damage

ELD: “any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms”.

EDA: “land contamination resulting from the direct or indirect introduction of substances, organisms or micro-organisms in, on or under land which creates a significant risk of human health being adversely affected”.

NB: same definition except that EDA omits the word “preparations”.

15. Standard of remediation

Land

ELD: “necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer
poses any significant risk of adversely affecting human health.... Use shall be ascertained on the basis of the land use regulations, or other relevant regulations, in force, if any, when the damage occurred".

EDA: "‘remedial measures’ in respect of land damage means removal of any identified pollution and restoration of the baseline condition or corresponding remedial measures”.

- Biodiversity
  - Primary remediation

The transposing legislation does not specify any details for the standard of primary remediation other than those in Annex II of the ELD.

- Complementary and compensatory remediation

The transposing legislation does not specify any details for the standard of complementary and compensatory remediation other than those in Annex II of the ELD.

- Water
  - Primary remediation

The transposing legislation does not specify any details for the standard of primary remediation other than those in Annex II of the ELD.

- Complementary and compensatory remediation

The transposing legislation does not specify any details for the standard of complementary and compensatory remediation other than those in Annex II of the ELD.

16. **Format of determination of environmental damage**

The transposition legislation does not specify any details for a determination of environmental damage.

17. **Powers and duties of competent authority**

- Inspections, investigations, studies and analyses

The Minister for the Environment shall give notice to the responsible person to provide information and carry out investigations, etc needed to assess preventive and remedial actions. The notice may, among other things, require the responsible person to carry out sampling, analyses and measurement of substances, etc, with a view to mapping:

- the reasons for and effects of an imminent threat of, or actual, environmental damage;
- the nature and extent of any environmental damage; or
- changes in the extent and nature of an imminent threat of, or actual, environmental damage notified by the responsible person to the Minister for the Environment.
The relevant competent authority has the above powers.

Further, the competent authority’s powers include the power to access public and private property and means of transportation to supervise and carry out any tasks under the transposing legislation and to photograph, copy or take away documents and other objects without payment. Receipts shall be given for objects that are taken away. The police shall provide assistance to authorities and persons authorized by them in carrying out such tasks (in respect of which the Minister for the Environment may, after consultation with the Minister for Justice, lay down rules).

The competent authority may order an operator, user, producer or importer to carry out studies, analyse and measure substances and similar to clarify the cause and effects of pollution found on the site.

The competent authority may issue the order regardless of whether the operator, user, producer or importer has access to the property on which pollution or contaminated soil was found (in which case the competent authority may order the owner or occupier to tolerate the studies, etc; such orders are binding on the owner or occupier). The order shall include the obligation to restore the polluted property.

In cases to which Section 10 of the Act on legal certainty in connection with the use by authorities of coercive measures and disclosure obligations applies, the Minister for the Environment may carry out necessary investigations at the expense of the responsible person so as to shed light on circumstances about which the responsible person has otherwise been or could otherwise be ordered to provide information.

- Information orders

The competent authority may require the operator, user, producer or importer to provide information regardless of whether there is an imminent threat of, or actual, environmental damage.

Under the Water Supply Act, the information to be provided by the operator includes financial and accounting matters pertaining to the water supply; if the information relates to the water supply or the operator cannot be identified, the order may be addressed to the owner of the water supply facility instead of the operator.

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

The Minister for the Environment may give notice to a responsible person to carry out preventive measures.

Environmental Protection Act: the competent authority “shall ensure compliance with [the operator’s obligations] to carry out preventive measures even when the competent authority does not make a decision under the EDA concerning an imminent threat of environmental damage against the person responsible for it.

The competent authority cannot issue a decision to require the person responsible for an imminent threat of environmental damage to carry out preventive measures if that person can prove that the damage:
was caused by a third party and occurred despite appropriate safety measures being in place; and
resulted from compliance with compulsory regulations laid down by a public authority unless the regulations result from orders or instructions caused by the responsible person’s own activities.

“The Minister for the Environment shall have any unlawful situation rectified, unless the situation is of minor significance.” A decision regarding this cannot be brought before any other administrative authority.

An unlawful situation is a situation which does not correspond to the requirements of the law (the Act). The provision aims at allowing the Minister to disregard minor cases of non-correspondence. It is a de minimis clause.

Power or duty to require an operator to carry out remedial actions

The Minister for the Environment shall give notice to a responsible person to carry out remedial measures.

Environmental Protection Act: the competent authority “shall ensure compliance with [the operator’s obligations] to carry out all practical measures to limit the extent of the damage and prevent further damage even when the competent authority does not make a decision under the EDA as to whether there is environmental damage against the person that is responsible for it.

The competent authority cannot issue a decision to require the person responsible for the environmental damage if that person can prove that the damage:

was caused by a third party and occurred despite appropriate safety measures being in place;
resulted from compliance with compulsory regulations laid down by a public authority unless the regulations result from orders or instructions caused by the responsible person’s own activities; or
the permit defence applies.

“The Minister for the Environment shall have any unlawful situation rectified, unless the situation is of minor significance.” A decision regarding this cannot be brought before any other administrative authority. See above regarding an unlawful situation.

Power or duty of competent authority to carry out preventive measures

If the responsible person has not complied with the deadline in a notice for preventive measures, the Minister for the Environment may have the measures carried out at the expense of that person. The Minister’s decision cannot be brought before another administrative authority.

Power or duty of competent authority to carry out remedial measures

If the responsible person has not complied with the deadline in a notice for remedial measures, the Minister for the Environment may have the measures carried out at the expense of that person.
Form of preventive order

The notice shall include requirements:

- to remove any identified pollution or other adverse effects on natural resources; and
- “to restore the baseline condition or take corresponding remedial measures to the extent that it is possible to give such notices under the Act under which the decision that the pollution or other adverse effects constituted an imminent threat of environmental damage was made”.

The notice “cannot include the interventions made and measures taken by the Minister for Defence pursuant to the Marine Environment Protection Act”.

The notices shall contain a deadline for compliance with them. If special circumstances exist, however, the notice may state that it must be complied with immediately.

Form of remediation order

The notice shall require the responsible person:

- to remedy environmental damage to biodiversity and water as set out in regulations issued by the Minister for the Environment; and
- to remedy land damage by removing any identified pollution and restoring the baseline condition or to take corresponding remedial measures.

The notice “cannot include the interventions made and measures taken by the Minister for Defence pursuant to the Marine Environment Protection Act”.

The notices shall contain a deadline for compliance with them. If special circumstances exist, however, the notice may state that it must be complied with immediately.

Appeal against preventive or remediation order

A responsible person may appeal a decision concerning an imminent threat of, or actual, environmental damage under the EDA to the Environmental Appeals Board or the Nature Protection Appeals Board, as appropriate.

The appeal must be submitted in writing to the Minister for the Environment who then forwards the appeal to the relevant Appeals Board, accompanied by the decision that is being appealed against and the material used in assessing the case.

The deadline for making an appeal is four weeks from the date on which the decision is issued.

The Chairman of the Nature Protection Appeals Board may make a decision on behalf of the Board when an appeal is not considered to contain issues of significant interest in relation to the purpose of the EDA.

The persons who may make an appeal are:

- the person against whom the decision has been issued;
any person who has a personal significant interest in the outcome of the case;

eligible interested parties which may be required to submit their articles of association or substantiate their eligibility to lodge an appeal in some other way; and

the authorities concerned.

The deadline for legal proceedings to examine decisions under the EDA or other rules issued pursuant to it is 12 months from the date of the issuance of the decision or the date of a public announcement of it.

Sanctions for delay in complying with preventive or remediation order

The transposing legislation does have specific sanctions for a delay in complying with an order requiring remediation.

Formal consultees on contents of preventive and remediation orders

The transposing legislation does not require formal consultation with specified consultees.

Recovery of implementation and enforcement costs

The responsible person is liable for the Minister of the Environment’s costs in administering, supervising and enforcing the EDA. The recoverable costs include:

- costs related to the provision of security by the responsible person;
- issuing preliminary and final notices for preventive and remedial measures including apportioning responsibility between them;
- issuing notices to persons eligible to lodge appeals;
- processing comments received;
- any subsequent comments received from interested parties;
- any subsequent modifications to notices;
- issuing decisions to the responsible person and to persons eligible to lodge appeals;
- consultation with municipal councils and regional councils in investigating a case;
- determining the order of remediation when more than one instance of environmental damage has been reported, the time for which to be apportioned between responsible persons;
- issuing a toleration notice to the owner of third-party property;
- registering details of notices issued in, and their subsequent removal from, the land register;
- time involved when there is a notification of the worsening of environmental damage;
supervising compliance with notices;
supervising inspections, sampling, etc;
appeals against decisions;
time in connection with new information;
travel time in respect of the above;
dialogue with responsible persons; and
preparation of reports to the police but not activities carried out by the Environment Centre after the report to the police as part of the police investigation.

Only costs for activities related to an individual responsible person are included in the charges.

The costs of the following are not to be included:

- general knowledge acquisition, in-service training, etc. and work on identifying general practice;
- work at the environment centre in connection with the processing of an appeal at an appeals body; and
- processing of a case is a decision is rescinded and the case is returned to the environment centre to be processed again.

If the appeals body decides that a case does not fall within the scope of the EDA, any charges paid, including any interest, are to be repaid.

The Danish arrears collection authority may recover claims by a competent authority for administrative, supervision and enforcement costs under the rules on the collection of person taxes in the Withholding Tax Act. The authority may also waiver such claims in accordance with the Act on the collection of taxes and duties.

The EDA does not limit the right of a competent authority to compensation under the general rules on contractual or non-contractual compensation or pursuant to rules laid down in or pursuant to other legislation.

- Deadline for competent authority to seek recovery of costs

The deadline for a competent authority to seek the recovery of costs is five years after the measures were completed or the person responsible for the costs was identified, whichever is later.

**18. Duties of responsible operators**

- Preventive measures

The operator has a duty immediately to take all the necessary preventive measures to avert the imminent threat of environmental damage.

- Remedial actions (emergency actions)
The operator has a duty immediately to take all practical measures to limit the extent of the damage and to prevent further damage.

- **Remedial measures**

  The Danish transposing legislation does not specify details of remedial measures.

- **Duty to notify/ provide information when imminent threat of environmental damage occurs**

  The operator has a duty immediately to notify the competent authority of “all relevant aspects of the situation” when an imminent threat of environmental damage occurs.

  Marine Environment Protection Act: the master of a ship, aircraft, the installation manager of a platform, the person responsible for the operation of a pipeline, and the captain of an aircraft has a duty to immediately to report an imminent threat of, or actual, environmental damage. If they become aware that reporting has not been carried out, the owner of the ship, aircraft, platform or pipeline must immediately report this fact. The Order on reporting under the Marine Environment Protection Act sets out detailed requirements for reporting including authorities to which the reports must be made and details to be reported.

  If environmental damage worsens or an imminent threat of environmental damage increases or becomes environmental damage, the responsible person has a duty immediately:

  - to notify the Minister for the Environment of all relevant circumstances; and
  - to carry out any practical measures or necessary preventive measures to prevent or limit the worsening or increase.

  The Marine Environment Protection Act applies if the environmental damage involves the oil and chemical pollution of marine waters.

  The above notification by a responsible person does not reduce the obligation effectively to prevent the consequences of the environmental damage or avert the threat of such damage.

- **Entity to which notification should be provided**

  The entity to which a notification must be made differs depending on the law under which the imminent threat of, or actual, environmental damage has been caused.

**19. Access to third-party land to comply with the ELD**

Access is specifically permitted to a responsible person by a notice which may be issued by the Minister for the Environment.

The notice shall require the person who has control of the third-party land to tolerate the carrying out of investigations and preventive measures by the person who is responsible for the imminent threat of, or actual, environmental damage.

If, during the carrying out of the measures, other parties caused damage to the third-party’s land and if agreement on a determination of compensation cannot be reached or if the person who
caused the damage cannot pay the claim, the owner or user of the third-party land may claim compensation from the Minister for the Environment. In such a case, the Minister for the Environment may bring the claim for compensation against the person who caused the damage.

In the event of the above situations, the determination of compensation by the Minister for the Environment shall be made by the valuation authorities established under the Public Roads Act, in which case the Minister for the Environment shall perform the tasks under the Public Roads Act in lieu of the National Roads Board.

20. Interested parties

Eligible persons may request the Minister for the Environment to issue notices for preventive and remedial measures and related measures and to investigate non-compliance with the EDA.

Any person who has a personal significant interest in the outcome of the case may notify the Minister for the Environment of an imminent threat of, or actual, environmental damage.

**Qualification criteria for “sufficient interest”**

The following persons meet the qualification criteria for "sufficient interest" and, thus, may notify the Minister for the Environment of an imminent threat of, or actual, environmental damage:

- national associations and organisations which, according to their articles of association have
  - the protection of nature and the environment as their principal object; or
  - the safeguarding of significant recreational interest, or material leisure interests, as their object when the decision affects those interests;

- local associations and organisations which have
  - the protection of nature and the environment as their principal object; or
  - the safeguarding of significant recreational interests, or material leisure interests as their object when the decision affects those interests.

The above persons may notify the municipal council, the regional council, or the Minister for the Environment, as appropriate, “of which specific types of decisions … they wish to be informed …. The association must at the same time send its articles of association documenting that it is locally organised and that its main purpose is to protect the environment. The same shall apply to local associations and organisations whose objective is to safeguard material leisure interests, when the decisions concern those interests”.
If the request is to the Minister for the Environment, the Minister shall inform the relevant municipal council or regional council within 14 days.

- Method of notifying interested parties of planned remedial measures

The Danish transposing legislation does not specify the method by which interested parties are provided with information of planned remedial measures other than to state that decisions are to be published.

- Information to be provided to competent authority

The interested party’s notification of an imminent threat of, or actual, environmental damage must include “relevant information” in support of the notification / comment.

- Challenges to competent authority’s decision

Eligible interested parties may challenge a competent authority’s decision by way of an appeal against a decision issued by the authority when a decision concerns their interests.

- Duty on competent authority to respond to person making the notification

Before a decision is made, the competent authority shall notify the person making the notification in writing about the case and also make that person aware of its right of access to documents.

The competent authority shall also call upon the person who is the subject of the notification “to provide information which may shed lights on costs, benefits and drawbacks with the decision”.

The competent authority does not have a duty to respond to the person making the notification if “an immediate decision is required or if notification may be deemed manifestly unnecessary” or if the notification is not accompanied by relevant information on the suspected imminent threat of, or actual, environmental damage.

- Inclusion of interested party in any proceedings by the competent authority against an operator

The Minister for the Environment shall, before making a decision to issue a notice to a responsible person to remedy environmental damage to biodiversity, water or land, notify persons who are eligible to lodge appeals in writing of the draft decision and of the fact that they can lodge such appeals. The deadline for comments on the draft decisions is four weeks from the date of the notification unless there is a special case that entitles the Minister to deviate from that time limit. If the Minister makes a public announcement of the draft decision, the time limit is calculated from the date of the announcement. Persons who meet the criteria for “sufficient interest” shall be notified only if they have made a request to the Minister for the Environment to receive notification of such decisions.

Notification of a draft decision to a person who has a personal significant interest in the case may be made through public announcement.
21. **Public access to information regarding environmental damage and related measures**

The transposing legislation does not specify public access to information regarding environmental damage and related prevention, containment or remedial measures. The legislation does, however, require the publication of decisions against persons who cause an imminent threat of, or actual, environmental damage. It also requires the notification of draft decisions to interested parties, which notification may be by way of public announcement.

22. **Charges on land / financial security after environmental damage**

A responsible operator must provide security to the Minister for the Environment to cover its obligations under the EDA.

The amount of the security, which is to be decided by the Minister, includes the Minister’s costs of administering and enforcing the EDA.

A responsible person may appeal a notice or decision requiring the provision of security. Such an appeal suspends the notice or decision unless the Minister for the Environment or the appeals body decides otherwise.

If, during proceedings, the responsible party cannot provide all of the financial security, the case shall be dealt with under the rules of the legislation under which the decision that an imminent threat of, or actual, environmental damage was made.

If, during proceedings, the responsible party can provide only part of the financial security, the case shall be dealt with under the rules of the legislation under which the decision that an imminent threat of, or actual, environmental damage was made, to the extent that the security cannot be provided.

23. **Offences and sanctions**

Unless a more severe penalty is available under other legislation, a fine shall be imposed on any person who:

- fails to comply with decisions under the EDA;
- fails to provide a notification of the worsening of environmental damage or an increase in an imminent threat of environmental damage;
- provides incorrect or misleading information concerning the worsening of environmental damage or an increase in an imminent threat of environmental damage;
- fails to take measures to prevent or limit the worsening of environmental damage or the increase in the damage;
- obstructs access to public or private property to the Minister for the Environment or any person authorised by the Minister to supervise or carry out any tasks under the Danish transposing legislation; or
- obstructs access to a property, site or means of transport when the Minister for the Environment or any person authorised by him requires such access in order to carry out supervision or to perform other tasks under the EDA.

The penalty for the above breaches may be increased to imprisonment of up to two years if the breach 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 increased penalty does not apply to breaches committed from foreign vessels unless the breach was committed in inner territorial waters.

For offences committed in outer territorial waters, the penalty may be increased by to up to two years if there was deliberate and serious pollution of the marine environment.

Companies may be held criminally liable for breaches of the EDA under the rules in Chapter 5 of the Criminal Code.

In cases concerning breaches of the EDA, searches may take place in accordance with the rules in the Administration of Justice Act in respect of searches in cases which under the law could lead to custodial sentences.

The Act amending the Act on environmental protection and various other Acts adds the following offences to:

- section 1 adds to section 110, para 1 of the Environmental Protection Act: (1) the failure to avert an imminent threat of pollution or prevent the further release of pollutants; and (2) the failure to take the necessary preventive measures with regard to an imminent threat of environmental damage or all practical steps to limit the extent of the environmental damage and prevent further damage to the environment;

- section 2 adds to section 88, para 1 of the SCA: the failure to take necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage;

- section 3 adds to section 59 para 1 of the Marine Environment Protection Act: the failure to comply with a prohibition or order under various sections of that Act;

- section 4 adds to section 84 para 1 of the Water Supply Act: (1) the failure to provide information; (2) the failure immediately to inform the municipal council of all relevant facts related to an imminent threat of, or actual, environmental damage; and (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures
to limit the extent of environmental damage and to prevent further damage;

- section 5 adds to section 91 para 1 of the Act on the Environmental Approval, etc. of Livestock Use: (1) the failure to try to avert an imminent threat of pollution or prevent the further release of pollutants; and (2) the failure to take the necessary preventive measures with regard to an imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage;

- section 6 adds to section 36 para 1 of the Environment and Gene Technology Act: (1) the failure to provide information; (2) the failure immediately to inform the supervisory authority of all relevant facts related to an imminent threat of, or actual, environmental damage; and (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage;

- section 7 adds to section 89 para 1 of the Nature Conservation Act: (1) the failure to provide information; (2) the failure immediately to inform the supervisory authority council of all relevant facts related to an imminent threat of, or actual, environmental damage; and (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage;

- section 8 adds to section 65 para 1 of the Woodlands Act: (1) the failure to provide information; (2) the failure immediately to inform the Minister for the Environment of all relevant facts related to an imminent threat of, or actual, environmental damage; and (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage;

- section 9 adds to section 54 para 1 of the Hunting and Game Management Act: (1) the failure to provide information; (2) the failure immediately to inform the Minister for the Environment of all relevant facts related to an imminent threat of, or actual, environmental damage; and (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage;
section 10 adds to section 50 para 1 of the Act on the protection of the outer polders of the Tønder Marsh: (1) the failure to provide information; (2) the failure immediately to inform the municipal council of all relevant facts related to an imminent threat of, or actual, environmental damage; (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage; (4) the failure to comply with information orders or orders requiring the operator to carry out studies, etc; and (5) the failure to comply with an order by the municipal council against the owner or occupier of land to allow the carrying out of studies, etc. on the land;

section 11 adds to section 86 para 1 of the Watercourse Act: (1) the failure to provide information; (2) the failure immediately to inform the watercourse authority of all relevant facts related to an imminent threat of, or actual, environmental damage; and (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage; and

section 12 adds to section 44 para 1 of the Raw Materials Act: (1) the failure to provide information; (2) the failure immediately to inform the supervisory authority of all relevant facts related to an imminent threat of, or actual, environmental damage; and (3) the failure immediately to take all necessary preventive measures to avert the imminent threat of environmental damage or all practical measures to limit the extent of environmental damage and to prevent further damage.

Directors and officers liability for breaching legislation

The transposing legislation does not indicate whether directors and officers may be liable.

Publication of penalties

The transposing legislation does not require the publication of penalties.

24. Registers or data bases of incidents

The Minister for the Environment shall, at the expense of the person to whom a preliminary or final notice is issued, register its details in the land register in respect of the property(ies) affected by an imminent threat of, or actual, environmental damage. Details of preliminary or final notices issued in respect of third-party property shall not be registered in the land register.

If a preliminary notice is not made final, the Minister for the Environment shall pay the registration costs.
The Minister of the Environment shall remove details of preliminary and final notices when the notice has been complied with.

The transposing legislation does not require the publication of summaries of all ELD incidents; it is limited to draft and final decisions against responsible persons.

25. **Cross border damage in another Member State**

If environmental damage affects or may affect another Member State, the competent authority shall decide the person responsible for it unless there is an applicable defence.

The competent authority shall send the decision that there is an imminent threat of, or actual, environmental damage, together with the material used to assess the case, to the Minister for the Environment and, at the same time, to the responsible person.

The competent authority shall publish the decision.

26. **Financial security**

The Danish Government has not adopted mandatory financial security. The rules concerning mandatory financial security for persons who have caused an imminent threat of, or actual, environmental damage are, however, detailed and stringent.

27. **Establishment of a fund**

The transposing legislation does not establish a fund.

28. **Reports**

The transposing legislation does not indicate any reports that must be submitted.

29. **Information to be made public**

A decision against a person who is responsible for an imminent threat of, or actual, environmental damage must be published.

A competent authority may publish a draft decision. It must, however, provide them to eligible interested parties that have requested notification of decisions affecting their interests.

30. **Provisions concerning genetically modified organisms**

The permit defence applies to persons who use GMOs.
31. Key features and differences in legislation transposing the ELD and existing legislation

Liability for preventing and remediating land contamination already existed and continues to exist. It also includes liability for preventing and remediating water pollution. The existing legislation is well developed.

The current legislation for preventing and remediating contaminated land differs from the ELD in several respects as noted in section 2 above. The person who is liable under the legislation is the person who carried out an activity or who used the plant from which the contamination originated when the original contamination occurred, and any other person who caused the contamination due to their reckless conduct. The owner of the land, as in the ELD, is not liable under the legislation as it applies to current contamination incidents. Liability is modified proportionate liability, the same scope of liability applied by Denmark to the ELD.

The existing legislation is fault-based in respect of its retrospective application depending on the date at which the pollution incident that caused the contamination occurred. That is, prior to the specified dates, liability is fault-based; after the specified dates, liability is strict. These dates differ concerning whether the requirement is for the investigation of contamination or its remediation.

The threshold for land damage is much lower than the threshold for land damage in the ELD.
1. Existing national environmental legislation

Finland had extensive environmental legislation prior to the transposition of the ELD. That legislation, which focused on preventing environmental damage, also imposed liability for remediating it, in particular, damage to land and groundwater. Finland did not have legislation that imposed liability for remediating biodiversity damage.

In transposing the ELD, the Finnish Government introduced liability for biodiversity damage and extended liability for water damage. It did this by enacting an Act (383/2009) and a Decree (713/2009) with specific provisions on preventing and remediying environmental damage and by amending five environmental Acts. The transposing legislation supplements the existing legislation.

The main legislation, after transposition of the ELD, is the Environmental Protection Act (86/2000), as amended (EPA), which is framework legislation supplemented by regulations and guidelines issued by the Ministry of Environment. The Nature Conservation Act (1096/1996), as amended, the Water Act (587/2011), as amended, the Gene Technology Act (377/1995), as amended, and the Act on Transport of Dangerous Goods (719/1994), as amended, impose liability for preventing and remediying damage to biodiversity, water, genetically modified organisms (GMOs), and environmental damage to which the EPA does not apply.

2. Existing regimes for preventing and remediaying environmental damage

Finland’s transposition of the ELD resulted in the supplementation of a broad range of Acts that already included liability systems for preventing and remediaying environmental damage. As discussed below, those Acts have been amended to include provisions of the ELD. In particular, the EPA, with only slight amendments, continues to apply to soil and groundwater damage.

- Water pollution

The Water Act (587/2011), which entered into force on 1 January 2012, imposes liability for damage to waters to which the EPA does not apply. The Water Act also contains provisions to prevent damage to waters as well as the remediayion of damaged waters.

The EPA imposes liability for preventing and remediaying groundwater pollution.

- Land contamination

Early legislation on liability for remediaying contaminated land was set out in the Waste Management Act (673/1978), which entered into force on 1 April 1979, and the 1993 Waste Act.
These Acts, however, did not include specific provisions on liability for remediating contamination, although the courts construed provisions in the Waste Act to impose such liability.

The Waste Acts were superseded in part and supplemented in respect of liability for remediating contaminated land by revisions to the EPA.

The EPA, which entered into force on 1 March 2000, is wide ranging. Among other things, it transposed Directive (2008/1/EC) on integrated pollution prevention and control into Finnish law. The regime covers a large number of smaller installations that do not fall under the IPPC Directive (and the Industrial Emissions Directive). The competent authorities have powers under the EPA to require the prevention and remediation of environmental damage including, not only contaminated soil and groundwater, but also biodiversity. The provisions on contaminated land were introduced in a new chapter 12.

The EPA applies only to contamination that has been caused after 1 January 1994. The EPA 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 they consented to the contamination or the owner knew or should have known that the site was contaminated when it acquired the site. The owner or occupier may subsequently seek the recovery of its costs from the polluter. 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 soil 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. As above described, the existing legislation has retrospective effect in that the current landowner may be liable. However, the legal situation and decisions are not very predictable, particularly because the regime is based on few court decisions, not legislation.

Decisions of authorities under the EPA may be appealed to the Vaasa Administrative Court, as provided in the Administrative Judicial Procedure Act (586/1996). Further, decisions of the Government and the Ministry of the Environment may be appealed to the Supreme Court.

13 The current Waste Act is Waste Act (646/2011), which entered into force in May 2012. The scope of the Waste Act, which has subsequently been amended, includes only waste regulation. The current regime for remediating contaminated land is set out in the EPA.
An ELY Centre (see section 5 below) may grant an operator the right to access another person’s land to monitor the environmental effects of its activities on the quality of the environment even if the owner/occupier of the third-party land has not consented to the access provided that the monitoring does not cause any major inconvenience. The owner/occupier has a right to be heard in such a case. This provision is not specific to the ELD regime (see section 19 below).

Further, measures to remediate contaminated land are based on a risk assessment, as specified in the Government Decree on the Assessment of Soil Contamination and Remediation Needs (214/2007). The standard of remediation is not necessarily the environmental condition of the land prior to its contamination.

The EPA requires a person who causes a pollutant to enter soil or groundwater immediately to notify the environmental authorities. The failure to notify is a criminal offence.

The legislation transposing the ELD amended the EPA to add organisms and micro-organisms in order to prohibit their dumping or discharging on the land or in the soil. The EPA, with this amendment, continues to apply to land and soil damage (see section 14 below).

The EPA is considered to be more extensive and stringent than the legislation transposing the ELD in respect of land damage. 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 EPA.

The potential for an overlap or clash between legislation transposing the ELD and existing legislation is thus obviated for land and soil damage.

- Restoring biodiversity damage

The Nature Conservation Act (384/2009), as amended, includes provisions for preventing and remediating damage to biodiversity.

- Other liability systems for remediating environmental damage

The main civil cause of action for compensation for environmental damage entered into force on 1 June 1995, with the introduction of the Act on Compensation for Environmental Damage (737/1994), as amended (EDA). The EDA is more specific in respect of environmental damage than earlier legislation such as the Tort Liability Act (412/1974).

The EDA provides a cause of action in civil liability for environmental damage, which is defined broadly to include water, soil and air pollution as well as noise, vibration and heat. The person against whom a claim may be brought is the person whose activity caused the environmental damage. The operator’s liability for an “activity” includes the storage of hazardous chemicals, and thus, chemical tanks, but not liability for the remediation of contaminated land. The EDA also includes a secondary civil liability regime. A new owner of the activity and/or the operator can be liable if the person who caused the damage cannot be found or cannot pay compensation. However, the new owner or occupier of the land is not liable for paying compensation under the EDA regime, but it can be liable for remediating contaminated soil under the EPA regime.

Liability is strict and joint and several. The EDA includes provisions for allocating damage between tortfeasors according to an agreement between them or, if not achievable, according to

Administrative Court as may decisions of the Vaasa Administrative Court, again as provided in the Administrative Judicial Procedure Act.
a standard of reasonableness which takes into account the standard of liability, the potential for preventing the damage and other facts and circumstances. A claimant may thus bring an action against any tortfeasor, which in turn may claim contribution from other tortfeasors.

Liability is not retrospective, that is, the EDA applies only to an activity that caused environmental damage after the EDA entered into force on 1 June 1995. If the damage is discovered after 1 June 1995 and the activity that caused it occurred before that date, the EDA does not apply. If the activity causing the damage continued after 1 June 1995, the EDA applies only in respect of damage after that date. Compensation includes compensation for bodily injury, property damage, pure economic loss, and compensation for measures taken to prevent environmental damage and restoration costs and related investigatory costs.

The EDA applies only to damage that it is not reasonable to tolerate, with applicable criteria depending on the facts and circumstances of a claim. Further, the EDA applies only to stationary (not mobile) sources. It does not, therefore, apply to environmental damage caused by transportation (such claims are covered by the Traffic Insurance Act (279/1959), as amended), the Act on Liability in Rail Transport (113/1999), as amended, and the Maritime Code (674/1994), as amended. Those Acts contain their own provisions for environmental damage. The EDA, however, apply to locations where transport takes place such as roads.

Backing up the EDA and other civil legislation providing compensation for environmental damage is the Environmental Damage Insurance Act (81/1998), as amended (see section 26 below).

The legislation transposing the ELD amended the Gene Technology Act (377/1995) to require the prevention and remediation, and the limitation to a minimum, of GMOs above the threshold in the ELD for waters and biodiversity. The Gene Technology Act already provided that the operator of the direct release of a GMO into the environment must carry out remedial measures if the release of a GMO is altered or it changes unintentionally so that it may present a risk to human or animal health and the environment. The Act also contains provisions to require an operator to carry out preventive and remedial actions in the event of a risk. The operator is required to notify the Board for Gene Technology without delay of any accident or hazardous situation which has resulted, or could result, in the release of a GMO from contained use or which has or could have resulted in a risk to human or animal health or the environment.

In respect of the transfer of land, the EPA requires the seller of a freehold or leasehold interest in land to disclose information on activities at the site which may have resulted in soil or groundwater contamination. Such information includes information on the storage of waste and hazardous chemicals. The requirement applies only to asset transactions, not to share transactions. If the seller fails to do so, the purchaser or tenant may seek to rescind the contract or lease, or to claim compensation or a reduction in the sale price or rent. This is not, of course, administrative liability.

---


Interface between the existing national liability regimes and the ELD regime

There is essentially not an interface between existing national liability regimes and the ELD regime due to most amendments having been made to existing legislation with the transposition of the ELD. That existing legislation, as amended, continues to apply. However, the interaction between the threshold “damage” under existing legislation and the threshold for “serious environmental damage” under the ELD-transposing legislation could be problematic, because it has created two standards of liability and some uncertainty in cases that could potentially fall within either category.

3. Integration of the ELD into existing national legislation

Transposing legislation

The transposing legislation is:

- Act on the Remedying of Certain Kinds of Damage to the Environment (383/2009) of 1 July 2009 (Environmental Liability Act or ELA); and

Amendments to existing national legislation

The following legislation has been amended to bring the ELD regime into effect:

- Nature Conservation Act (1096/1996);
- Environmental Protection Act (86/2000);
- Water Act (587/2011);
- Gene Technology Act (377/1995); and

Authorisation in legislation for other governmental entities to issue rules and regulations

There is no authorisation for other governmental entities to issue rules and regulations.

Relationship to other legislation

The ELA refers to amended provisions in the legislation specified above. That is, it states that: “Remedial measures are laid down in the Nature Conservation Act, the Environmental Protection Act, the Water Act and the Gene Technology Act”. It also states that “The obligation to prevent damage as referred to in section 1(1) [of the ELA] and the obligation to limit damage caused are described in the Acts mentioned in subparagraph 1 [see above] and the Act on the Transport of Dangerous Goods”.

The Administrative Procedure Act (434/2003) also applies to the ELD regime.

Guidance and other documentation

---

16 The Guidance refers to the Act as the Act on the Remediation of Certain Environmental Damages.

The Guidance is designed primarily for governmental authorities, in particular Regional State Administrative Agencies, ELY Centres (see section 5 below), and local environmental protection authorities.

4. **Effective date of national legislation**

1 July 2009

The transposing legislation specifically states that the ELA does “not apply in the remediying of damage due to activity that ends before the [ELA] enters into force, even if the damage has not become apparent until after the [ELA’s] entry into force”.

5. **Competent authority(ies)**

The legislation transposing the ELD into Finnish law designated the Regional Environmental Centres as the competent authorities at a regional level. On 1 January 2010, some of the functions of those Centres were transferred to the Centres for Economic Development, Transport and the Environment, commonly known as ELY Centres. The functions of the Regional Environmental Centres in respect of environmental permitting were transferred to the newly created Regional State Administrative Agencies.

There are 15 ELY Centres (13 of which have Environmental Departments). They are responsible for:

- business and industry, the labour force, competence and cultural activities;
- transport and infrastructure; and
- the environment and natural resources, including the ELD regime.

The competent authorities in Finland are thus as follows:

- ELY Centres, which can issue orders in accordance with the Nature Conservation Act and the Environmental Protection Act;
- Regional State Administrative Agencies, which can issue orders based on the Water Act (which covers damming and abstraction matters);
- the Board for Gene Technology, which can issue orders in accordance with the Gene Technology Act; and
- local environmental protection authorities (Municipality), which act as supervisory authorities under the Environmental Protection Act and the Water Act.
If a local environmental protection authority (municipality) is notified of environmental damage under the ELD, it should contact the ELY Centre.

6. **Operators and other liable persons**

The transposing legislation extends the definition of an operator. The definition includes, among others, a person in charge of a road, railway, port, airport or similar areas.

Under the Nature Conservation Act, a person who is engaged in a professional activity "or who *de facto* controls" such an activity may be liable under the ELD regime. The activity must, however, be a professional activity to be within the scope of the transposing legislation. This is not necessarily the case with some other Finnish legislation such as the Forest Act (1093/1996), Land Extraction Act (555/1981) and biodiversity damage by hunting under the Nature Conservation Act.

- Secondary liability (e.g., parent company)

The transposing legislation does not mention secondary liability. However, the EPA imposes secondary liability for remediating soil contamination on the owner of the site.

- Death or dissolution of responsible operator

The transposing legislation does not mention the effect of the death or dissolution of a responsible operator, because in such cases the relevant regime is civil legislation including rules on probate and insolvency. However, the EPA imposes secondary liability for remediating soil contamination on the owner of the site.

- Person other than an operator who may be liable

Only an operator may be liable. See, however, section 14, “Land damage” above and below in respect of the remediation of soil contamination and groundwater pollution.

7. **Annex III legislation**

- Rebuttable presumption that operator’s activity caused environmental damage

The transposing legislation does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

- Additional occupational activities subject to strict liability

The transposing legislation does not include additional occupational activities as Annex III activities. However, national environmental legislation (EPA) requires the remediation of contamination from all activities that pose a threat of, or that cause, such contamination regardless of whether the activities are specifically regulated under Annex III legislation.

The Guidance states that national law also provides that an order to remedy damage to protected species and natural habitats caused by an activity related to damming or water abstraction (under the Water Act) will be issued regardless of whether the damage is caused by negligence.
Thus, strict liability for some biodiversity damage exists under Finnish law beyond liability from activities listed in Annex III.

- Spreading of sewage sludge for agricultural purposes

The transposing legislation does not exempt the spreading of sewage sludge for agricultural purposes from Annex III activities.

### 8. Standard of liability for non-Annex III activities

The standard of liability for non-Annex III activities is negligence. But see section 7 above concerning strict liability for non-Annex III activities under national law.

### 9. Exceptions

- Application to imminent threat of environmental damage as well as environmental damage

The transposing legislation applies the exceptions only to environmental damage.

- Differences with exceptions in the ELD

ELD: “a natural phenomenon of exceptional, inevitable and irresistible character”

ELA: “an exceptional natural phenomenon”. The Guidance refers to “an exceptional natural phenomenon” and states that it “chiefly refers to extreme situations (force majeure). However, the Act applies to damage that has been caused by thunder, normal storms or heavy rain”.

The exception in Finnish law is the same as the exception in the ELD because a natural phenomenon is not limited to weather but also includes, for example, earthquakes, volcanoes, flooding from groundwater and landslides, whether or not they occur in Finland.

There is no exception in the transposing legislation for “an act of armed conflict, hostilities, civil war or insurrection”. The lack of this exception is more stringent than the ELD.

- Diffuse pollution exception

The diffuse pollution exception tracks the ELD. The Guidance states that an authority must be able to establish the identity of the operator who caused the damage and the causal link between the damage and the operator’s activity subject to administrative enforcement.

### 10. Joint and several or proportionate liability

The transposing legislation imposes proportionate liability (see the summary of existing legislation to which proportionate liability already applied in section 2).

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”. These provisions are equivalent to case law under the EPA (see Guidance, p. 40, section 4.2.3).
The Guidance further states that if it is difficult “to assess the share of responsibility of each individual operator who has contributed to the damage ... responsibility will be divided per capita”. Further, it states that the State is not obliged to contribute to remediation costs but may do so under certain circumstances by allocating funds budgeted to the Ministry of the Environment (Guidance, p. 40, section 4.2.3).

When a competent authority issues an order to carry out remedial measures, it must, if necessary, include “the distribution of liability between parties and on rendering the costs equitable”.

Mechanism for contribution between liable operators

The transposing legislation does not specifically mention contribution between liable operators. Procedures for contribution actions for environmental damage, however, already exist under the EPA.

11. Limitation period

The transposing legislation does not include a limitations clause. The Guidance states that Finnish legislators did not consider it necessary to specify a time limit, which means that the ELA may be applied to environmental damage that occurs after the ELA entered into force and which emerges “over a very long period of time”.

Existing legislation such as the EPA does not include a limitation clause.

12. Defences

Defences to liability or costs?

The following defences are defences to liability:

- environmental damage that is the result of an action by a third party that occurred despite the operator having taken proper precautions; and
- environmental damage as a result of compliance with a regulation or instruction issued by an authority, unless the regulation or instruction concerns an emission or other occurrence resulting from the operator’s own activity.

That is because, as discussed directly below, an operator is not required to comply with a decision if the ELY Centre decides not to enforce the decision during the pendency of the appeal. The general rule, however, is that decisions are not generally suspended. This would, in effect, make the defences, defences to costs.

The Water Act and the Nature Conservation Act contain provisions on the enforcement of decisions regardless of an appeal. The Guidance states that an authority’s decision on a matter pertaining to administrative enforcement may include an order that, regardless of the appeal, the operator must comply with the decision.
The Guidance further states, in respect of the Nature Conservation Act, that “the decision of the ELY Centre must be adhered to regardless of appeal, unless the appeal authority decides otherwise”.

In respect of the defence of a third party causing environmental damage, the Guidance states that “[a]ppropriate safety measures include prevention of access by means of fencing and adequate locking mechanisms”. These measures can be adequate in some cases to avoid liability, if they reach a normal, average level of safety.

-if defences to liability; suspension (or not) of remediation notice during appeal-

The Guidance states that the general provisions to enforcement of decisions apply to decisions under the ELD. A decision may be enforced before it has become final if there is a provision to this effect in an Act or Decree, the decision requires immediate enforcement, or its enforcement cannot be delayed for reasons of public interest.

-Permit defence-

Finland has adopted the permit defence. The defence, however, differs from that in the ELD. The ELA 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 Guidance states that the operator must prove that the damage was not caused deliberately or negligently. It further states that “[c]osts can be made equitable under some circumstances, if the damage is due to operations that were in compliance with the relevant obligations prescribed under legislation. In accordance with the [ELA], the latter restriction mainly applies to accidents occurring during the transport of dangerous goods” (italics original). In referring to the Act on Transport of Dangerous Goods, the Guidance states that “This limitation on liability is recorded in the national legislation under a wider scope than is set down in the [ELD]”.

The adoption of the above hybrid of the permit defence is in line with existing Finnish environmental legislation (see section 2 above).

-State-of-the-art defence-

Finland has not adopted the state-of-the-art defence.

The transposing legislation does not extend liability to a person that provides the hazardous substance or other product that causes environmental damage. The operator of the product is liable for the imminent threat of, or actual, environmental damage. The operator may, in some cases, seek compensation under national legislation from the person who provided the product. Examples are rights provided to farmers under the Fertiliser Product Act (539/2006) and the Seed Act (728/2000).
13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000) 14.42%

- Extension of biodiversity to nationally protected biodiversity

The transposing legislation does not extend biodiversity damage to nationally protected biodiversity.

- Biodiversity damage in the exclusive economic zone

Biodiversity damage in Finland’s exclusion economic zone is covered by the ELD regime.

- Water or water body

See section 14, Thresholds, below.

14. **Thresholds**

The transposing legislation and the Guidance refer repeatedly to “significant” environmental damage and “significant” pollution, thus using the word “significant” to mean damage or pollution that equates to the definition of “environmental damage” in the ELD.

- Water damage

The thresholds for water damage are discussed at length in the Guidance. The Guidance states that in section 4 of the ELA, the term “natural resource” in respect of services from a natural resource means, in respect of water:

- “the water bodies referred to in the Water Act ... and groundwater;
- the territorial waters referred to in the Act on the Delimitation of the Territorial Waters of Finland ...”; and
- the exclusive economic zone”.

Damage to surface water must be to a water body under the Water Act, the scope of which is broader than the Water Framework Directive. Damage to groundwater and coastal waters may be damage to the waters themselves. The Water Act (article 21:3c) stipulates, among other things, that the significance of a change is assessed on the basis of the river basin management plan.

- Biodiversity damage

The Guidance states, among other things, that the favourable conservation status is assessed area by area, whether at the EU level, Member State level or with respect to the natural range of a species or natural habitat. The Guidance also states that the destruction of a few known localities of various protected species outside the Natura 2000 network could have a significant impact on their range and favourable conservation status.

- National biodiversity damage

Nationally protected biodiversity damage is not covered.
Land damage
As indicated above, the legislation transposing the ELD added an amendment to the EPA to include the prohibition of a discharge or dumping of organisms and micro-organisms on land or the soil. The Guidance states that the term “other substance” in the EPA was already considered to include organisms and micro-organisms; and the purpose of the amendment was simply to clarify that this is the case.  

The EPA, as amended, continues to apply to soil and groundwater contamination (see discussion of the EPA in section 2 above).

The provisions of the EPA concerning the remediation of soil and groundwater contamination are considered to be more stringent than land damage under the ELD. As indicated in section 2 above, the liability regime under the EPA is more extensive than that in the ELD.

15. Standard of remediation

The Guidance differentiates between the terms “natural resources services” under the ELD regime and “ecosystem services” (that is, provisioning services, regulating services, cultural services, and supporting services). The Guidance notes that, although there are similarities, the main difference is that the former are services to other natural resources, the latter includes only benefits to humans. The ELD regime is, therefore, “slightly wider” than the definition of ecosystem services.

Land
See section 14 above.

Biodiversity

Primary remediation
The Finnish transposing legislation tracks the ELD in respect of the primary remediation of biodiversity.

Complementary and compensatory remediation
If the scale of complementary and compensatory remedial measures cannot be determined within a reasonable time or at a reasonable cost, “the extent of the measures may be determined at discretion”. If this is the case, “the costs incurred from the measures must match the monetary value of the lost natural resources or natural resources services”.

---

17 Guidance, section 2.2.1, p. 18. The Guidance further states that: “As regards assessment of groundwater pollution and liability for restoration, it makes no difference whether the pollution is determined to be substantial pollution as specified in the Environmental Liability Directive or groundwater pollution that exceeds the national pollution threshold” ibid.

18 Guidance section 2.4.1., p. 19. The Guidance states that “The requirements of the [EPA] apply to any actions causing soil contamination. There is strict liability for restoration, i.e. it applies even when the contamination has not been caused deliberately or negligently. In addition, such liability is not based on a violation of provisions or regulations laid down in or under an Act, or permit conditions. This means that the environmental liability legislation does not apply to soil contamination. Instead, the general provisions of the [EPA] soil contamination and groundwater pollution apply”. 
The Guidance states that, if possible, complementary remediation should be carried out at a damaged site. If this is not possible, it should be carried out within the ecosystem and, if this is not possible, remedial measures should be taken to provide an alternative natural resource or service. This concept differs slightly from the ELD in that it refers to an ecosystem rather than stating that the alternative site should be geographically linked to the damaged site.

**Water**

**Primary remediation**

The ELA has amended the Water Act in respect of water damage. The Guidance discusses at length environmental damage to water, noting among other things that significant damage to land typically involves damage to groundwater.

**Complementary and compensatory remediation**

See above under “Biodiversity”; “Complementary and compensatory remediation”.

16. **Format of determination of environmental damage**

The transposing legislation does not specify any particular format for a determination of environmental damage. The Guidance states that if an ELY Centre determines that damage does not constitute damage to biodiversity and, therefore, no grounds exist for administrative enforcement proceedings, it “must in most cases”, issue an administrative decision. In cases that clearly do not constitute significant damage and in which the ELY Centre has not initiated administrative enforcement proceedings, it may be sufficient to record the assessment of the damage in a separate memo.

17. **Powers and duties of competent authority**

Finland already had extensive administrative procedures under existing legislation when the legislation transposing the ELD entered into effect. These procedures continue to apply, as supplemented by the legislation transposing the ELD. The key existing legislation that includes administrative procedures and to which the transposing legislation applies is as follows:

- Nature Conservation Act;
- EPA;
- Water Act; and
- Gene Technology Act;
- Rescue Act (379/2011)
- Act on Combating Oil Pollution (1673/2009)
- Act on Environmental Protection in Maritime Transport (1672/2009); and
Inspections, investigations, studies and analyses

The EPA provides competent authorities with the power to carry out inspections, investigations, studies and analyses.

The Administrative Procedure Act (434/2003) provides that the authorities must provide the owner or occupier of a site with prior notification of an inspection.

Information orders

The ELY Centre “has the right, notwithstanding the provisions on confidentiality, to obtain from the operator the information necessary to prevent damage to nature or the threat thereof or to remedy damage to nature”.

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

The ELY Centre has a duty to require a responsible operator, “if necessary to take action to prevent adverse effects or limit them to a minimum”.

The Guidance states that, upon being notified of possible significant environmental damage, an ELY Centre must order an operator to take measures necessary to limiting and preventing the damage if it receives notification of an imminent threat of damage and the operator has not taken such measures.

Power or duty to require an operator to carry out remedial actions

The ELY Centre has a duty to issue an order to an operator to carry out remedial measures. In addition, the ELY Centre “may make the order more effective with the conditional imposition of a fine or with the threat of having an ignored measure carried out at the defaulter’s expense or discontinuing the activity”.

The Guidance states that an order under the administrative enforcement proceedings (under the Water Act) “must be reinforced unless such a course of action is apparently unnecessary, under notice a conditional fine or a requirement that the neglected measure be carried out at the expense of the negligent party, or the suspension or prohibition of the operations in question”. The person subject to the prohibition or order may appeal it.

The Guidance also states that an ELY Centre must order an operator to take remedial actions to minimise adverse effects if it receives notification of environmental damage. If, for example, an operator who caused environmental damage does not prepare a proposal on remedial measures, the competent authority must assess the damage in order to select suitable remedial measures. The operator is liable for costs incurred by the authority in doing so.

Further, the Guidance states that before an order to carry out remedial measures is made under the Nature Conservation Act, the operator must have an opportunity to be heard and have the opportunity to submit a proposal. The ELY Centre must take the proposal and the comments of interested parties into consideration when issuing the order on remedial measures. An order given under the administrative enforcement proceedings “may be reinforced with notice of a

---

99 See Guidance, p. 37, section 4.1.
conditional fine or a requirement that the neglected measures be carried out at the expense of the negligent party, or suspension of the operations in question”.

Power or duty of competent authority to carry out preventive measures

The ELY Centre may, at the State’s expense, take necessary measures, or have them taken, to prevent or limit damage if:

- there is an emergency and the damage may extend significantly if procedures are complied with; or
- the identity of the responsible operator is unknown or operator is insolvent.

The Guidance states that:

- the ELY Centre’s right to carry out such measures extends only to the damaged area;
- in order for the ELY Centre to carry measures in an urgent matter, the measures must not be able to be delayed “without substantially exacerbating the damage”; and
- if the ELY Centre carries out the measures because the identity of the responsible operator is unknown and the operator is later identified, “the state will collect the costs incurred from the operator who caused the damage”.

The Guidance further states that the procedure for initiating administrative enforcement proceedings after having carried out any urgent measures differs depending on the type of damage, as follows:

- under the administrative enforcement provisions referred to in the Nature Conservation Act and the EPA, the ELY Centre is also the decision-making authority with respect to remedial measures and can commence administrative enforcement proceedings independently;
- under the Water Act, the ELY Centre must initiate the proceedings at the Regional State Administrative Agency. In such a case, if the ELY Centre considers that the damage is “clearly insignificant, after carrying out the urgent measures, and it does not initiate administrative enforcement proceedings, it may be sufficient to record the assessment of the damage in a separate memo. However, to be able to recover costs from the operator that caused the damage, the authority must make a decision on the matter”; and
- for matters within the scope of the Gene Technology Act, the ELY Centre does not have the right to initiate proceedings but must inform the Board for Gene Technology by other means about possible damage caused by GMOs.
Power or duty of competent authority to carry out remedial measures

The ELY Centre has the power but not the duty to carry out remedial measures or to have them carried out.

The Guidance states that if the operator is not liable for the costs “or the liability of the operator who caused the damage has been made more equitable, the ELY Centre may carry out the remedial measures, or have them performed as work benefitting the environment [in which case the state has no obligation to contribute to these costs, but under certain circumstances, it could be possible to allocate certain funds budgeted to the Ministry of the Environment to carry out remedial measures].”

Form of preventive order

The transposing legislation does not specify the form of order from a competent authority for preventive measures. The Guidance, however, notes various provisions that should be in such orders as discussed in this summary.

Form of remediation order

The transposing legislation does not specify the form of order from a competent authority for remedial measures. The Guidance, however, notes various provisions that should be in such orders as discussed in this summary.

Appeal against preventive or remediation order

Appeals against competent authorities’ decisions to impose remedial measures or liability for costs are set out in the Act whose administrative enforcement procedures have been followed. The procedures are as follows:

- an appeal relating to matters within the scope of the Water Act and the EPA is made to the Administrative Court of Vaasa;
- an appeal relating to matters within the scope of the Nature Conservation Act is made in a regional Administrative Court; and
- a decision by the Board for Gene Technology may be appealed to the Administrative Court, as referred to in the Administrative Judicial Procedure Act (586/1996).

An operator has a right to appeal against an assessment of the significance of environmental damage as well as the competent authority’s enforcement of the ELD regime.

Sanctions for delay in complying with preventive or remediation order

The transposing legislation does not specifically mention sanctions for a delay in complying with an order requiring remediation. The breach would, however, be subject to sanctions (see section 23 below).

Formal consultees on contents of preventive and remediation orders

The transposing legislation does not provide for formal consultees. The Guidance notes, however, that certain types of remedial measures may also require the permission of other authorities. It provides the example of a landscape work permit granted by municipal building
Implementation challenges and obstacles of the Environmental Liability Directive

- **Recovery of implementation and enforcement costs**

Costs that may be recovered by a competent authority from a responsible operator include costs incurred by the authority in:

- assessing the damage and the immediate threat posed by it including the costs of clarifications necessary to determine the damage and its immediate threat;
- deciding upon remedial measures including clarifications necessary to assess alternative remedial measures and clarifications necessary to select remedial measures; and
- supervising remedial measures including clarifications in monitoring implemented remedial measures.

- **Deadline for competent authority to seek recovery of costs**

A competent authority has five years from the conclusion of measures taken by it, or the discovery of the identity of the responsible operator. A decision on recovery may not be enforced until it has gained legal force.

**18. Duties of responsible operators**

- **Preventive measures**

“If an activity ... directly threatens to result in pollution, the operator must, without delay, take the necessary action to prevent the pollution”.

Under the Water Act, an operator who causes an imminent threat of damage or harm must immediately take appropriate measures to prevent it.

- **Remedial actions (emergency actions)**

If the operator’s activity has caused pollution, “the operator must, without delay, take the necessary action ... to limit it to a minimum”.

Under the Water Act, an operator who causes damage or harm must immediately take appropriate measures to minimise it.

- **Remedial measures**

There is a three-phase assessment procedure for remedial measures as follows:

- assessment of the significance of damage to natural resources and services to determine the necessary primary response measures;
- assessment of the need for remedial measures if the first assessment shows that an imminent threat of, or actual, environmental damage has occurred – this phrase consists of any
necessary additional investigations to establish a more detailed assessment of ELD incidents and their consequences; and

- selection of remedial measures, focusing on the most suitable and cost-effective measures or combination of measures including natural recovery if it can occur during a reasonable time.

Significance of environmental damage, that is, whether there is “environmental damage” under the ELD regime, is determined on a case-by-case basis.

**Duty to notify / provide information when imminent threat of environmental damage occurs**

An operator has a duty to notify the following, as appropriate of an imminent threat of damage:

- ELY Centre, without delay, concerning nature; and
- State supervisory authority, immediately, concerning the Water Act.

**Entity to which notification should be provided**

The operator must notify the relevant ELY Centre or State supervisory authority as indicated directly above.

19. **Access to third-party land to comply with the ELD**

The competent authority may grant the right to a responsible operator to enter third-party property. The authority must provide the owner of the property or holder of a special right in it with the opportunity to be heard before deciding on applicable remedial measures. If the remedial measures result in substantial harm to the owner or holder of a special right, they are entitled to compensation. The compensation is set out at the same time as the order conferring the right of access. If the owner/holder and the responsible operator cannot agree on the amount of compensation, that amount will be decided, where applicable, with reference to the Act on the Redemption of Immoveable Property and Special Rights (603/1997).

The Guidance states that if carrying out “remedial measures causes considerable inconvenience to the owner of the real estate or to a special right holder, he or she has the right to full compensation for any damage. The authority must provide the owner of the real estate or the special right holder the right to be heard, and determine the amount of any compensation to be paid”.

If a person who is entitled to compensation cannot obtain it from the responsible operator, the State is liable to pay the compensation.

20. **Interested parties**

The Guidance states that “[a]nyone who observes environmental damage may inform the supervisory authority, which is usually the nearest regional ELY Centre or the Board for Gene Technology”.
The following persons have the right to initiate proceedings under the Water Act when the supervisory authority has not done so:

- parties whose rights or interests may be affected by the matter;
- registered associations or foundations whose purpose is to promote protection of the environment or health or nature conservation, or the general amenity of the environment, and whose area of activity is subject to the environmental impact in question;
- the municipality where the water resources management project takes place and other municipalities that are subjected to its environmental impact; and
- other supervisory authorities that act in the public interest in the matter such as the Finnish Transport Agency, the Finnish Forest and Park Service (Metsähallitus), or the National Board of Antiquities.

The Guidance states that the procedure for initiating a matter is in writing at the appropriate Regional State Administrative Agency by an application for administrative enforcement. If the ELY Centre that acts as the supervisory authority does not initiate proceedings at the Regional State Administrative Agency because the damage is not considered sufficient to warrant such action, it may be sufficient to record the assessment of the damage in a separate memo.

The following persons have the right to institute proceedings under the Nature Conservation Act if neither the operator nor the ELY Centre does so:

- “anyone suffering inconvenience;”
- any registered local or regional association whose purpose is to promote nature conservation or environmental protection; and
- a municipality”.

Qualification criteria for “sufficient interest”

The following persons are affected, or are likely to be affected, by or have a “sufficient interest” under the transposing legislation:

- the person whose right or interest the matter may concern;
- “a registered association or foundation whose purpose is the promotion of environmental protection, the protection of health, nature conservation or pleasant living environments and whose sphere of operations relates to the environmental effects concerned”;
- “the municipality where the activities are located and any other municipality within which the environmental effects of the operations are felt”;
- “the [ELY Centre] and the environmental protection authorities in the municipality where the activities are located and municipalities in the area affected by them”; and
In respect of the Gene Technology Act, the following persons are affected, or likely to be affected, by or have a “sufficient interest”:

- the person whose right or interest the matter may concern; and
- “a registered association or foundation whose purpose is the promotion of nature conservation and environmental protection and whose sphere of operations under the rules relates to the environmental effects concerned”.

Method of notifying interested parties of planned remedial measures

The transposing legislation does not specify a method for notifying interested parties of planned remedial measures.

Information to be provided to competent authority

The transposing legislation does not specify details of the information to be provided to the competent authority.

Challenges to competent authority’s decision

The transposing legislation does not specify the nature of, or procedures for, a challenge to a competent authority’s decision. The EPA specifies the procedures and other relevant details. This legislation is not specific to the ELD regime.

Duty on competent authority to respond to person making comments

The transposing legislation does not discuss a duty on a competent authority to respond to a person making comments.

Inclusion of interested party in any proceedings by the competent authority against an operator

The transposing legislation does not provide for the inclusion of an interested party in any proceedings by the competent authority against an operator.

21. Public access to information regarding environmental damage and related measures

The transposing legislation does not specifically provide for public access to information regarding environmental damage and related prevention, containment or remedial measures.

22. Charges on land / financial security after environmental damage

The transposing legislation does not include provisions for charges on land or financial security to cover the costs of remediating environmental damage.
23. **Offences and sanctions**

- Directors and officers liability for breaching legislation

The transposing legislation does not mention the liability of directors and officers for breaching that legislation.

- Publication of penalties

The transposing legislation does not provide for the publication of penalties under the ELD regime.

24. **Registers or data bases of incidents**

The transposing legislation does not require the establishment of a register or data base of ELD incidents.

25. **Cross border damage in another Member State**

The Guidance states that “If environmental damage might have an impact outside Finland’s borders, prevention and remediation typically require international cooperation between the authorities. Several international conventions regulate international cooperation between rescue authorities, and more specifically, international cooperation related to environmental damage, such as damage at sea and damage affecting transboundary waters. In these situations, the national authorities to be contacted must be identified on a case-by-case basis”.

26. **Financial security**

Finland has not adopted mandatory financial security for environmental damage under the ELD. Finland has, however, enacted the Environmental Damage Insurance Act (81/1998), which provides compensation for environmental damage if the liable party is insolvent or cannot be identified. Compensation for environmental damage paid by insurance under the Act is narrow; it does not cover environmental damage under the ELD. The insurance includes compensation for bodily injury, property damage, and pure economic loss caused by environmental damage such as noise. The Act applies to damage that has occurred after it entered into force on 1 January 1999. Funding for the scheme is from mandatory financial security on companies which have an environmental permit. The scheme is administered by insurance companies, which have established the Environmental Insurance Centre to handle claims for compensation.

This obligatory insurance does not obviate the need for operators to purchase voluntary environmental insurance, which has a larger role in providing financial security for companies and other persons whose activities may cause environmental damage.

27. **Establishment of a fund**

Finland has not established a fund for environmental damage under the ELD.
Prior to the ELD, however, Finland had established a national oil pollution fund, which is financed by a charge on imports of oil.

28. **Reports**

The transposing legislation does not refer to reports under the ELD regime.

29. **Information to be made public**

The transposing legislation does not specify any information to be made public under the ELD regime.

30. **Provisions concerning genetically modified organisms**

The Guidance discusses damage from GMOs separately due to liability for them being included in distinct legislation in Finland. It states that environmental damage from GMOs may damage biodiversity, water bodies or land.

The transposing legislation added organisms and micro-organisms to the EPA even though the word “substances” was considered to include them (see section 14 above).

The Guidance discusses assessment criteria for GMOs as including damage caused by a GMO itself (such as the effects of toxin-producing cultivated plants on protected insects) and indirect damage (such as the eradication of an insect pest due to the toxin, causing the eradication of a protected species feeding on the pest), as well as immediately and delayed damage. The Guidance further states that “Environmental Damage caused by [GMOs] always constitutes damage to water bodies, protected species and natural habitats and soil”.

In transposing the ELD, Finland amended the Gene Technology Act to add an order for the prevention, limitation to a minimum and remediation of the significant pollution of a water body or significant damage to protected species and natural habitats.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

Liability for preventing and remediating land contamination, and associated groundwater pollution, already existed and continues to exist. The existing legislation for contaminated land is considered to be more extensive and stringent than the legislation transposing the ELD in respect of land damage.

The legislation for preventing and remediating contaminated land imposes retrospective as well as prospective liability. The owner or occupier of contaminated land may be liable in lieu of the polluter depending on the circumstances, in particular, the time at which the polluting incidents occurred. Liability exists for investigating contaminated land as well as remediating it. The proportionate liability system under the legislation is the same as that under the ELD regime.
In addition to the contaminated land legislation, the civil legislation for environmental damage (which includes water, soil and air pollution), imposes liability for compensation, which includes compensation for measures taken to prevent environmental damage, restoration costs and related investigatory costs, as well as compensation for bodily injury, property damage and pure economic loss. Liability under the civil law is not retrospective; it is strict and joint and several, with provisions for allocating damage between tortfeasors.

Although legislation for preventing and remediating damage to biodiversity and water pollution existed, and continues to exist, it is not as developed as the contaminated land legislation.

Unlike many Member States, Finnish legislation specifically provides requirements for an operator to carry out preventive and remedial actions in the event of a risk from GMOs.
Implementation challenges and obstacles of the Environmental Liability Directive
1. **Existing national environmental legislation**

France has longstanding administrative enforcement legislation to ensure the control of industrial nuisances.

The current classified facilities legislation, dated 19 July 1976 and codified since 2000 in the Environmental Code, is rooted in a decree decided by Napoleon back in 1815. When France enacted Law n° 2008-757 of 1 August 2008 and Decree n°2009-468 of 23 April 2009 (that is, the legislation that transposed the ELD into national law), France already had legislation that imposed liability for remediating contaminated land and groundwater associated with such land.

In transposing the ELD, the French Government introduced liability for biodiversity damage and extended liability for water and land damage. This took place by the enactment of Law n° 2008-757 dated 1 August 2008 which introduced article L160-1 et seq. into the Environmental Code.

2. **Existing regimes for preventing and remediating environmental damage**

When France transposed the ELD, liability systems for preventing and remediating water pollution and land contamination already existed.

- **Water pollution**

According to the legislation on water, adopted by Law No. 92-3 of 3 January 1992 on water and codified in articles L210-1 and R.214-1 et seq. of the Environmental Code, an authorisation or declaration is required for water sensitive activities or works. However, it is not necessary to obtain a specific authorisation or to proceed to a specific declaration if an authorisation or a declaration has already been obtained under the classified installations regime.

Under this regime, competent authorities can require an operator who pollutes water to remEDIATE it in the following circumstances:

- When operations cease on a site. In this situation, the site must be put back into such a state that there is no risk for the balanced management of water resources, as described in article L211-1 of the Environmental Code; and
- In the event of an incident our accident causing water pollution. Similarly, remediation may be required.

These requirements are similar to those that apply to installations subject to Directive 2008/1/EC on integrated pollution prevention and control / Directive 2010/75/EU although, as noted below, they apply to a wider range of installations.

See below for the remediation of groundwater pollution related to contaminated land.
Land contamination

Various regimes in France impose liability for the remediation of contaminated land.

ICPE regime

Law No. 76-663 of 19 July 1976 on classified installations was the most relevant law to address the remediation of contaminated land due to land generally becoming contaminated as a result of industrial activities. The Law, which has been much amended, is now mainly codified in the Environmental Code (Classified Installations Law) in particular Title I, Part V of the Environmental Code. The Classified Installations Law classifies industrial activities according to their dangerous nature i.e. the risks from classified installations to human health and the environment including biodiversity and cultural heritage. The Law thus differs from the Water Law due to its focus on industrial activities. Indeed, liability for remediating contamination under the Classified Installations Law concerns contamination that results from industrial activities.

Classified installations where high-risk operations are carried out must obtain a permit; installations with medium risk operations must be registered; installations with low risk operations must make a declaration of operations to the relevant competent authority. There are approximately 500,000 ICPEs, among which 45,000 are subject to authorisation (permit), 6,000 are subject to the integrated pollution prevention and control/industrial emissions regime and 1,200 are covered by the Seveso legislation. The French regime is, thus, much broader than the EU integrated pollution prevention and control/industrial emissions regime.

If a pollution accident/incident occurs during the pendency of a permit for a classified installation, the operator (that is, the person who holds the permit for the installation) must declare the accident/incident to the competent authority as soon as possible if the accident/incident may cause harm to human health or the environment. If the accident/incident contaminates land, remediation may be required; compliance with a permit is not a defence to carrying out such remediation. The competent authority, after due formal notice and expiration of the period allowed for remediation, is also authorised to:

- Compel the operator to deposit with the Treasury a sum that corresponds to the amount of the works to be carried out, which sum will be returned to the operator gradually as the required measures are performed;

- RemEDIATE the contamination and seek the recovery of its costs from the operator; and

---

20 Articles L551-1 et seq. of the Environmental Code.
21 The regime is known as ICPE (installations classées pour la protection de l'environnement).
22 Article L512-1 et seq. Of the Environmental Code.
23 Article L512-7 of the Environmental Code.
24 Article L512-8 of the Environmental Code.
26 Article L514-1 of the Environmental Code.
Issue a ruling suspending the operation of the facility until the conditions imposed have been fulfilled and necessary provisional measures have been taken.

Moreover, the Classified Installations Law requires the operator to leave the site on which the installation is located in a condition that does not pose a danger to human health or the environment when the operator ceases its operations.²⁷

Accordingly, the operator shall:

- Notify the Préfet of the date the operation is to be shut-down, with a three months prior notification period (for classified installations subject to authorisation or registration) or one month (for classified installations subject to declaration); and
- Carry out, at its own cost, remediation measures (including as the case may be environmental assessment, removal of pollution sources, monitoring of the pollution, etc).

The remediation measures to be performed are set out in a memorandum²⁹ sent by the operator to the Préfet or are mentioned in a complementary prefectoral order issued by the Préfet in accordance with the future use of the site. The future use will impact on the nature of the remedial actions to be performed by the operator as well as the standard of remediation. The operator is not required to remediate all contamination that has occurred on the site during the pendency of the permit. Failure to comply with an order is an administrative²⁰ and criminal²¹ offence.

For Classified Installations subject to the declaration regime, the future use of the site will be the same than the last use of the site during operations (often an industrial use). For Classified Installations subject to registration and authorisation, the future use of the site will be determined in accordance with a procedure specified in the Environmental Code²² which involves the operator, the owner of the site (if different from the operator), the Mayor of the city where the site is located and the Préfet. In case of disagreement, a use similar to that of the previous period of operation will be taken into consideration. However, if that use is incompatible with the use determined by the urban planning documents approved before the...

²⁷ Articles L.512-6-1 (Classified installations submitted to Authorization); article L.512-7-6 (Classified installations submitted to Registration) and L.512-12-1 (Classified installations submitted to Declaration).
²⁸ Only for Classified Facilities submitted to a Declaration receipt (the time limit is longer for other type of Classified Facilities submitted to Authorization or Registration).
²⁹ In practice, this memorandum is a Management Plan ("Plan de gestion") which indicates the measures to be implemented on the Site given (i) the potential level and area of pollution identified (ii) the future use(s) and (iii) the works (removal of pollution, monitoring of water,....) to be performed by the operator to ensure the compatibility between the future use and the polluted area identified, completed, as the case may with a safety risk assessment.
³⁰ Article L514-1 of the Environmental Code.
³¹ Article L514-11 of the Environmental Code.
cessation of operations as declared by the operator, the Préfet is entitled to impose a more sensitive use (e.g. residential).

Once the remedial actions have been completed, the operator notifies the Préfet who, following verification of the implementation of the remedial actions, issues a statement which ascertains such implementation. A copy of this statement is provided to the Mayor, the former operator and the owner of the site. In addition, the Préfet can require the operator, at any time up to 30 years from the notification of the cessation of operations, to carry out measures to protect the environment and human health according to the future use. Unless the operator proposes to change the use of the site (for instance from industrial to residential use), the Préfet cannot require the operator to carry out additional remedial measures linked to the change of use. It should be noted that remediation obligations may be imposed off-site provided that the pollution originates from the Classified Installation.

The operator of a Classified Installation is responsible for implementation and bears the cost of clean-up measures directly generated by the operation of the Classified Installation, or resulting from the Classified Installation previously operated by the former operator to whom he has succeeded in the same activities. However, if the operator shows that he has no responsibility for the on-site and off-site pollution, the former operator of the Classified Installation (to whom he did not succeed and who carried out different activities) which caused the pollution will be liable for the pollution linked to its activities.

So, in case of a succession of operators with the same operations, the last operator is liable for remediating any contamination linked to its activity even if the contamination was, in fact, caused by a previous operator. The last operator may bring a civil claim against a former operator for costs incurred in remediating contamination caused by the former operator, provided that the last operator can show that the damage resulted from a fault attributable to the former operator and the existence of a causal link between that fault and the damage.\textsuperscript{33} Further, it should be specified that the last operator is the one known as such by the administration. Consequently, if there is a change in the operator of a Classified Installation, it is very important to inform the administration. The new operator must make a declaration of the change during the month which follows management of the operation by it.\textsuperscript{34}

The owner or occupier of the site on which a Classified Installation is located is not liable under the Classified Installations Law for remediating contamination at the site provided that it is not also the de jure or de facto operator of the Classified Installation.

If the operator 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.

\textsuperscript{33} Article 1382 of the Civil Code.

\textsuperscript{34} Article R512-68 of the Environmental Code.
Under the so-called Grenelle 2 law, article L. 512-17 of the Environmental Code provides that the parent company of the last operator may be liable for remediating contamination at a Classified Installation if the last operator (the subsidiary) has entered into liquidation proceedings and the parent company acted negligently and, as a consequence, contributed to the subsidiary’s loss of assets. Article L. 512-17 further extends such liability to include the “grandparent company” or “great grandparent company.”

If the operator is insolvent or has ceased to exist, the Agency for Environment and Energy Management may take measures in order to ensure a level of security appropriate to the risk, and if necessary to remediate contamination at a Classified Installation.

To avoid the existence of “orphan sites” (that is, sites for which no person is responsible for their remediation), the competent authority must require operators of high risks Classified Installations (waste storage facilities, quarries, “Seveso” installations subject to public utility easement, geological storage of carbon dioxide sites and windmills subject to authorisation) to provide financial guarantees for remediating accidental contamination from their operations and to implement security measures when operations cease. Since 1 July 2012, this obligation to provide financial guarantees has been extended to certain Classified Installations subject to authorisation whose list has been set by order and to certain transit, separation and treatment of waste subject to authorisation. Since that date, the competent authority may request additional guarantees to cover the occurrence of accidental land or groundwater pollution caused by the operator after 1 July 2012 and when this pollution cannot be subject to immediate management measures by reason of technical or financial constraints linked to the operations of the site. The competent authority can call on the additional guarantee only on the cessation of activities. Financial guarantees may be provided through various mechanisms including bank guarantees, guarantees by a parent company (in such a case, the parent company must benefit from a financial guarantee), and deposits at a specified guarantee fund such as the Caisse des dépôts et consignations (French public deposit establishment), or the guarantee fund managed by the Agency for Environment and Energy Management.

The Ministry of the Environment has published guidelines and circulars, dated 8 February 2007, on the management of contaminated land. They include guidelines to identify and manage contaminated sites, and guideline values for determining whether land needs to be remediated.

---

35 Law n° 2010-788 of 12 July 2010 on national environmental engagement.
37 Circular of 26 May 2011 on the cessation of activity of a classified installation – Chain of responsibility- Default of the responsible persons.
38 Articles L516-1, R516-1, L553-3 et R553-1 à R553-8 of the Environmental Code.
39 31 May 2012 order setting the list of Classified Installations subject to the obligation to provide financial guaranteed in application article R. 516-1 5° of the Code.
40 Article R516-3 of the Environmental Code.
41 R516-2 of the Environmental Code.
42 The Ministry is now called the Ministry for Ecology, Energy, Sustainable Development and Sea.
France began compiling an inventory of contaminated land in the 1970s. Progress was slow, however, until the 1990s. In 1993, the Ministry for the Environment introduced a national register. The current inventory of potentially and actually contaminated sites is the BASOL database\(^{43}\) maintained by the Ministry of the Environment. BASOL lists sites that are already or must be subject to remedial measures. The database contained 4,591 sites as of February 2013.\(^{44}\) Another database, BASIAS,\(^{45}\) contains details of historic uses of certain sites which may be contaminated.

Waste regime\(^{46}\)

According to article L.541-2 of the Environmental Code, the waste producer or the waste holder must treat and eliminate its waste. If the producer or holder asks a waste collector to manage the waste, the producer or the holder must ensure that the collector is registered with the appropriate authority.

In case of land contamination or a risk of land contamination, or in case of waste that is abandoned, deposited or treated contrary to the prescriptions of the Environmental Code, article L541-3 provides that the Mayor, after due formal notice, may carry out the necessary measures ex officio at the expense of the responsible person. The Mayor may also issue administrative sanctions.\(^{47}\)

As described above, the landowner is not liable, according to the Classified Installations Law, for remediating contamination at a site. The situation is, however, different under the waste regime. Also, the Conseil d’Etat, in a decision of 23 November 2011\(^{48}\) decided that the Préfet, in case of the Mayor's failure to act, can require the current landowner to eliminate the waste and to remediate the contaminated land according to the waste regime even if the landowner never carried out operations on the site.

However, case law\(^{49}\) imposes two conditions, both of which must exist:

- there is no other liable person: that is, the liable person cannot be identified or has disappeared; and
- the landowner has been negligent, that is, the landowner has allowed or acquiesced in the deposit of waste by its negligence or connivance.

This case law was made in respect of the provisions of the Environmental Code that applied at that time and which transposed Directive 75/442/EEC relating to waste. Since that time Directive 2008/98/CE on waste (Waste Framework Directive) expressly excludes “land (in situ) including

---

\(^{43}\) BASOL stands for Base de données des sites et sols pollués.

\(^{44}\) See http://basol.environnement.gouv.fr/tableaux/home.htm

\(^{45}\) BASIAS stands for Banque de données des anciens sites industriels et activités de service.

\(^{46}\) Articles L541-1 et seq. of the Environmental Code.

\(^{47}\) The administrative sanctions can be deposit of a sum of money between a public accountant’s hands, compulsory measures imposing work to be done, suspension of the running out of the installation, fine.

\(^{48}\) CE, 23 novembre 2011, Sté de Montreuil Developpement (req n° 325334).

\(^{49}\) CE, 26 juillet 2011, n°328 651, Wattelez II ; Cass, civ. 3\(^{\text{ème}}\), 11 juillet 2012, n°11-10478
unexcavated contaminated soil and buildings permanently connected with land.” This Directive was transposed into French law by Order n°2010-1579 of 17 December 2010. As a consequence, article L.541-4-1 of the Environmental Code excludes unexcavated soil, including unexcavated contaminated soil and buildings permanently connected with land from the waste regime.

Specific regime on contaminated sites and soils

Order n° 2010-1579 of 17 December 2010, which transposed Directive 2008/98/CE on waste, introduced a specific regime for “contaminated sites and soil.”

According to article L.556-1 of the Environmental Code, in case of soil contamination, or a risk of soil contamination, the competent authority, after having given formal notice to the liable person, can automatically ensure the carrying out of the necessary works at the expense of such liable person. The liable person can also be required to deposit an amount corresponding to the amount necessary to carry out the works with a public accountant. The deposit will be progressively returned to the liable person as the works are carried out.

If the liable person has disappeared or is insolvent, the Agency for Environment and Energy Management can be designated to carry out the remediation measures.

This regime covers contaminated land regardless of whether there is a Classified Installation (ICPE).

Civil liability

The remediation of contaminated land can also result from the application of civil liability rules:

- When a person has caused contamination on a site, the landowner can initiate a legal action against the liable person to remediate the contaminated land provided that the landowner can prove that the person was at fault and there is a causal link between that person and the damage. For example, the owner of the site may bring a civil claim against the last operator of the Classified Installation on the site if the last operator failed to comply with its obligations to remediate contamination. Failure to comply with the administrative remediation obligation constitutes a civil fault;

- The landowner may also be held liable for damages under article 1384 of the Civil Code if pollution migrates from its site; and

- The seller of a contaminated site can be liable for its remediation if the seller has breached its notification obligation, notably according to article L514-20 of the Environmental Code. Article L. 514-20 of the Environmental Code provides that a person who sells land on which a classified installation subject to an authorisation or a registration operated must notify the buyer in writing of the...

---

50 Article L556-1 of the Environmental Code.
51 The Decree No 2013 -5 of the January 2, 2013 specifies that the Préfet is the competent authority, when the liable person operates a Classified Installation (ICPE).
52 Article 1382 of the Civil Code.
existence of the classified installation and insofar as the seller is aware, any dangers or nuisances that such operations may entail. If the seller is the operator, the seller must also notify the buyer if its operations included handling or storing chemicals or radioactive substances.

If the seller fails to do the above, the buyer may be entitled to rescind the sale contract, be partially reimbursed for the purchase price, or remediate the site at the seller’s expenses provided that the costs are not disproportionate to the purchase price.

Law n° 2010-788 of 12 July 12 2010 (“Grenelle II Law”) introduced a new article L125-7 into the Environmental Code which provides that any seller or lessor of land shall inform the buyer or tenant in writing of the information released by the State concerning a risk of contaminated land on the site. If the seller or lessor fails to do so and existing contamination makes the land unfit for its intended use, the buyer or the tenant may be entitled to rescind the sale or lease contract, be partially reimbursed for the purchase price or rent, or remediate the site at the seller’s expense provided that the costs are not disproportionate to the purchase price. The decree implementing this rule has not been adopted as yet.

► Restoring biodiversity damage

Law n° 76-629 of 10 July 1976 on nature protection, codified notably in Part IV of the Environmental Code, introduced the obligation for the project owner (maître d’ouvrage), within the scope of the development works, to carry out an impact study. This study must specify the measures taken, within the scope of the development works, to limit environmental damage according to a procedure consisting of:

- The removal, as much as possible, of the impact on the environment,
- The reduction of impacts that cannot be avoided; and
- Compensation of the residual environmental impacts.

If there is an adverse impact on biodiversity, the project owner must prepare a derogation file subject to the Conseil National de la Protection de la Nature (CNPN), which specifies the reduction and compensation measures to be taken in case of the impact on protected species and their habitats. Until the transposition of the ELD, the concept of compensation was not clearly defined.

In respect of the indemnification of environmental damage, the main issue concerns the fact that the harm is to the unowned environment, thus standard indemnification mechanisms that are linked to harm to a person or the person’s property do not apply.

“Ecological prejudice” was recognised and indemnified for the first time in the Erika case. In that case, the Court de Cassation decided, on 25 September 2012, that a local authority whose territory had been damaged by pollution caused by the oil spill from the Erika, as well as

53 Paris, pôle 4, 11e ch., 30 mars 2010, RG n° 08/02278, Cass,
environmental NGOs, were entitled to compensation for pure environmental damage, i.e.,
damage to biodiversity.

The concept of environmental damage is now recognised by French case law but its regime
should be specified in order to determine the persons who are entitled to initiate legal actions.

The law dated 1 August 2008 that transposed the ELD established an indemnification mechanism
for environmental damage, but this regime is limited to serious damage. As a consequence, a
draft Bill was proposed on 23 May 2012, which would insert a new article 1382-1 into the French
Civil Code. The article would provide that: “any act which causes damage to the environment,
obliges the person by whose fault it occurred, to compensate for it. The compensation shall be
carried out primarily by specific performance”.

Interface between the existing national liability regimes and the ELD regime

The following are key differences between the transposing legislation and the ELD, some of
which are more stringent in the transposing legislation:

- The Classified Installations Law applies to many more operators
  than the integrated pollution prevention and control Directive /
  industrial emissions Directive under Annex III of the ELD;

- Liability for remediating a Classified Installation is channelled to the
  last operator of the installation, subject to proving that the
  contamination was caused by a former operator, whereas the ELD
  channels liability to the operator whose activity caused
  environmental damage;

- French law ensures that the liquidator of an insolvent operator has
  funding, subject to the availability of funds in the insolvency estate,
  to remediate environmental damage; the ELD has no such
  provisions;

- The Grenelle 2 law provides that a parent company, grandparent or
  great-grandparent company, may be liable for remediating
  contamination if that company acted negligently and, as a
  consequence, contributed to the subsidiary loss of assets leading to
  its liquidation; the ELD has no such provisions;

- The Classified Installations Law requires financial guarantees to
  ensure that land and water pollution is remediated; the ELD does
  not require such guarantees;

- French law provides for compensation for pure environmental
damage to local authorities and environmental NGOs; the ELD
regime does not provide for such compensation (which is not a
claim for bodily injury, property damage or economic loss);

- French law does not provide for complementary or compensatory
remediation, whereas the ELD does so; and
If the draft Bill inserts a new article 1386-19 in the French Civil Code, French civil law would include a requirement to remediate environmental damage.

3. **Integration of the ELD into existing national legislation**

   - Transposing legislation

   The ELD was transposed by:
   - Law n° 2008-757 of 1st August 2008 published in the Official Journal of 2 August 2008 on environmental liability, which is codified in the Environmental Code under articles L. 160-1 et seq. (Law); and
   - Decree n°2009-468 of 23 April 2009 (Decree), which sets out the content of the new environmental liability regime.

   Decree n° 2012-615 of May 2, 2012 was subsequently enacted to extend strict liability to the transport of oil by pipeline (see section 6 below).\(^\text{54}\)

   - Amendments to existing national environmental law

   The Law and the Decree inserted a new title VI into the Environmental Code. In addition, they modified various articles of the Environmental Code and in existing laws.

   - Authorisation in legislation for other governmental entities to issue rules and regulations

   There is no legal authorisation for other authorities to issue rules and regulations.

   - Relationship to other legislation

   See above.

   - Guidance and other documentation

   The Commissariat Général au Développement Durable (CGDD) published:

   - "La directive ‘Responsabilité environnementale’ et ses méthodes d’équivalence" in April 2010.\(^\text{55}\) The guidance discusses methods to evaluate damage under the ELD regime; and
   - "La loi responsabilité environnementale et ses méthodes d’équivalence – Guide méthodologique" in July 2012.\(^\text{56}\) (CGDD Guidance). The CGDD Guidance describes the measures resulting from the Law and the process to be used for identifying the restorative measures.

4. **Effective date of national legislation**

27 April 2009


\(^{55}\) Available at: [www.developpement-durable.gouv.fr/IMG/pdf/ED19c.pdf](http://www.developpement-durable.gouv.fr/IMG/pdf/ED19c.pdf)

Law n° 2008-757 of 1 August 2008 provides that liability under the transposing legislation was applicable retrospectively to 30 April 2007. However, the Decree, which was indispensable to the application of the Law, entered into force on 27 April 2009. This means that prior to its entry into force, 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.

5. **Competent authority(ies)**

The competent authorities are as follows.

- The Préfet de département of the départment where an imminent threat of, or actual, environmental damage occurs.
- If environmental damage occurs over the territories of several départements, the Prime Minister issues an administrative order appointing the competent Préfet.
- When the threat of or damage results from IPPC or certain water-related installations, the competent authority is the Préfet de département where the installation is located.
- In Paris the Préfet de Police is the competent authority.
- If there is an imminent threat of, or actual, environmental damage caused by an installation placed under the authority of the Ministry of Defence, the Minister of Defence is the competent authority.
- The representative of the State in Seas is the competent authority if his/her zone of competence is concerned.

6. **Operator and other liable persons**

The operator is defined as any natural or legal, private or public person operating or controlling effectively an activity irrespective of its profit or non-profit character. Persons who are the de facto operators of an activity are also deemed to be operators. This definition is materially the same as that in the ELD.

Although it is not specified by the Law, the holder of a permit or authorisation, or a person who registers or notifies an activity, may also be an operator because that person is operating or controlling an occupational activity by following those procedures.

- Secondary liability (e.g., parent company)

The transposing legislation does not mention the secondary liability of a parent company or other person.

- Death or dissolution of responsible operator

The transposing legislation does not mention the effect of the death or dissolution of a responsible operator.

- Person other than an operator who may be liable

The transposing legislation does not impose liability on any person other than an operator.
7. **Annex III legislation**

- Rebuttable presumption that operator’s activity caused environmental damage
  
  The transposing legislation does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

- Additional “occupational activities” subject to strict liability
  
  The transposing legislation does not extend strict liability other than to activities carried out under the legislation listed in Annex III of the ELD.

Following the rupture of an underground pipeline in August 2009, when over 4,000 cubic metres of crude oil spilled onto the Coussouls de Crau nature reserve, the French Government adopted Decree n° 2012-615 of May 2, 2012 in order to extend strict liability to the transport of oil by pipeline.

- Spreading of sewage sludge for agricultural purposes
  
  The spreading of sewage sludge for agricultural purposes is not an Annex III activity.

8. **Standard of liability for non-Annex III activities**

  The standard of liability for a non-Annex III activity is fault or negligence. The level of negligence is mere, not gross, negligence (article L162-1 of the Environmental Code).

9. **Exceptions**

- Application to imminent threat of environmental damage as well as environmental damage
  
  The exceptions apply only to environmental damage. They do not apply to an imminent threat of environmental damage.

- Differences with exceptions in the ELD
  
  The exceptions in the transposing legislation are identical to those in the ELD.

- Diffuse pollution exception
  
  The exception for diffuse pollution is stated in the affirmative. That is, the competent authority has the burden of proof.

10. **Joint and several or proportionate liability**

  Liability is proportionate. That is, when environmental damage has multiple causes, the costs of preventive or remediation measures is 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.

  There are no provisions concerning the case of insolvency under Law no. 2008-758. The law provides only that the competent authority may itself take or cause to be taken the required measures at the failing operator’s expense:
at any time, in cases of emergency or serious danger; or

if the operator does not take the required measures, after having been instructed to carry out such measures within a set timeframe and after the deadline has expired.

**Mechanism for contribution between liable operators**

The transposing legislation does not include a mechanism for contribution between liable operators due to the adoption of proportionate liability.

**11. Limitation period**

The limitation period is 30 years starting from the date of the event giving rise to the damage/imminent threat.

**12. Defences**

- Defences to liability or costs?

The defences are defences to costs. That is, the operator must pay to prevent or remediate an imminent threat of, or actual, environmental damage. The operator 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.

The operator must prove that the imminent threat of, or actual, environmental damage has been caused by the above-mentioned entities.

The state-of-the-art defence is a cost liability as well.

- If defences to liability; suspension (or not) of remediation notice during appeal

Not applicable

- Permit defence

France has not adopted the permit defence.

- State-of-the-art defence

France has adopted the state-of-the-art defence.

To apply the state-of-the-art defence, the operator must prove:

- that the damage occurred in the absence of fault or negligence, and
- the damage resulted from an emission or activity which was not considered likely to cause environmental damage on the basis of the scientific and technical state-of-the-art when the damage occurred.
The state-of-the-art defence also applies to products. That is, it 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.

The operator must prove:

- that the damage occurred in the absence of fault or negligence, and
- the damage resulted from a product, used in the framework of an activity which was not considered as likely to cause environmental damage on the basis of the scientific and technical state-of-the-art when the damage occurred.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
  - 12.56%

- Extension of biodiversity to nationally protected biodiversity

France has not extended biodiversity damage to nationally protected biodiversity.

- Biodiversity damage in the exclusive economic zone

In July 2011, France issued a Decree to provide better protection for biodiversity in its ecological protection zone in the Mediterranean and its exclusive economic zone.

- Water or water body

The Law does not state whether water damage under the ELD must be to a body of water as defined by the Water Framework Directive (2000/60/EC) or whether it may simply be to water as defined by the WFD. Instead, the Law refers only to “water”. The CGDD Guidance, when mentioning inland surface water, transitional waters, and groundwater, cites only the definitions of WFD articles 2(1) and (3) (collectively defined as “inland surface water”, (2) “groundwater”, (6) “transitional waters” – the WFD definition, cited by CGDD, refers to “bodies of surface water”). It may therefore be construed from the CGDD Guidance that water damage under the ELD must simply be damage to the categories of water mentioned and not to bodies of such water.

14. **Thresholds**

- Water damage

Damage to water is any impairment caused to waters (as defined), directly or indirectly, and measurable. This threshold is the same as the ELD. Neither the Law nor the Decree provide details on the significance threshold. The Decree states that the threshold is assessed regarding the ecological, chemical and quantitative state or the ecological potential of waters, based on methods and criteria set up by an administrative Order, that is, *Arrêté du 25 janvier 2010 relatif aux méthodes et critères d’évaluation de l’état écologique, de l’état chimique et du potentiel écologique des eaux de surface pris en application des articles R. 212-10, R. 212-11 et R. 212-18 du code de l’environnement*. This Order was issued to complete the transposition of the Water Framework Directive, not the ELD.
Biodiversity damage

Biodiversity damage in the transposing legislation is defined as direct or indirect measurable environmental impairments having a significant adverse effect on maintaining or restoring the favourable conservation status of habitats or species.

The ELD includes the phrase “reaching or maintaining the favourable conservation status of such habitats or species” instead of “maintaining or restoring”. The threshold is, however, the same.

National biodiversity damage

Not applicable

Land damage

The Law and Decree do not provide details on the significance threshold for land damage. The significance of risks for human health generated by soil contamination is assessed in respect of:

- The characteristics and properties of the land, and
- The type, concentration, hazard and possibilities of dispersion of the contaminant.

These criteria are similar to, but less detailed than, those contained in Annex II of the ELD “Remediation of land damage”. In essence, the threshold for land damage is, therefore, the same as that in the ELD.

15. Standard of remediation

Land

The use of the land is assessed on the basis of the existing land use when the environmental damage occurs or its future use as reflected in planning documents that are in effect at that time.

Biodiversity

Primary remediation

The definition of primary remediation is essentially the same as the ELD.

Complementary and compensatory remediation

The definition of complementary remediation is essentially the same as the ELD except that it does not state that there should be a “geographical link” between the damaged site and the site at which complementary remediation is carried out.

The provisions for compensatory remediation are essentially the same as the ELD except that they do not mention anything corresponding to the following ELD provision: “This compensation consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site”. The French transposing legislation states instead that “Compensatory remediation shall be undertaken to compensate for the interim loss of natural resources and services between when the damage occurs and when the primary or complementary measure has produced effects. This compensation can be undertaken on an alternative site and cannot consist of financial compensation.”
The interests of the public affected by the damage must be considered when complementary and compensatory remediation is carried out.

- Water
  - Primary remediation
  
The definition of primary remediation is essentially the same as the ELD.

- Complementary and compensatory remediation

See this section above under "Biodiversity".

16. Format of determination of environmental damage

The legislation does not specify any particular format for a determination of environmental damage.

17. Powers and duties of competent authority

- Inspections, investigations, studies and analyses

When an imminent threat of, or actual, environmental damage occurs, officials ("agents publics") whose names are specified in an authorised list can access premises, places, installations and transportation used for a professional purpose between the hours of 6 am and 9 pm. These officials also have access outside these hours if public access is authorised, an activity is ongoing, or the damage is ongoing. They may also require the operator to provide any necessary documentation and information.

The competent authority evaluates the nature and consequences of the damage. In addition, the authority may require the operator to carry out its own evaluation.

In order to establish the causal link between environmental damage and the operator’s activity, the authority may require the operator to provide necessary evaluations and information.

- Information orders

The competent authorities can require an operator to provide information but only when there is an imminent threat of, or actual, environmental damage (art. L162-13 of the Environmental Code).

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

Competent authorities have the power, and also appear to have the duty, to require an operator to carry out preventive measures if the operator does not carry them out.

- Power or duty to require an operator to carry out remedial actions

Competent authorities have the power, and also appear to have the duty, to require an operator to carry out remedial actions if the operator does not carry them out.

- Power or duty of competent authority to carry out preventive measures

If the operator does not carry out preventive measures that the competent authority orders it to carry out, the authority can require the operator to deposit a sum of money with a public accountant. The money is returned to the operator, as the measures are undertaken.
The deposit is calculated in accordance with the authority's estimated cost of the preventive measures taking into account the cost of the preventive measures described in the formal notice. The competent authority has no discretion in this calculation. In the event of a dispute, a judge will ensure that the cost evaluation is not disproportionate.

Alternatively the measures can be undertaken by the authority, which is then authorised to bring a cost recovery action for such costs against the operator.

If there is an emergency or severe hazard or the operator cannot be identified, cities or other local and regional public authorities, associations protecting the environment, professional unions, foundations, owners whose property is affected by the environmental damage or the associations representing them can offer to the authority to carry out the preventive or remediation measures (see “Recovery of implementation and enforcement costs” below).

If the competent authority agrees to the intervention of the association (for example), the authority shall determine the conditions of the intervention by prefectoral order (“arrêté préfectoral”), in particular, the required measures. The association must act in accordance with the order. When the operator is eventually identified, the association can demand reimbursement of its costs. In order to do this, the operator must submit a formal request to the competent authority. The competent authority, after consultation with the operator concerned, then determines the amount of the costs to be reimbursed. This is a specific procedure provided by Law n° 2008-757 of 1st August 2008 (article L162-20 of the Environmental Code). The association cannot, however, recover its costs from the French Government, even if the operator cannot be identified.

In addition, in the same conditions of emergency or hazard, the competent authority has the power to carry out (or direct the carrying out of) necessary preventive measures. The competent authority can then demand that the operator reimburse the costs.

- Power of competent authority to carry out remedial actions

The same procedures (described in the immediately preceding section) apply to remedial measures, including remedial actions.

- Form of preventive order

The administrative order (arrêté) sets out the list of measures and the deadline for carrying them out.

- Form of remediation order

The administrative order (arrêté) sets out the list of measures and the deadline for carrying them out.

The Préfet must issue an order requiring remediation within three months after having received details of the measures proposed by the operator. If the Préfet cannot issue the order before this deadline, he can set a new deadline by administrative order (arrêté) with justification for his decision.
Appeal against preventive or remediation order

The decision of the competent authority can be appealed before the Administrative Court within two months following the notification of the decision. It is an administrative proceeding on the merits (article L.165-1 of the Environmental Code). The administrative judge can, for example, overrule the decisions or modify them. This appeal is called a “recours en plein contentieux”.

Settlement of a remediation order may also be negotiated. That is, the operator proposes a list of measures to the authority, which can ask the former to complete or modify them. The measures are then submitted for consultation to various stakeholders.

Then, the authority has the duty to allow the operator to express his opinions. After that, the authority prescribes the required measures by administrative order.

Sanctions for delay in complying with preventive or remediation order

The sanctions for the failure to carry out the remediation measures prescribed by the administrative authority are a fine with a maximum of €1,500 for a natural person and a maximum of €7,500 for a legal person; and a fine with a maximum of €3,000 in case for a second offence.

Formal consultees on contents of preventive orders and remediation orders

Once the operator and the authority agree on the list of remediation measures, the proposal is submitted for comments to local and regional administrative authorities, public companies and environmental associations which are concerned due to their missions or to the location, type or significance of the damage.

Private persons likely to be affected by the remediation measures are also consulted.

The competent authority consults the public companies or environmental associations concerned because of their activities and the location, the nature and the importance of the damage (article L162-10 of the Environmental Code) by all appropriate means including email. The competent authority can set a reasonable deadline, and determine that the absence of an answer means a positive opinion (article R162-12 of the Environmental Code).

The competent authority determines the private persons concerned by the remediation measures according to the nature and extent of these measures. These persons are informed by all appropriate means including email (article R162-12 of the Environmental Code).

The competent authority may also make the contents of the proposal available to the public.

When preventive or remedial measures have been completed, they are set out in a statement issued by the competent authority. This statement is sent to the city council(s) (or other competent administrative authority) where the damage occurred, as well as to the operator and to the property owner of the remediated damage.

Recovery of implementation and enforcement costs

The operator bears the costs linked to the:

- damage evaluation;
determination, implementation and follow-up of prevention and remediation measures; and
consultation of local authorities, interested parties and possibly of the public.

If the authority has not required the operator to deposit a sum of money with a public accountant and has to direct the undertaking of measures, the authority recovers the expenses from the operator, unless the costs of recovery actions are higher than the sum of money to be recovered.

If other organisations or persons have invested money in preventive or remediation actions, they are entitled to recover their expenses from the operator (if the latter has been identified). The request must be addressed to the competent authority which collects the views of the operator and determines the sum to be reimbursed.

 Deadline for competent authority to seek recovery of costs

The deadline for a competent authority to seek recovery of its costs is 5 years after the remedial measures are completed or the operator is identified, whichever is the earliest.

18. Duties of responsible operators

Preventive measures

In case of an imminent threat of damage, the operator must carry out measures to:

- Prevent the damage from occurring, and
- Limit the effect of the damage.

If environmental damage occurs, the operator must carry out measures aimed at:

- Ending the causes of the damage,
- Preventing the damage, or
- Limiting its aggravation and its effects on human health and ecosystems and their services.

Remedial actions (emergency actions)

See Preventive measures above.

Remedial measures

The authority agrees with the operator on a set of measures, then after consultation with stakeholders specified in an official list; the authority submits the remediation project to one or several “local (départemental) committees of environment and of technological and health risks” for their review and approval.

This committee is led by the Préfet and includes six representatives of State services, the director of the regional Health Agency, five representatives of local authorities, nine individuals (from consumers, fishery, or environmental associations, experts or advisors of these professional areas); and four qualified persons including at least one physician.
In the case of environmental damage to biodiversity and habitats, the competent authority also submits the proposed remedial project and the advice provided by the above committee to a committee with competence on nature, landscapes and natural sites composed of State representatives, local authorities’ representatives, and experts in the field of natural science or natural resources.

The operator must apply the measures prescribed by the authorities and must also notify the competent authorities about the implementation (execution) of prescribed measures. At any time, the competent authority can prescribe to the operator by administrative order complementary measures aimed at remediating the damage.

The competent authority has a duty to consult with the operator on any new measures. The Law does not provide a prior consultation of the operator. However, under French law, individual administrative decisions can be adopted only after the concerned person is consulted (article 24 of Law No 2000-321 of 12 April 2000 on the rights of citizens in their relations with the public administration).

An officer of the competent authority records the implementation of requested measures.

The statement recording the measures that have been completed is communicated to the competent authority which sends a copy to:
- the operator;
- the Mayor of the city or President of the grouping of cities competent on land planning; and
- the owner of the site.

Duty to notify / provide information when imminent threat of environmental damage occurs

If there is an imminent threat of damage and such damage continues after the operator has carried out preventive measures, the operator must inform the authority immediately of:
- the origin and type of the threat;
- an identification of damages likely to affect human health or the environment;
- preventive measures taken in order to limit or eliminate the threat;
- the results of preventive measures applied and estimated scope of the threat; and
- factors which makes the operator think that the preventive measures that have been applied will not prevent the damage.

If environmental damage occurs, the operator must notify the authority. The information to be provided includes the following:
- origin and significance of the damage;
- identification of damage that is affecting or is likely to affect human health and the environment;
the estimated scope of the damage and its consequences on human health and the environment; and

- measures taken by the operator.

The authority can set a deadline for the operator to provide additional information.

Entity to which notification should be provided

Notification should be provided to the competent authority (i.e. Préfet, see above).

19.  **Access to third-party land to comply with the ELD**

The operator must obtain written authorisation from the land owner(s), occupiers or other persons with an interest in the site on which remedial measures will be carried out. An agreement can be concluded between the operator and the owner(s) in order to set up the conditions of authorisation and possibly financial compensation for occupying the land. In the absence of an agreement or in cases of emergency, the authorisation to carry out measures in the land of a third party can be given by a tribunal.

If the landowner, occupier, etc, refuses access onto the land to carry out remedial works, the authorisation may be granted by the President of the Tribunal de Grande Instance (article L162-5 of the Environmental Code).

Alternatively, if the context (large scale damage or high number of affected owners) makes it necessary, the competent authority may:

- Apply the law of 29 December 1892, which set up conditions concerning the effects of public works on private properties;
- Impose public utility easements on the affected lands (financial compensation can be provided); and
- Register the works carried out on third-party land as public utility works.

20.  **Interested parties**

Qualification criteria for “sufficient interest”

The transposing legislation defines an interested party as:

- An association for the protection of environment; and
- Any person directly affected or likely to be affected by an imminent threat of, or actual, environmental damage.

The associations for the protection of environment as well as any natural or legal person directly affected or likely to be affected by an imminent threat of, or actual, environmental damage, which possess serious elements establishing the existence of this threat of, or actual damage, may inform the competent authorities. The Law does not specify those persons which are considered to have a “sufficient interest”.

The above persons can also ask the authority to carry out or require the operator to carry out preventive and remedial measures.
Method of notifying interested parties of planned remedial measures

The authorities have the duty to inform the above persons who provided comments to them of the effects and follow-up of their comments.

Information to be provided to competent authority

The demand must include relevant information and data.

Challenges to competent authority’s decision

Challenges to a competent authority’s decision can be made following specific national public law. That is, any interested third party (for example, a third party who suffered damage because of an administrative decision) may challenge the competent authority’s decision before the Administrative Tribunal within two months of the publication of the measure (article R421-2 of the Code of Administrative Justice). The administrative judge can cancel or reform, totally or partially, the disputed decision.

Duty on competent authority to respond to person making comments

The competent authority shall inform the person who provided comments of the actions (or absence thereof) taken pursuant to his/her demand. This reasoned decision shall be communicated to such a person in written form.

Inclusion of interested party in any proceedings by the competent authority against an operator

The transposing legislation does not provide for the inclusion of interested parties in proceedings by the competent authority against an operator.

21. Public access to information regarding environmental damage and related measures

There is no mandatory requirement to inform the general public when environmental damage occurs.

The competent authority must consult with persons likely to be affected by the remedial actions.

The competent authority may also provide information to the public after an agreement on remedial measures has been reached, but this is not mandatory.

22. Charges on land/financial security after environmental damage

The transposing legislation does not provide for any charges on land or financial guarantee to secure costs incurred by a competent authority.

The competent authority may, however, require the operator to deposit a sum of money with a public accountant (see section 17 above).

23. Offences and sanctions

The Law and the Decree created new criminal offences and sanctions. The main offences are as follows.
Preventing or obstructing the work of authorised officials investigating the imminent threat of, or actual, environmental damage (visits on-site, requests for additional information and documents, etc.) is punished by 1 year imprisonment, a €15,000 fine for a natural person or a €75,000 fine for legal person, or both imprisonment and a fine.

Failure to respect a formal administrative order to carry out remedial actions is punished by 6 months imprisonment and a €75,000 fine (€375,000 for a legal person). In case of condemnation, the Judge may defer sentencing and urge/order the operator to apply the formal administrative order issued by the competent authority and impose a periodic penalty payment. This penalty shall not exceed €3,000 per day for a maximum period of 90 days.

The Tribunal may order displaying or communication (full or partial) of its decision. In doing so, the Tribunal decides the applicable conditions which may on the company's premises, on the company's website or in a newspaper.

Specific Penal Code provisions provide sanctions for legal persons. That is, the Law provides penalties applicable to legal persons (article L163-7 of the Environmental Code). These penalties are:

- a fine. The maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons (article 131-38 of the Penal Code);
- prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years. This penalty can be applied only to the occupational activity in the exercise of which the offence was committed.
- placement under judicial supervision for a maximum period of five years;
- permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the concerned offence;
- disqualification from public tenders, either permanently or for a maximum period of five years;
- prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds;
Implementation challenges and obstacles of the Environmental Liability Directive

- Confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it; and
- Posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.

- Failure to communicate to the competent administrative authority information in case of an imminent threat of damage or when damage has occurred or to provide information requested by the competent authority, and failure to carry out prescribed remediation measures, are punished by a “category 5” fine (i.e. (€1,500 maximum (€7,500 maximum for a legal person); €3,000 maximum for a second offence (€15,000 maximum for a legal person).

- Directors and officers liability for breaching legislation
The legislation does not specify any specific penalties for directors and officers if they breach the transposing legislation.

- Publication of penalties
The Tribunal may order displaying or communication (full or partial) of its decision. The Tribunal decides on the conditions for displaying or communication. This could be on the company's premises, on the company's website, or in a newspaper.

24. **Registers or data bases of incidents**

There is no provision that requires details of incidents to be included in a register. (NB: The ARIA database already exists and keeps track of incidents which affect (or are likely to) public health, safety, agriculture or nature.).

The ARIA database is available at: www.aria.developpement-durable.gouv.fr/

The database 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.

25. **Cross border damage in another Member State**

If environmental damage affects or is likely to affect the territory of other Member State, the competent administrative authority shall inform the Foreign Minister (**Ministre des Affaires Etrangères**) and, in emergency cases, the competent authorities of concerned States. This information includes details on preventive and remedial actions already undertaken.

26. **Financial security**

France has decided not to impose mandatory financial security.
27. **Establishment of a fund**

The transposing legislation does not establish a fund.

28. **Reports**

The transposing legislation does not indicate any reports that must be submitted. A simple statement must be written by the competent authority, establishing the completion of remedial measures.

The only requirement for a report is the submission of a report to another governmental entity in the case of cross border damage in another Member State (see section 26 above).

29. **Information to be made public**

The administrative order establishing remedial measures to be carried out is notified to the operator, and if necessary, to affected third parties (owner of the property affected by remediation measures or other persons with an interest in the property according to national law).

A copy of the administrative order is published for a minimum of one month at the city council (Mairie and if relevant Mairies d’arrondissement) where the damage occurred.

A copy of the administrative order is also sent to every local council that was consulted during the process.

Once the remedial measures have been completed, the competent authority writes a statement indicating completion. A copy of this statement is addressed to the operator, to the city council(s) or the other relevant competent local council, and to the property owner.

30. **Provisions concerning genetically modified organisms**

There are no provisions concerning GMOs in the transposing legislation other than the references to EU legislation in Annex III of the ELD with the exception that the Law provides that information regarding GMOs (characteristics, description, location etc.) provided to the authorities when a request for agreement (contained used of GMO) or authorisation (deliberate release into the environment, transport and placing on the market of) are introduced shall not be considered as confidential. This law is not specific to the ELD.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

Liability for preventing and remediating land contamination and associated groundwater pollution and preventing and remediating water and biodiversity already existed and continues to exist (see section 2).

In contrast to many other Member States, the Classified Installations Law extends beyond the integrated pollution prevention and control / industrial emissions regime. This Law specifically provides for the prevention and remediation of contamination. The primary liable party for the remediation of contamination is the last operator of a Classified Installation, who is liable for remediating any contamination linked to its activity even if the contamination was, in fact,
caused by a previous operator. The last operator may then bring a civil claim against a former operator if it can show that the former owner was at fault and a causal link exists between its operations and the damage. The owner or occupier of the site on which a Classified Installation is located is not liable for remediating the contamination unless the owner or occupier carried out the operations at the Classified Installation.

The owner of contaminated land may, however, be liable under the waste regime even if it never carried out operations on the land, provided that no liable person can be identified or found and the owner was negligent in allowing or acquiescing in the deposit of waste.

Unlike many Member States, France has well developed legislation to impose liability on the parent, or grand-parent, company if the last operator is insolvent or is liquidated.

Also unlike most, if not all other, Member States, an environmental NGO may be entitled to compensation for “ecological prejudice”.

1. **Existing national environmental legislation**

Environmental legislation in Germany is set out in many pieces of legislation that are focused to a large extent on different environmental media and regulatory situations, such as water pollution, waste management, nature conservation and permitting. This is due, in part, to the 16 Länder having competency for enacting most environmental legislation prior to 2006 when constitutional reform transferred much of that competency to the Federal Government (see below). Moves to harmonise German environmental law into a single Environmental Code began in the 1970s and were considered extensively again in the 1990s and 2000s. Drafts have been prepared but the Code has not been (and may not be) finalised.\(^{57}\)


The EDA is short\(^{58}\) and is largely a “copy-out” of the ELD. It contains general provisions that supplement existing environmental legislation. The amendments to the Water and Nature Acts set out definitions of environmental damage in respect of water and biodiversity, respectively,\(^{59}\) together with remediation requirements for such damage. In addition to the ELD transposing legislation itself, various provisions in other legislation apply to the ELD regime. For example, criminal sanctions set out in the Federal Criminal Act apply to the regime.

The Federal Government did not amend the Federal Soil Protection Act (*Bundesbodenschutzgesetz*—BbodSchG) of 3 March 1998 (SPA) when it transposed the ELD because it considered that it was not necessary to do so. That is, it concluded that transposition of the ELD had been accomplished in respect of land contamination by supplementing the SPA with the general non-media-specific provisions of the EDA.\(^{60}\)

In adopting the above approach, the Bundesrat\(^{61}\) rejected adding provisions to existing legislation to set out obligations in the ELD to carry out preventive and remediation measures concerning operations specified in the existing legislation. The reasons for rejecting this approach were the

---

\(^{57}\) See Environmental Law / Associational Claims, Project Environmental Code (http://www.umweltbundesamt.de/umweltrecht-e/umweltgesetzbuch.htm)

\(^{58}\) The English translation is 11 pages in length.

\(^{59}\) The 2007 Act simply refers to the relevant provisions of the Federal Water Act and the Federal Nature Conservation Act that set out the definitions of water damage and biodiversity damage.


\(^{61}\) The Bundesrat represents the governments of the 16 Länder; the Bundestag (Parliament) is directly elected by the people.
The duplication would not only have affected federal legislation; it would also have affected legislation enacted by the Länder some of which had also enacted water resources, nature protection and soil protection legislation.

The Federal Government resolved concerns about the EDA supplementing existing environmental legislation enacted by the Federal Government and the Länder by adding a subsidiarity clause to the EDA. Article 1 provides that the EDA applies only when other legislation is not more specific in respect of the prevention and remedying of environmental damage or when the other legislation is in conflict with the EDA. The EDA does not pre-empt any requirements in federal or Länder legislation that are more stringent than those in the EDA. 63

Transposition of the ELD into existing German environmental legislation cannot be reviewed solely by reviewing the environmental legislation that existed when the ELD was transposed in 2007. This is because the Federal Water Act (Wasserhaushaltsgesetz) and the Federal Nature Conservation Act (Bundesnaturschutzgesetz), which the transposing legislation amended, have been superseded by a New Federal Water Act and a new Federal Nature Conservation Act, both of which came into force in 2010 (discussed in section 2 below). The new legislation was a result of constitutional reforms in 2006.

The Constitution of the Federal Republic of Germany (the Basic Law) was reformed on 1 September 2006. Prior to the reforms, the Federal Government had predominant competency for regulating waste disposal, air pollution control and noise abatement. The Federal Government’s competency to regulate nature conservation, landscape protection and water resources, among other things, was, however, limited to enacting framework legislation that set out general provisions. The Länder had competency to enact the detailed legislation in those areas of law. This had resulted in widely differing environmental regulations and standards across Germany.

As a result of the reforms, the Federal Government has competency, among other things, for enacting legislation on water pollution prevention and management, nature conservation, landscape management, waste management, soil protection, coastal protection and air quality management. The Länder may deviate from the federal legislation in respect of nature conservation, landscape management and water pollution prevention and management.

---


63. More specifically, article 1 provides “This Act shall apply in cases where more detailed provisions for the prevention and remedying of environmental damage are not provided for by federal or Land legislation or where the requirements laid down by that legislation conflict with this Act. Legislation with requirements over and beyond the requirements of this Act shall remain unaffected”,

---

114 | Implementation challenges and obstacles of the Environmental Liability Directive
Federal legislation is enforced by the Länder; it is not enforced by federal authorities.\textsuperscript{64} Legislation enacted by each Land is enforced by it. Accordingly, the Länder have designated the competent authorities that enforce the EDA in Germany.

The Länder have competency under the legislation transposing the ELD to enact legislation concerning costs and to adopt the permit and state-of-the-art defences in their jurisdictions (see section 3 below). The Länder have not enacted optional provisions of the ELD concerning the permit or state-of-the-art defences. This legislation was not, however, necessary for Germany fully to transpose the ELD, which it has done.

2. **Existing regimes for preventing and remediating environmental damage**

When Germany transposed the ELD, it already had liability systems for preventing and remediating land contamination and water pollution and prohibiting damage to, and requiring the remediation of, Natura 2000 sites.\textsuperscript{65}

- **Water pollution**

The Länder have enacted Water Acts and Ordinances that authorise competent authorities to require water, including groundwater, pollution to be remediated. In addition the competent authorities may remediate the pollution and seek reimbursement from liable persons.

- **Land contamination**

The legislation concerning land contamination in Germany is the SPA, which came into force on 1 March 1999. Its enactment was followed by the Federal Soil Protection and Contaminated Sites Ordinance, which came into force on 17 July 1999.

Prior to 1999, liability for land contamination and water pollution was subject to legislation enacted by the Federal Government and the Länder. The federal legislation was the Federal Waste Management Act of 1972 (in respect of abandoned waste dumps that had operated after 1972 when the Federal Waste Act came into force) and the Federal Water Act of 1957 (in respect of abandoned waste dumps at which operations had ceased between 1960 and 1972 and industrial sites that had ceased operations after 1960). The land contamination legislation enacted by each of the Länder was enacted mostly under their general police and water legislation but with some Land having enacted specific legislation.\textsuperscript{66}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{64} The federal environmental authorities (Federal Ministry of the Environment (Bundesministerium für Umweltschutz) and the Federal Environmental Agency (Umweltbundesamt) do not have direct enforcement powers, with the exception of emissions trading in respect of the latter. The Federal Ministry is responsible for the actions of federal agencies, with the exception of nuclear energy. Operational activities are carried out by authorities in each Land (generally district or county authorities) subject to the supervision of the environmental ministry for each Land.
  \item \textsuperscript{66} See Eckard Rehbinder, A German source of inspiration? Locus standi and remediation duties under the Soil Protection Act, the Environmental Liability Act and the draft Environmental Code, Environmental Law Review vol. 6, p. 4, 5-6 (2004)
\end{itemize}
\end{footnotesize}
The SPA does not apply to all land contamination; its focus is sites at which operations that may or are causing contamination are no longer carried out. It, therefore, imposes retrospective as well as prospective liability. Specific legislation, which includes the Federal Genetic Engineering Act, the Federal Closed Substance Cycle, and the Federal Waste Management Act is excluded from the SPA.

The SPA established precautionary, preventive and remediation duties. That is, it imposed a duty on any person whose activities affect soil to avoid harmful changes to it and to prevent contamination from it, in particular, owners and occupiers of land who must carry out measures to prevent contamination from their land.

If land contamination has occurred, the following persons are liable for its remediation:

- the polluter (that is, the person who caused the contamination),
- the legal successor (Gesamtrechtsnachfolger) of the polluter (that is, the person who, by virtue of law, assumes all the rights and obligations of the polluter by, for example, inheritance or a merger),
- the owner,
- the tenant or other occupier of the contaminated land, and
- the former owner provided that the former owner transferred the site on or after 1 March 1999 (when the SPA entered into force) and knew or should have known that the land was contaminated when it was sold; there is 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 (this defence does not apply to current owners).

A person listed under the first two bullet points is known as a “disturber by conduct”. A person listed under the last three bullet points is known as a “disturber in fact”. In addition, the shareholder or parent company in respect of a subsidiary or affiliated company may be secondarily liable under general principles of company law; that is, the corporate veil may be pierced under company law principles if, for example, the subsidiary or affiliate is inadequately capitalised or is a sham company. As a practical matter, piercing the corporate veil rarely occurs.

There is no hierarchy of liability between persons who are disturbers by conduct or disturbers in fact; all are jointly and severally liable. For example, if a competent authority has sufficient grounds to suspect that land is contaminated, it may require any such persons to investigate the suspected contamination and, if it exists, to remediate it. The authority’s decision is subject to judicial review but this review is limited in nature. As a practical matter, competent authorities require the liable party who can promptly carry out investigations and remediation measures to carry them out so as to avoid or abate danger from the contamination, subject to the constitutional principle of proportionality.
In 2000, the Federal Constitutional Court issued an important ruling on proportionality.\(^6\) The case concerned two complaints. The first involved soil and groundwater contaminated by chlorinated hydrocarbons at an industrial site used to degrease rabbit skins; the estimated remediation costs were DM 1.1 million. The second involved soil contaminated by lead at a depth of up to 80 cm at a clay pigeon range; the estimated remediation costs were DM 5.9 million. The court concluded that imposing liability on the owner of contaminated property was appropriate due to the benefits and obligations associated with the ownership of land, including not only the public interest but also the owner’s private interest in the increase in the value of the land that would result from its remediation.

The court then discussed proportionality in respect of the amount for which an owner should be liable. It stated that if the cost of carrying out remediation works exceeds the value of the land, the owner does not have an interest in continuing to own the land because the land would be worthless. It would thus be unreasonable to impose unlimited liability on the owner for costs that exceeded the land’s value because the owner would have to pay for the remediation from assets that were not connected with the contaminated land. In such a case, the owner’s liability should be limited to taking measures to contain the contamination and, thus, prevent the contamination causing a risk. The court further stated that, if the land was essential to the owner’s and his/her family’s living arrangements, the costs of carrying out remediation should be limited to the use value of the land. If, however, a landowner had consciously or negligently assumed the risks associated with the contamination by, for example, knowingly acquiring contaminated land or negligently allowing risky uses of it, the landowner should be liable for higher – although not unlimited – remedial costs, with a differentiation between whether risks arising from the contamination were assumed consciously or negligently. In such a case, the remedial costs for which the owner is liable should be derived, not only from the value of the land that was required to be remediated but also from the value of land that is legally or economically related to the contaminated land (such as a farm).

The SPA specifically authorises contribution actions between persons who are liable under it. A disturber in fact is authorised to bring a contribution action against a disturber by conduct, but not vice versa. A disturber by conduct who has incurred costs is authorized to bring a claim against any other disturber by conduct that has not been pursued by the competent authority.

The limitation period for a contribution action by a liable person is three years from the date the authority that has carried out remediation seeks recovery of its costs from the liable person, or three years from the date the liable person completed the works and discovered the identity of the person against whom it is claiming. The limitation period is subject to a long stop of 30 years after completion of the works. A public authority that carries out such works may bring a claim against any liable persons subject to a limitation period of three years from the date it completed

---

the works for which it is seeking reimbursement. The authority is also authorised to secure its costs by placing a mortgage on the contaminated site.

If an authority publicly funds remediation works, the current owner of the remediated land may be required to compensate the authority for any increase in the value of the land resulting from the remediation even though the owner is not liable under the SPA.

The standard for remediation of current or future contamination is removal of the contamination or harmful changes to the soil. The standard for historic contamination is subject to a reasonableness test. If, when the contamination was caused, the liable person did not breach the law and did not expect contamination to occur, the liable person may be permitted to contain the contamination at the site (rather than remove it all) provided that, under the facts and circumstances of the case, it is considered appropriate to protect the liable person’s good faith.

Prior to investigating and remediating contamination, the person liable for doing so must inform owners of property that may be affected by the investigation and remediation, including neighbouring owners, about such measures. The penalty for the failure to comply with an administrative order is an administrative fine. If the failure results in significant contamination that threatens the environment or human health, a criminal penalty may be imposed.

The Soil Protection and Contaminated Land Ordinance of 13 July 1999 sets out trigger, action and precautionary values for remediation, standards for remediation, and specifies measures for investigating, evaluating and monitoring sites at which contamination is suspected as well as requirements to prevent soil degradation. The threshold levels vary depending on the use of the land (residential, industrial, etc).

Some Länder, such as Bavaria and Baden Württemberg, have enacted legislation that requires a person who knows that soil and/or groundwater is contaminated to notify the relevant authorities of the contamination. The failure to do so is punishable by an administrative fine.

The following are some key differences between the SPA and the EDA:

- Liability under the SPA is focused on contaminated land, although it includes the remediation of some but not all water pollution;
- The joint and several liability system in the SPA differs substantially from that under the EDA;
- Liability under the SPA is not limited to an “operator” but includes former and current owners and occupiers of contaminated land and the legal successors;
- Liability under the SPA is retrospective as well as prospective, with a focus on remediating contamination from historic pollution;
- There is no statute of limitations in respect of a polluter under the SPA;
- The permit defence and the state-of-the-art defence do not apply in the SPA;
The EDA applies only if the damage is caused by an activity listed in Annex III of the ELD; the application of the SPA is not limited to contamination caused by specified activities; and

- There are no provisions for “interested parties” to submit comments.

Restoring biodiversity damage

The Federal Nature Conservation Act (BundesNaturschutzgesetz) of 29 July 2009 (NCA) came into force on 2 March 2010 and has since been amended.

Natura 2000 areas are regulated by articles 31ss. of the NCA. By their designation, they become parts of nature which must be protected (Article 20 NCA). Articles 13 to 19 of the NCA contain detailed provisions on interference with protected areas and the restoration, etc. of them. Whilst the NCA is broader than Natura 2000; the incorporation of Natura 2000 in the NCA is binding on the Länder and is thus truly federal legislation.

Section 14 of the NCA sets out a compensation scheme for the impairment of ecosystems (Eingriffsregelung). Most of the scheme relates to compensation for planned and authorised activities that significantly impair the environment. Such activities are predominantly the construction of buildings and infrastructure. The compensation scheme also applies, as modified, to unauthorised significant impairments.

An impairment of the environment in the NCA is defined as:

- “any change of
  - natural and artificial components of the earth’s surface,
  - land use,
  - the intensity of the land use, and
  - groundwater combined with the biological active topsoil layer,

- if there are significant negative impacts on the functionality and sensibility of ecological systems or on characteristic landscapes”.68

The above definition includes soil, water, climate, species and natural habitats, characteristic landscapes and any interaction between them.

Under the NCA, the relevant competent authority has a duty to require the person who is significantly impairing the environment to cease the impairment and to remediate the damage.

---

If the damage to the environment cannot be fully remediated, the NCA provides for complementary remediation. It does not provide for compensatory remediation, as provided by the EDA.

Article 15(2) of the NCA differentiates between restoration measures (Ausgleichsmassnahmen) and substitution measures (Ersatzmassnahmen).

The word "Ausgleichsmassnahme" is defined to mean that the impaired natural functions of nature are restored in an equivalent way and the landscape was restored or newly organised in an adequate manner.

The word "Ersatzmassnahme" is defined to mean that the impaired functions of nature were restored in an equivalent way and the landscape was newly organised in an adequate way.69

Where the interference is unavoidable and nature cannot be restored or substituted by Ausgleichs- or Ersatzmassnahmen, article 15(5) of the NCA provides that a monetary payment must be made.

Thus, the aim of Ausgleichs- und Ersatzmassnahmen is a zero net loss of biodiversity. If a zero net loss is unavoidable, monetary compensation is allowed.

The following are key differences between the NCA and the EDA:

- The NCA does not establish liability for compensatory remediation in respect of biodiversity damage;
- Liability for impairing an ecosystem under the NCA is not limited to occupational activities (as defined in the ELD) but includes any activities, professional or private;
- The NCA applies to all species and habitats, not only those protected by the Birds and Habitats Directives (Germany has not extended biodiversity under the ELD to nationally protected biodiversity; see section 13 below);
- An impairment of the environment under the NCA includes detrimental effects on climate change, air quality and landscapes; whereas the ELD does not apply to these;
- An impairment of an ecosystem is limited to an activity that modifies the use of the ground; whereas the ELD applies to any biodiversity damage provided the threshold is met;
- Environmental NGOs have the right to submit comments / observations under the ELD but not under the NCA; and
- Whilst the significance threshold under the ELD is identical to the threshold under the NCA (both legislative texts use the word

---

69 The translation of the words "Ausgleichsmassnahme" and "Ersatzmassnahme" has been kindly provided by Ludwig Krämer.
Implementation challenges and obstacles of the Environmental Liability Directive

erheblich), competent authorities do, however, make a difference in practice.70

Other liability systems for remediating environmental damage

Some of the Länder have enacted legislation that is more extensive than the federal legislation discussed above. The enactment of such legislation is, as noted in section 1 above, subject to relevant restrictions in the Basic Law.

In addition to administrative environmental law, civil environmental law also exists in Germany. A key civil liability law is the Environmental Liability Act 1991, which imposes strict, joint and several liability on operators of specified commercial and industrial installations that are permitted under the Federal Emission Control Act. The Environmental Liability Act includes a rebuttable presumption that provides that the operator of a specified installation is liable unless the operator proves that only normal operations at the installation were carried out at the time of the damage. There is a limit of liability of just over €81 million per incident. The liability imposed by the Environmental Liability Act, however, is for personal injury and property damage; it does not require the operator of a specified installation to remediate environmental damage. The Environmental Liability Act does, however, provide that property damage includes environmental damage but this damage is only to the extent of a claimant’s property interest in the damaged nature or landscape. The amount of compensation for such damage is linked to the restoration of the nature and landscape. An issue could, therefore, arise as to whether the EDA pre-empts a claim for compensation for damage to nature or landscape under the Environmental Liability Act due to the potential for an overlap between the two and the requirement for damage to be remediated (not merely compensated monetarily) under the EDA.

Other civil environmental legislation in Germany includes the following.

A person who has sold contaminated land without informing the purchaser about any suspected or actual contamination known to the seller may be liable to the purchaser for compensation due to having sold the land with a defect (a term that includes serious contamination under the SPA). The buyer must bring the claim for compensation within two years of the purchase. Such liability is based on civil law, however; it is not environmental administrative law and does not entitle the purchaser to require the seller to remediate the contamination.

A person whose land is damaged by contamination (either directly or as a result of the migration of contaminants) may bring a claim for compensation against the person who contaminated the land under section 823(1) of the Civil Code. Such a person may also seek an order to require the person causing the contamination to prevent further damage under sections 906 and 1004 of the Civil Code. Further, such a person may also bring a claim against the person who caused the contamination for the costs of remediating the contamination under section 823(1) of the Civil Code and section 24(2) of the SPA. Again, however, such claims are civil environmental liability not administrative liability.

70 See Andrea Eberlein & Gerhard Roller, Application of the Environmental Liability Directive (ELD) in practice; The German experience pp.7-11 (study commissioned by the European Environmental Bureau, January 2012).
In addition to the provisions of the SPA discussed above, it also established a programme to identify, register and remediate closed sites at which there is “historic contamination”. Article 2(5) of the SPA defines “historic contamination” (Altlasten or old burdens) as: (1) closed waste management sites and other sites in or on which waste has been treated, stored or disposed of (former waste disposal sites) and (2) sites of closed installations and other sites on which environmentally harmful substances have been handled (former industrial sites), with the exception of nuclear sites, that cause adverse changes to the soil or other dangers for individuals or the general public. Each Land has its own inventory of such sites.

3. **Integration of the ELD into existing national legislation**

   - Transposing legislation

   Act concerning the Prevention and Remedying of Environment Damage (Umweltschadensgesetz) of May 10, 2007, as amended (EDA)

   The EDA has been amended by the following Acts:

   - Gesetz zur Ablösung des Abfallverbindungsgesetzes und zur Änderung weiterer Rechtsvorschriften, of 19 July 2007 (Bundesgesetzblatt 2007, no 33, p.l-1462), Article 7;
   - Gesetz zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege, of 29 July 2009 (Bundesgesetzblatt 2009, no.51 p.l-2542), Article 16;
   - Gesetz zur Neuregelung des Wasserrechts, of 31 July 2009 (Bundesgesetzblatt 2009, no 51, p.l-2585), Article 14;
   - Gesetz zur Neuordnung des Pflanzenschutzrechts, of 6 February 2012 (Bundesgesetzblatt 2012, no 7, p.l-148), Article 7;
   - Gesetz zur Neuordnung des Kreislaufwirtschafts- und Abfallrechts, of 24 February 2012 (Bundesgesetzblatt 2012, no.10, p.l-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.l-1726), Article 3; and

   The EDA is federal legislation. Germany has enacted all legislation necessary to transpose the ELD. In some cases, the Länder already had the necessary provisions so it was not necessary for them to enact new provisions. The only provisions of the ELD that the Länder have not enacted are optional provisions such as the permit and state-of-the-art defences.

   - Amendments to existing national environmental law

   The EDA amended the then Federal Water Act (repealed; now Federal Water Act (Wasserhaushaltsgesetz-WHG) of July 31, 2009, as amended), and the Federal Nature
As indicated in section 1 above, the EDA also refers to provisions of the Water and Nature Acts and the Federal Soil Protection Act (Bundesbodenschutzgesetz-BbodSchG) of March 3, 1998, as amended, together with the implementing rules, for “relevant technical legislative provisions.”

The EDA has not been amended in substance by the NCA. However, as noted above, article 1 of the EDA needs to be taken into consideration.

- Authorisation in legislation for other governmental entities to issue rules and regulations

As indicated in section 1 above, the EDA authorises the Länder to issue 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 not enacted legislation on the permit and state-of-the-art defences.

- Relationship to other legislation

The EDA applies in cases where more detailed provisions for the prevention and remedying of environmental damage are not provided by federal or Land legislation or where the requirements laid down by that legislation conflict with the EDA. Legislation with requirements over and above the requirements of the EDA remains unaffected. That is, if other legislation contains more stringent provisions than the EDA, the other provisions apply.

Further, as noted in section 1 above, provisions of other legislation apply to the ELD regime.

- Guidance and other documentation

Neither the federal Governmental nor the Länder have published any guidance or other documentation.

4. Effective date of national legislation

30 April 2007


5. Competent authority(ies)

The Länder have designated the competent authorities in their jurisdictions.

6. Operators and other liable persons

The definition of an operator is the same as that under the ELD, including the holder of a permit or authorisation.

- Secondary liability (e.g., parent company)

The EDA does not mention secondary liability.
Implementation challenges and obstacles of the Environmental Liability Directive

- Death or dissolution of responsible operator
  The EDA does not mention the effect of the death or dissolution of a responsible operator.
- Person other than an operator who may be liable
  The EDA does not impose liability on any person other than an operator.

7. **Annex III legislation**
   - Rebuttable presumption that operator’s activity caused environmental damage
     The EDA does not establish a rebuttable presumption that an operator’s activity caused environmental damage.
   - Additional occupational activities subject to strict liability
     The EDA does not extend strict liability beyond Annex III activities.
   - Spreading of sewage sludge for agricultural purposes
     The spreading of sewage sludge for agricultural purposes is an Annex III activity.

8. **Standard of liability for non-Annex III activities**
   The standard of liability is willful act or negligence.

9. **Exceptions**
   The exceptions in the EDA are a copy-out of the exceptions in the ELD.
   - Application to imminent threat of environmental damage as well as environmental damage
     The exceptions apply to an imminent threat of, and actual, environmental damage.
   - Differences with exceptions in the ELD
     The exceptions in the transposing legislation are the same as in the ELD.
   - Diffuse pollution exception
     The exception for diffuse pollution is a copy-out of the ELD.

10. **Joint and several or proportionate liability**
    Joint and several liability applies.
    - Mechanism for contribution between responsible operators
      The EDA 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.
11. **Limitation period**

The limitation period is 30 years from the time of the damage provided that the competent authority has not brought proceedings against a responsible operator during that time. This limitation period is the same as in the ELD.

12. **Defences**

- Defences to liability or costs?
  
  The defences are defences to costs.
  
  - If defences to liability; suspension (or not) of remediation notice during appeal

  See above. A remediation notice is not suspended during appeal.
  
  - Permit defence

  The Länder have the option to adopt the permit defence; none of them has done so.
  
  - State-of-the-art defence

  The Länder have the option to adopt the state-of-the-art defence; none of them has done so.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
  
  15.43%
  
  - Extension of biodiversity to nationally protected biodiversity


  Liability has not been extended to include any nationally protected species or natural habitats; it is limited to environmental damage to species and natural habitats protected under the Birds and Habitats Directives.

  The Länder do not have authority to include any species or natural habitats beyond those specified in the Birds and Habitats Directives.

  - Biodiversity damage in the exclusive economic zone

  Liability extends to biodiversity damage in the exclusive economic zone.

  - Water or water body

  Liability to water is limited to (a) the ecological or chemical status of surface and coastal waters (b) the ecological potential or the chemical status of an artificial or significantly modified surface or coastal water (c) the chemical or quantitative status of groundwater. These amendments follow from the new Act of 31 July 2009, mentioned under (1), above, Article 90. The threshold for water damage in the transposing legislation is damage to waters, not water bodies.
14. **Thresholds**

- **Water damage**
  
  Section 90 of the Act of 31 July 2009 concerns “any damage with significant negative consequences” on the water.

- **Biodiversity damage**
  
  The relevant provisions are now found in section 19 of the Act of 29 July 2009: “Significant damage” is any damage which has significant negative effects on habitats or species. No damage exists when the competent authority authorised an activity with negative consequences, this concerns in particular town and country planning, specific projects, and GMO releases. Whether damage is significant shall be examined by comparison to the baseline status. Normally, significant damage does not exist, when (a) deviations are smaller than the natural fluctuations that are relevant for the species or the habitat; (b) negative consequences which have their origin in natural causes, or which are the consequence of previous normal management of that zone, or which correspond to the way in which the owner or operator (farmer) economically used the area; or (c) a damage to habitats or species where it can be proven that without external acts regeneration to the original or even a better status will take place in a short time.

- **National biodiversity damage**
  
  There is no extension of liability to nationally protected biodiversity damage so there is no separate threshold.

- **Land damage**
  
  The EDA applies if there is a danger to human health; a significant risk of an adverse effect on human health is not required. The relevant standard is set out in section 2 Abs 2 of the Federal Soil Protection Act. This threshold is lower than the threshold under the ELD.

15. **Standard of remediation**

Section 90 of the Federal Water Act and section 19 of the Federal Nature Protection Act refer to Annex II, section 1 of the ELD.

- **Land**
  
  The EDA is largely a copy out of the ELD.

- **Biodiversity**
  
  - **Primary remediation**
    
    The Nature Protection Act of 2009 indicates that significant damage shall be avoided. Where this is not possible, remediation or compensation shall take place. Should this not be possible, compensation in money shall be paid (section 13). This is not a higher standard than the ELD.

  - **Complementary and compensatory remediation**
  
    The EDA is largely a copy-out of the ELD.
Water

- Primary remediation

The Nature Protection Act of 2009 indicates that significant damage shall be avoided. Where this is not possible, remediation or compensation shall take place. Should this not be possible, compensation in money shall be paid (section 13). This is not a higher standard than the ELD.

- Complementary and compensatory remediation

The EDA is largely a copy-out of the ELD.

16. **Format of determination of environmental damage**

The EDA does not specify any particular format for a determination of environmental damage.

17. **Powers and duties of competent authority**

**Inspections, investigations, studies and analyses**

The EDA does not specifically refer to any power or duty of a competent authority to carry out inspections and investigations or any studies or analyses which must be made. However, section 7(1) of the EDA, which provides that “The competent authority shall monitor to determine that the responsible party takes the necessary preventive, damage limitation, and remedial measures”, implicitly contains such powers and duties.

- **Information orders**

A competent authority may require a responsible operator to “provide all necessary information and data concerning an imminent threat of environmental damage or a suspected imminent threat of such damage or the actual occurrence of such damage, as well as an assessment of the situation”.

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

The competent authority has a duty to “monitor to determine that the responsible party takes the necessary preventive … measures”.

The competent authority has the power but not the duty to require an operator to carry out preventive actions if the operator fails to do so.

- **Power or duty to require an operator to carry out remedial actions**

The competent authority has a duty to “monitor to determine that the responsible party takes the necessary … damage limitation, and remedial measures”.

The competent authority has the power but not the duty to require an operator to carry out remedial actions if the operator fails to do so.

- **Power or duty of competent authority to carry out preventive measures**

The competent authority has the power but not the duty to carry out preventive measures if the operator fails to do so.
Power or duty of competent authority to carry out remedial measures

The competent authority has the power but not the duty to carry out remedial measures if the operator fails to do so. This power comes from general obligations of the police authorities to prevent the realisation of imminent risks (for the public order, including people). Where the environmental impairment does not constitute such a risk (which might increase in time), the authorities are not entitled to take remedial action themselves.

Form of preventive order

The EDA provides that “Any administrative act arising from this Act shall include reasons for that act and instructions on the legal remedies available”.

Form of remediation order

See directly above (Form of preventive order). In addition, the EDA states that “[t]he competent authority shall decide on the type and scope of the remedial measures to be implemented in accordance with the relevant technical legislative provisions” after the responsible party has identified the remedial measures and submitted them to the competent authority.

Appeal against preventive or remediation order

A responsible operator has the right to file an objection with a higher authority. If the objection is not successful, the operator may bring an action in an administrative court.

Sanctions for delay in complying with order requiring remediation

The EDA does not mention sanctions.

Formal consultees on contents of preventive or remediation orders

The EDA does not provide for any formal consultees on the contents of preventive orders or remediation orders.

Recovery of implementation and enforcement costs

The definition of “costs” is a copy-out of the ELD.

Deadline for competent authority to seek recovery of costs

The Länder have enacted harmonised cost recovery legislation that provides for a limitation period of five years for a competent authority to seek recovery of its costs.

18. Duties of responsible operators

Preventive measures

An operator has a duty to take “necessary preventive measures without delay” if there is an imminent threat of environmental damage.

Remedial actions (emergency actions)

If environmental damage has occurred, an operator has a duty to take “the necessary damage limitation measures”; defined as “any measure to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit
or to prevent further environmental damage and adverse effect on human health or further impairment of services” (this is a copy-out from the ELD).

▶ Remedial measures

An operator has a duty to take “necessary damage limitation measures” and “necessary remedial measures” if environmental damage has occurred. The scope of complementary and compensatory remedial measures for water and biodiversity is the same as those under the ELD; the EDA refers to point 1 of Annex II of the ELD.

▶ Duty to notify / provide information when environmental damage occurs

An operator has a duty to inform the competent authority when environmental damage occurs; the notification provision is largely a copy-out of the ELD.

▶ Duty to notify / provide information when imminent threat of environmental damage occurs

The operator has a duty to inform an imminent threat regardless whether preventive measures have dispelled the imminent threat (section 4 of EDA). This is a logical reflection of the legislator: the obligation exists at the moment when there is the threat, thus already before any dispelling could have taken place.

▶ Entity to which notification should be provided

The name of the entity is not specified in the EDA.

19. Access to third-party land to comply with the ELD

The EDA does not mention remedial measures being carried out on third-party land.

20. Interested parties

Notification/comments may be made in respect of both an imminent threat of environmental damage as well as environmental damage.

▶ Qualification criteria for “sufficient interest”

Following the Act of 15 December 2006 Concerning Supplemental Provisions on Appeals in Environmental Matters Pursuant to Directive 2003/35/EC, NGOs that meet qualification criteria may make notifications/comments to competent authorities. The transposing legislation states that the NGO’s articles of association must state that its main purpose is nature conservation or landscape preservation.

The Federal Environment Agency (UBA), in conjunction with the Federal Agency for Nature Conservation (BfN) determines whether an NGO meets the above criteria.

NGOs which limit their activities to one Land only, are recognised by that Land.

▶ Method of notifying interested parties of planned remedial measures

“The competent authority shall notify the persons and associations eligible to request action under section 10 [of the EDA] of the remedial measures planned and give them an opportunity to
submit their observations. Such notification may be effected by public notice”. The response to an interested party must include reasons as well as instructions on available legal remedies.

Section 10 of the EDA provides that a competent authority must take remedial action “if an affected party or association eligible to seek legal remedy [to challenge the competent authority’s decisions, acts or failure to act], requests the competent authority to take action, and that request for action shows in a plausible manner that environmental damage exists”.

Information to be provided to competent authority

The EDA states that “[o]bservations which have been submitted in time shall be taken into account in the competent authority’s decision”; it does not provide details of the form of the observations / comments.

Challenges to competent authority’s decision

A challenge to a competent authority’s decision is by way of administrative review and judicial review.

Duty on competent authority to respond to person making the notification

The EDA does not mention any requirement on a competent authority to respond to a person submitting observations / comments.

Inclusion of interested party in any proceedings by the competent authority against an operator

Notifications/comments by interested parties are taken into account. The competent authority is not required to include an interested party in any proceedings.

21. Public access to information regarding environmental damage and related measures

The EDA does not provide for public access to information regarding environmental damage or related preventive, containment or remedial measures.

22. Charges on land / financial security after environmental damage

The Länder have the authority to decide all costs matters (Kostenregelung) including charges on land and other forms of financial security.

23. Offences and sanctions

The EDA does not mention and offences or sanctions for them.

Sanctions are provided for in the German Criminal Act which contains provisions on environmental crimes, in general legislation on administrative sanctions, etc.

Directors and officers liability for breaching legislation

The EDA does not mention directors and officers liability for breaching the EDA.
24. **Registers or data bases of incidents**

The EDA does not mention any registers or data bases of incidents of imminent threats of, or actual, environmental damage.

25. **Cross border damage in another Member State**

The provisions on cross border environmental damage are largely a copy-out of article 15 of the ELD except that there is no requirement in the EDA to report to the European Commission any damage within Germany which is not caused in Germany.

26. **Financial security**

Germany has decided not to impose mandatory financial security.

27. **Establishment of a fund**

The EDA does not establish a fund.

28. **Reports**

The EDA does not mention any reports.

29. **Information to be made public**

Planned remedial measures for an ELD incident are made by public notice so as to give persons and associations that are eligible to submit comments on them.

30. **Provisions concerning genetically modified organisms**

The transport of GMOs is an Annex III activity as well as their contained use, release into the environment and their placement on the market.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

Liability for preventing and remediating land contamination and associated groundwater pollution, preventing and remediating water pollution, and prohibiting damage to, and requiring the remediation of, Natura 2000 sites already existed and continues to exist (see section 2).

Germany has legislation that imposes liability for remediating contaminated land, with the focus of the legislation on sites at which operations that may or are causing contamination are no longer carried out. The legislation is retrospective as well as prospective. Several persons may be
liable including the polluter, the legal successor of the polluter, the owner or occupier and the former owner, depending on the facts and circumstances of a particular case. Liability is joint and several but is subject to proportionality. This joint and several liability system differs substantially from that in the legislation transposing the ELD.

The existing nature conservation legislation, which is developed more fully than that of many other Member States, provides for complementary remediation if damage to the environment cannot be fully remediated. Unlike the legislation transposing the ELD, it does not provide for compensatory remediation. The inclusion of complementary remediation is unusual; most – if not all other – Member States do not have such provisions.

If a damaged natural resource cannot be restored or substituted, the existing nature conservation legislation provides for monetary compensation. That is, the aim of the legislation is zero net loss of biodiversity, with monetary compensation if zero net loss is unavoidable.
Greece

1. Existing national environmental legislation

The Greek Government transposed the ELD in a single law, namely Presidential Decree No. 148/2009 (Decree).

Prior to the transposition of the ELD, article 24.1 of the Greek Constitution provided that the “protection of the natural and cultural environment is a duty of the State. The State is bound to adopt special preventative or repressive measures for the preservation of the environment”. This provision was strengthened in 2001 to read: “The protection of the natural and cultural environment constitutes a duty of the State and a right for everyone. The State is bound to adopt special preventive and repressive measures for the preservation of the environment in the concept of sustainable development”. That is, the original provision was strengthened to state that, not only does the State have an obligation to protect the natural and cultural environment, but everyone has a right to environmental protection.

Law 1650/1986, as amended and Law 4014/2011, on the protection of the natural environment (Env. Laws I and II) are the main laws that specify the rules in section 24.1 of the Constitution. They are broad and include many areas of environmental law including waste management, environmental impact statements and nature conservation.

2. Existing regimes for preventing and remediating environmental damage

Law 1650/1986 is the main law in Greece that imposes liability for environmental damage. It does not, however, establish an administrative regime to require the prevention and remedying of environmental damage.

Instead, Laws 1650/1986 and 4014/2011 impose civil liability, and criminal liability and administrative penalties for environmental damage. The administrative liability provisions in these Laws (section 30 of 1650/1986 and section 21 of Law 4014/2011) authorise the service of orders to suspend or prohibit activities that may cause, or are causing, environmental damage.

Article 29 of Law 1650/1986 imposes strict liability on a person who causes pollution or degradation of the environment in respect of a third-party claim for compensation from such damage. There are two defences to liability: force majeure and the intentional act of a third party.

---

71 Translation from Christina Vlachtsis, Greece, Cross-Border Transactions and Environmental Law, p. 283 (Mark Brumwell, editor, Butterworths, 1999).

Article 29 was not, however, used very much due, among other things, to difficulties in determining the meaning of environmental pollution and environmental degradation. The Decree supplemented Law 1650/1986 and defined those terms more specifically.73

Compliance with a permit is not a defence to liability under Law 1650/1986.

Water pollution

There is specific existing legislation in Greece for administrative and criminal liability in case of water pollution or contamination (article 13 of Law 3199/2003 which transposed the Water Framework Directive (2000/60/EC) but not for the remediation of water pollution. The legislation also provides the potential for cost recovery on the basis of the polluter pays principle following a decision by the National Water Committee.

Land contamination

There is no specific existing legislation in Greece for the remediation of land contamination.

Restoring biodiversity damage

There is specific existing legislation in Greece for remediating biodiversity damage.

Pursuant to article 12 of Joint Ministerial Decision No. 37338/1807/E.103 (FEK B’ 1495/6.9.2010), as amended and supplemented though Joint Ministerial Decision No. 8353/276/E103 – FEK B’ 415/23.2.2012, on determination of measures and procedures for the preservation of wild birds and their habitats, in compliance with the Birds and Habitats Directives, any natural person or legal entity, private and governmental, whose activity causes damage or a direct threat of damage to species of birds and their habitats, is liable.

Other liability systems for remediating environmental damage

Law 1650/1986 is not the only civil law that authorises a cause of action for compensation for environmental damage. The other provisions are, however, based on fault rather than strict liability.

Article 29 of Law 1650/1986 is the main provision for civil liability claims. Article 914 of the Civil Code can also be applied, but it imposes fault-based liability for claims for compensation, including compensation from environmental damage.

Article 57 of the Civil Code is a general provision that authorises, among other things, a person to demand that an activity that is harming lato censu (even indirectly) that person must cease and not be repeated in the future when such activity is unlawful (article 59 of the Civil Code provides in this context compensation for restitution of subsequent moral damage).

Compliance with a permit is not per se a defence to liability under the Civil Code. A different issue, however, is whether such an incident could, under certain circumstances, be raised under

article 281 of the Greek Civil Code if the person holding the permit complied with it but the authority abused its discretion when it issued the permit (see section 10 below).

- Interface between the existing national liability regimes and the ELD regime

As a result of the Decree introducing administrative liability for preventing and remedying damage to land, water and biodiversity in the absence of such liability prior to its enactment, the problem of overlapping provisions between the Decree and existing legislation does not arise.

3. Integration of the ELD into existing national legislation

- Transposing legislation


- Amendments to existing national legislation

The Decree did not amend existing national legislation.

The Decree does, however, state that it “shall apply without prejudice to more stringent national and community legislation regulating the operation of the activities falling within [its scope]” (article 4(3)).

- Authorisation in legislation for other governmental entities to issue rules and regulations

The Decree authorises, among others, the Minister of the Environment, Energy and Climate Change (Minister), and “any possible jointly responsible Minister” to issue decisions concerning mandatory financial security. The Decree further authorises a joint ministerial decision by the Minister and the Minister of Economy and Finance concerning the proposed mandatory financial security system. The decisions have not been issued as yet (see section 26 below).

- Relationship to other legislation

Various existing laws apply to fill the gaps in the ELD. These include laws concerning comments / observations from environmental NGOs (see section 20 below), laws concerning administrative sanctions (see section 23 below) and relevant administrative procedure laws.

- Guidance and other documentation

The Greek Government has not issued any guidance or other documentation pursuant to the Decree.

4. Effective date of national legislation


5. Competent authority(ies)

The competent authorities are:
the Ministry of the Environment, Energy and Climate Change (Ministry)\textsuperscript{74} when the damage affects natural resources or services of national important that are protected and/or managed by a public authority,\textsuperscript{75} 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 States; and

- the Decentralised Administrations\textsuperscript{76} when the imminent threat of, or actual, environmental damage affect natural resources or services only within their areas.

The Decentralised Administrations must notify the Ministry of any imminent threat of, or actual, environmental damage and any action taken by them under the Decree.

The Greek Government established the Coordinating Office for Environmental Damage Management (COEDM) (Συντονιστικό Γραφείο Αποκατάστασης Περιβαλλοντικών Ζημιών - SYGAPEZ) to supervise and control the implementation of the ELD regime and to co-ordinate actions taken by competent Environmental Agencies at central and local level and competent bodies of narrow or broader public sector which may be involved in law enforcement issues. COEDM reports to the Ministry.

The work of the COEDM is supported by a consultative committee called the Environmental Damage Management Committee (EDMC) (Επιτροπή Αντιμετώπισης Περιβαλλοντικών Ζημιών – EAPEZ).

The Decree also provides for the establishment of a consultative committee, called the Regional Environmental Damage Management Committee (REDMC) (Περιφερειακή Επιτροπή Αντιμετώπισης Περιβαλλοντικών Ζημιών - PEAPZ) at regional level. That is, due to the large size of the Decentralised Administrations, REDMC operates at a regional level in 11 Regions, with the formation of two REDMC still pending.

Article 6 of the Decree sets out detailed criteria for the establishment, composition and responsibilities of the COEDM and the above committees.

6. **Operators and other liable persons**

The Decree has the same definition of an “operator” as the ELD.

\textsuperscript{74} When the Decree was enacted, the Ministry of Environment, Physical Planning and Public Works was designated as the competent authority. In 2009, the Public Works sector of this Ministry was split off and merged with the Ministry for Transport and Communications to form the Ministry of Infrastructure, Transport and Networks. The name of the competent authority under the ELD regime is the Ministry for the Environment, Energy and Climate Change.

\textsuperscript{75} Article 2(17) of the Decree defines a “public authority” as “the public services, Local Government Organizations and bodies corporate under public and private law at a national, regional or local level”.

\textsuperscript{76} On 1 January 2011, there was a re-organisation in Greece which resulted, among other things, in the creation of seven Decentralised Administrations, some of which include two Regions.
Secondary liability (e.g., parent company)

The Decree does not provide for secondary liability other than as noted directly below.

Greek case law has acknowledged the possibility that the corporate veil of a subsidiary company may be pierced in exceptional cases if a parent company has a “commanding influence” on a subsidiary. The existence of a commanding influence depends on the specific facts of each case.

Death or dissolution of responsible operator

Article 11(6) of the Decree provides that if a liable operator dies or disappears, “the relevant liability shall be borne pro rata by his universal successors”.

Article 11(6) applies to natural and legal persons. If there is environmental damage to a piece of land, the regulatory authority seeks to identify the owner or another person with a legal interest in the land. If such a person has died or no longer exists but they have a successor, the successor is liable for the liabilities of the natural person who has died or the legal person that no longer exists. If the natural or legal person does not have a successor, the relevant claim is pursued in the context of liquidation/insolvency proceedings concerning that person.

Person other than an operator who may be liable

Only an operator appears to be liable although article 8(3)(b) of the Decree states that a competent authority may require a third party to implement preventive measures, and article 9(4) states that a competent authority may require third parties to implement remedial measures. These references may simply be drawn from such references in the ELD.

The Decree further provides for the recovery of preventive and remedial costs that are incurred voluntarily. That is, if a natural or legal person carries out preventive or remedial measures on its own initiative, in consultation and collaboration with the competent authority and in compliance with the Decree, that person may claim the costs from a liable operator under the Civil Code provisions on unjust enrichment or management without mandate which apply in such a case by analogy. There is a five-year limitation period for claiming such costs (article 11(9) of the Decree; see ELD article 10).

### 7. Annex III legislation

Rebuttable presumption that operator’s activity caused environmental damage

The Decree does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

Additional occupational activities subject to strict liability

No additional activities are subject to strict liability.

Spreading of sewage sludge for agricultural purposes

Greece has not exempted sewage sludge for agricultural purposes from Annex III activities.
8. **Standard of liability for non-Annex III activities**

The standard of liability for non-Annex III activities to biodiversity damage is strict liability. This is more stringent than the ELD.

9. **Exceptions**

- Application to imminent threat of environmental damage as well as environmental damage

The exceptions in the Decree apply to an imminent threat of, and actual, environmental damage.

- Differences with exceptions in the ELD

The ELD refers to "a natural phenomenon of exceptional, inevitable and irresistible character".

Article 5(1)(a) of the Decree refers to "a natural phenomenon of exceptional and inevitable character".

It is unclear whether there is a material difference between the above two exceptions. If there is, the exception in the Decree is narrower – and thus more stringent – than that in the ELD.

- Diffuse pollution exception

The diffuse pollution exception is the same language as the ELD.

10. **Joint and several or proportionate liability**

The Decree provides for joint and several liability.

If the competent authority or another public authority is one of the parties liable for the imminent threat of, or actual, environmental damage or further damage arising from it, article 300 of the Civil Code applies, by analogy, on a pro rata basis in favour of the operator in respect of the allocation or investigation of preventive or remedial costs (article 12(3) of the Decree).

Article 300 of the Civil Code provides that a court has discretion, limited by various factors, to make a decision not to award compensation or to reduce the amount of compensation if the claimant is at fault and that fault contributed to the harm suffered by the claimant.

Article 12(3) of the Decree thus provides for contributory negligence. That is, if the act or omission of a competent authority or other public authority results in the liable operator(s) incurring costs, or higher costs, for preventing or remediating environmental damage, the authority is responsible for paying such costs to the extent that they contributed to the damage.

- Mechanism for contribution between liable operators

Articles 926 and 927 of the Civil Code apply by analogy to a contribution action (also known as a recourse action) by the liable operator who has paid preventive or remedial costs and is seeking recovery from other liable operators. There is a five-year limitation period for a contribution action. The accrual date for the cause of action begins to run on the date that the operator bringing the action paid the costs to the competent authority, or paid the costs itself and was informed of the identity of the other liable operator, whichever is later. The limitations period is
Implementation challenges and obstacles of the Environmental Liability Directive

subject to a long-stop of 20 years from payment of the costs to the competent authority or their payment by the operator.

If the imminent threat of, or actual, environmental damage is caused by the use of a product, the operator may seek recourse against the producer, importer or supplier, provided that the operator complied strictly, in its activities, with the conditions for the use of the product and the legislation in existence at the time of the imminent threat of, or actual, environmental damage (article 12(2)). In any case, the provisions of the existing legislation on producer’s or supplier’s liability for defective products and the safety or health of consumers are not affected.

11. Limitation period

The limitation period pursuant to article 17 of the ELD (for damage caused by, or derived from, an emission, event or incident) is 30 years. The Decree follows the same position (article 19(c)).

12. Defences

Defences to liability or costs?

The defences are defences to costs. As discussed below, however, there is a limited exception due to the potential for an order to carry out preventive and remedial measures being suspended. That is, if an operator is not required to carry out the measures set out in an order until there is a ruling on its liability for carrying out such measures, the defences, in this limited situation, could be defences to liability because the operator would not be required to carry out the measures at all if it succeeds.

Article 11(4) of the Decree, which concerns responsibility for costs when environmental damage was caused by a third party despite appropriate safety measures being in place, or compliance by the operator with a compulsory instruction from a public authority, tracks the language of the ELD.

Article 18(2) of the Decree provides that if an operator has sought such legal remedies and the competent court has issued a final ruling in favour of the operator, the operator “shall be entitled to seek recovery of the costs he may have incurred by submitting a request to the competent authority, accompanied by the necessary supporting documentation”.

Further, articles 8(3)(a) and 9(3) of the Decree provide that a competent authority will itself carry out preventive measures and remedial measures and bear the relative costs, respectively, if the operator is relieved of his obligation to pay the competent authority the cost of preventive or remedial actions according to article 11(4) of the Decree.

In respect of the permit and state-of-the-art defences, article 11(5)(1) states that “an operator is relieved of his obligation to pay the cost of remedial actions taken pursuant to this decree, if he demonstrates that he was not at fault or negligent, as well as [satisfying the permit or state-of-the-art defence]”.

Article 11(5)(2) states that “When one of the above cases is true, the operator is required to comply with and implement environmental damage prevention and remedial measures. He shall
recover the relative expenses incurred [by analogy to] the provisions of paragraph 2, article 18 of this decree”.

Article 18(1) of the Decree provides that an operator may challenge the competent authority’s decision that imposes preventive or remedial measures and that “Seeking a legal remedy does not involve suspension of the enforcement of the contested act, without excluding the option of requesting suspension of the enforcement of such act”.

The phrase “without excluding the option of requesting suspension of the enforcement of such act” in article 18(1) means that it is possible for a decision of the competent authority to be judicially suspended.

- If defences to liability; suspension (or not) of remediation notice during appeal

An order to carry out remedial measures may be suspended (see above). The Decree does not specify the grounds on which an order may be suspended.

However, the potential to suspend a remediation notice during an application for judicial review of an order issued by a competent authority, or an act of the competent authority, appears to apply regardless of the classification of the defence.

- Permit defence

Greece has adopted the permit defence. The Decree provides, however, that the defence applies only if the emission or event that immediately caused the damage was expressly stipulated in the permit or authorisation and the operator strictly complied with the terms and conditions of the permit or authorisation when the emission or event occurred (article 11(5)(1)(a)). The Decree further provides that compliance with the terms and conditions which are set out in decisions approving environmental conditions or any permit or authorisation that are necessary for the lawful exercise of the activities covered by the permit or authorisation is not a defence (article 7(2)).

The difference between the two types of terms and conditions is unclear.

- State-of-the-art defence

Greece has adopted the state-of-the-art defence.

13. Scope of environmental damage

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)

27.3%

- Extension of biodiversity to nationally protected biodiversity

Greece has extended biodiversity damage under the Decree to biodiversity protected under national legislation.

- Biodiversity damage in the exclusive economic zone

Greece has declared an exclusive economic zone and is asserting rights to explore for hydrocarbons in it. Biodiversity damage in the exclusive economic zone is thus subject to liability under the ELD.
Water or water body

The Decree is not clear on whether water damage is damage to waters under the Water Framework Directive or a surface or groundwater body of water under the Directive.

14. **Thresholds**

- Water damage

The Decree refers to Greek legislation transposing the Water Framework Directive for the definition of water damage (article 3(1)(b)). The threshold for water damage is thus the same as that in the ELD.

- Biodiversity damage

Article 3(1)(a) defines biodiversity damage as in the ELD.

Article 3(4)(b) refers to “the Greek Territory or the natural range of [a] species” in the definition of the conservation status of a species. This provision is basically a copy out of the ELD with a small adaptation.

- National biodiversity damage

See above.

- Land damage

The definition of land damage is the same as the ELD. Thus, the threshold for land damage is the same as that in the ELD.

15. **Standard of remediation**

- Land

The Decree sets out the framework in Annex II of the ELD for remedying environmental damage, including land, in Annex II to the Decree. The standard of remediation for land is, therefore, the same as that in the ELD.

- Biodiversity

  - Primary remediation

As indicated above, the Decree sets out the framework in Annex II of the ELD for remedying environmental damage, including biodiversity, in Annex II to the Decree. The standard of remediation for biodiversity is, therefore, the same as that in the ELD.

  - Complementary and compensatory remediation

Annex II to the Decree includes the definitions of complementary and compensation remediation.
Water
- Primary remediation

See above concerning the framework for remedying water, as well as biodiversity, damage.
- Complementary and compensatory remediation

See above.

16. Format of determination of environmental damage

The Decree does not specify a set format for the determination of environmental damage.

17. Powers and duties of competent authority

- Inspections, investigations, studies and analyses

Article 16 of the Decree provides that the competent section of the “Special Environment Inspectors Service” (Ειδική Υπηρεσία Επιθεωρητών Περιβάλλοντος – ΕΥΕΡ) shall carry out regular and special inspections with respect to an operator’s compliance with the obligations arising from the Decree.

Further, the SEIS may delegate the performance of the whole or a part of the inspections to scientific or other specialized bodies of the public or private sector when the SEIS considers that such bodies may substantially contribute to this work. If the SEIS delegates such authority to a third party, the operator will bear the third party’s costs.

- Information orders

A competent authority may require an operator to provide information on an imminent threat of environmental damage or a suspected case of such damage. The competent authority may also require an operator to provide supplementary information concerning any environmental damage that has occurred.

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

The competent authority has the power but not the duty to require an operator to carry out preventive measures. The authority may also give orders or instructions to the operator on the necessary preventive measures to be carried out.

- Power or duty to require an operator to carry out remedial actions

The competent authority has the power “to give orders and instructions to the operator in writing on the necessary remedial measures to be taken” (article 9(2)(c)).

- Power or duty of competent authority to carry out preventive measures

The competent authority has the power to carry out necessary preventive measures at the operator’s expense.
Power or duty of competent authority to carry out remedial measures

The competent authority has the power to carry out remedial measures at the expense of the operator. If so, the remedial measures must be determined by reference to the common framework for remedying environmental damage set out in Annex II (which tracks Annex II of the ELD). Further, the Ministry must issue a decision on the measures to be taken. In issuing the decision, the Ministry should follow the recommendation of the COEDM and the opinion of the EDMC or that of the Secretary-General of the relevant Decentralised Administration following the recommendation of the Decentralised Administration and the REDMC. In issuing the decision, comments by interested parties and the owner of the land on which the remedial measures are to be carried out must also be considered.

The competent authority shall carry out remedial measures if the operator cannot be identified or is not required to bear the costs of such measures because the operator has a defence to carrying out such measures. The defences that apply to remedial measures are:

- the damage was caused by a third party despite appropriate safety measures being in place;
- the damage was caused through the operator's compliance with a compulsory instruction from a public authority;
- the permit defence applies and the operator did not cause the damage with intent or negligence; and
- the state-of-the-art defence applies and the operator did not cause the damage with intent or negligence.

Form of preventive order

The Decree does not specify a set format for a preventive order.

Form of remediation order

The Decree does not specify a set format for a remediation order. It does, however, establish a detailed procedure for determining the remedial measures to be taken. The competent authority shall first determine the measures in collaboration with the operator and in accordance with Annex II (the framework for remedying environmental damage) and comments from any interested parties and the owners of the land on which the remedial measures will be carried out. The Minister shall then approve the remedial measures on a case-by-case basis following the recommendation of the COEDM and the opinion of the EDMC or the Secretary of the Decentralised Administration (following the recommendation of the Decentralised Administration and the opinion of the REDMC). The competent authority shall then inform any interested parties and the owner of the land on which the remedial measures will be carried out and invite them to submit comments / observations. The method and procedure for doing so “is laid down in a decision taken by the [Minister]” (article 10(3)).

Appeal against preventive or remediation order

An operator may appeal a preventive or remediation order. The Decree does not specify the procedure for appeals but implies that the final appeal is to a competent court (article 18(2)).
Depending on the nature of the act that is challenged, the relevant administrative procedure laws will apply.

- Sanctions for delay in complying with preventive or remediation order

The Decree does not specify a sanction for a delay in complying with a preventive or remediation order. A different issue, however, is whether such a delay, depending on the circumstances / conditions, may be classified as breaching the provisions of the Decree, giving rise to administrative sanctions.

The following should be noted as a practical matter:

- in ELD cases that have occurred so far in Greece, the majority of operators have complied with preventive / remediation orders issued by the competent authority;
- however, there have been cases whereby operators have significantly delayed the implementation of such orders; and
- the reported delay has given rise to the preparation of a draft decision at regulatory level which would apply in such cases and provide for a number of steps (“action plan”), subject to a specified timeframe, which the operators should follow in order to implement the order and avoid damage.

In cases indicated in the last two bullet points above, the sanctions indicated in section 23 below would apply.

- Formal consultees on contents of preventive and remediation orders

The Decree established the COEDM and various committees which, among other things, advise on the contents of preventive and remediation orders.

- Recovery of implementation and enforcement costs

The definition of “costs” is the same as in the ELD.

Article 11(2) provides for the recovery, by the competent authority, of costs incurred by the authority for preventive and remedial measures. The determination of the nature of the costs is to be taken in a joint decision by the Minister and the Minister of Economy and Finance, following either the recommendation of the COEDM, or the recommendation of the Secretary General of the relevant Decentralised Administration.

The Decree specifically refers to “insurance coverage or other financial guarantees ... from the operator who has caused the damage or the imminent threat of damage” for the recovery of such costs. Further, it states that “the competent authority shall record annual credit entries to the State Budget for payment” of such costs (article 11(2)). In this respect, the audits are to be verified by the competent sections of the SEIS on their own initiative or as the result of a complaint being filed (article 16(1)).

In order to be entitled to reimbursement of costs under the Decree, the authority must be a competent authority under the Decree. This issue arose following a fire that broke out at a temporary storage facility for used tyres in Ksiropotamos of Drama on 20 June 2010. The fire
burned for four days causing, among other things, environmental damage. A request for compensation by the Prefecture of Drama for recovery of the costs of fighting the fire (in part by covering the burning tyres with soil), taking soil samples and other monitoring, and transporting contaminated materials was rejected by the competent state audit agency. Although the agency agreed that the damage was environmental damage under the Decree, it stated that the Prefecture was not a competent authority under the Decree and was not, therefore, entitled to reimbursement of its costs.\textsuperscript{77}

- **Deadline for competent authority to seek recovery of costs**

A competent authority has five years from completion of necessary preventive or remedial measures or identification of the operator to seek recovery of its costs.

### 18. Duties of responsible operators

- **Preventive measures**

Article 8(1) states that an “operator is required to take, without prior notification and without delay, the necessary preventive measures, at discretion, and to inform the competent authority on all aspects of the situation”.

Article 7(1) requires operators “to adopt and implement appropriate measures for the prevention ... of environmental damage or imminent threat of such damage ... and to bear the relevant costs ... when their liability for said damage is ascertained”.

The meaning of the phrase “at discretion” in article 8(1) applies to the type of preventive measures to be carried out rather than whether an operator has discretion in carrying out preventive measures. Further, the duty to bear “relevant costs ... when their liability for said damage is ascertained” is unclear. That is, under the Decree and the ELD, an operator has a duty to carry out preventive measures without delay if there is an imminent threat of environmental damage. At this point in time, however, the liability of the operator will not – and cannot – have been ascertained.

- **Remedial actions (emergency actions)**

The operator has a duty to carry out emergency remedial actions. Article 9(1)(a) states that the operator must carry out such actions in accordance, not only with criteria decided by the Ministry but also criteria set out in Annex II, the framework for remedying environmental damage, which tracks Annex II of the ELD. Annex II, however, is the framework for remedial measures and does not include criteria for carrying out emergency remedial actions.

- **Remedial measures**

The Decree states that the operator has a duty to carry out remedial measures.

Duty to notify / provide information when imminent threat of environmental damage occurs

An operator has a duty immediately to notify the competent authority if there is an imminent threat of environmental damage.

Entity to which notification should be provided

The operator must notify the Ministry or the competent environmental service of the relevant Decentralised Administration if environmental damage has occurred.

The Decree simply states that the operator must notify the “competent authority” if there is an imminent threat of environmental damage (article 8(1)).

19. Access to third-party land to comply with the ELD

The Decree does not mention access to third-party land to comply with the ELD.

20. Interested parties

Interested parties are entitled to be notified of planned remedial measures and submit their comments on such measures. The Decree does not set out a method of such notification. However, it provides that the method and procedure for such notification “is laid down in a decision taken by the [Minister]” (article 10(3)). In the 29 ELD cases in Greece up to July 2012, interested parties were not notified that environmental damage under the Decree had occurred.78

Further, interested parties are also entitled to submit in writing to the competent section of the SEIS, established under articles 9(4)-(7) of Law 2947/2001 (A 228) and PD 165/2003 (A 137) (article 13(1)(b)), any available information with respect to environmental damage which has come to its attention and invite the competent authority to take action pursuant to the Decree.

Qualification criteria for “sufficient interest”

The Decree 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 (article 13(2)).

Information to be provided to competent authority

Requests for actions are to be accompanied by “relevant information and data supporting the observations submitted in relation to the environmental damage in question” (article 13(3)).

The SEIS is responsible for considering whether the requests for action should be accepted and must allow the operator to submit its comments prior to a decision by the Secretary-General for the Environment.

If the SEIS considers that a request for action and the accompanying information indicate environmental damage, the Secretary-General for the Environment shall make the decision to accept the request for action and attribute environmental liability to the operator. Such a decision shall be communicated immediately to the relevant competent authority in order that it may take actions for the prevention or remediation of environmental damage.

If the SEIS considers that a request for action and the accompanying information do not indicate environmental damage, the decision of the Secretary-General for the Environment that rejects the request for action must be justified. Such a decision shall be communicated immediately to the competent authority.

Whether an interested party’s request is granted or not, the SEIS must inform the party of the pertinent decision within a reasonable time.

- **Challenges to competent authority’s decision**

The Decree simply states that interested parties “can take such remedies as provided for in existing legislation against the actions or omissions of the SEIS” in respect of the requests for action (article 13(7)).

The procedure under Greek law is to bring a challenge to a decision before the competent administrative court. Greek law mandates various prerequisites for bringing such an action, including the existence of an enforceable act by the authority.

- **Duty on competent authority to respond to person making comments**

The SEIS may reject, at the outset, requests for action if they are “clearly unreasonable, incomprehensible or obviously groundless, if it is worded in an extremely vague manner, or repeated in an abusive manner, as well as if it is not accompanied by the [requisite] information and data”. The SEIS must, however, inform the person submitting the request for action of the reasons for its rejection of the request.

- **Inclusion of interested party in any proceedings by the competent authority against an operator**

The Decree does not provide for the inclusion of an interested party in any proceedings by the competent authority against an operator.

### 21. Public access to information regarding environmental damage and related measures

The Decree does not specifically provide for public access to information regarding environmental damage and related measures.

As with other Member States, Directive (2003/4/EC) on access to environmental information, currently implemented in Greece by Ministerial Decision ΗΠ 11764/653, applies.

### 22. Charges on land / financial security after environmental damage

The Decree does not mention charges on land or financial security after environmental damage has occurred.
Article 11(2), however, refers to the recovery of costs incurred by a competent authority “through insurance coverage or other financial guarantees according to article 14”; this section refers to the mandatory financial security system to be established under the Decree.

23. Offences and sanctions

A breach of the Decree is subject to an administrative sanction.

Article 30 of Law 1650/1986 applies in respect of the administrative sanctions to be imposed. The local competent Section of the SEIS is to make a recommendation on any fines that are imposed.

Fines shall be collected by the Public Financial Service Bureaus on behalf of the State pursuant to the Code for the Collection of Public Revenues. They shall be used for the prevention and remediation of environmental damage (article 17(2)).

- Directors and officers liability for breaching legislation
- The Decree does not specify that directors and officers are liable for breaching the Decree.
- Publication of penalties
- The Decree does not provide for the publication of penalties.

24. Registers or data bases of incidents

The Decree does not specify any registers or data bases of incidents under the ELD other than providing for the preparation and submission by COEDM of the report for Greece to the European Commission by 30 April 2013 as required by the ELD.

25. Cross border damage in another Member State

If environmental damage affects or is likely to affect several Member States, including Greece, the Ministry shall co-operate with the other Member States, mainly through an appropriate exchange of information, to ensure that effective preventive and necessary remedial actions are taken.

If environmental damage has occurred in Greece, the Ministry shall provide sufficient information to the competent authorities of the potentially affected Member States to enable them to adopt appropriate preventive or remedial measures.

If environmental damage is identified in Greece that has not been caused in Greece, the Ministry may report the damage to the European Commission, make recommendations for the adoption of preventive or remedial measures, and seek to recover its costs of preventing or remediating the damage.

The Ministry shall co-operate with the Ministry of Foreign Affairs in establishing mechanisms to co-operate with the competent authorities of other Member States to facilitate the adoption of measures to prevent, avoid and remediate environmental damage.
26. Financial security

The Decree 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 the Decree. It was anticipated that the system would be phased in by the end of 2012. Introduction of the mandatory financial security was subsequently postponed until 31 December 2012. This date has been postponed, albeit not officially. A draft of a joint ministerial decision has been prepared and is expected to take effect in mid 2013.

The Decree further provides that the Minister, 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 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” (article 14(4)).

The postponement of the mandatory financial security system under the Decree does not mean that insurance that covers the remediation of environmental damage does not exist. Joint Ministerial Decisions 13588/725/2006 and 8668/2007 established a system of mandatory financial security for businesses handling hazardous waste.

Further, article 23 of Law 2496/1997 on insurance contract (ICA) provides that an environmental damage insurance policy shall, unless otherwise specified in the policy, include the cost of restoration of the natural environment, including the removal of waste and debris resulting from the occurrence of the insured risk. The insurance money will be paid only in relation to the sums actually paid for expenses, and only to the extent that the loss was the result of a sudden and unexpected event. To be noted, in view of the special nature of the risk of environmental liability and the size of losses that it could cause, the international insurance practice does not provide coverage for such risk within the frame of traditional general liability policies and, where it grants such cover, the cover is limited to losses which arise from a sudden and unexpected event.79

27. Establishment of a fund

The Decree does not establish a fund.

---

28. **Reports**

Each Decentralised Administration must submit reports to the Ministry containing the information set out in Annex VI to article 21 to the Decree (which tracks Annex VI of the ELD concerning information to be provided by Member States to the European Commission in their reports of 30 April 2013).

29. **Information to be made public**

The Decree does not specifically state that specific information must be made public.

As in all Member States, however, Directive (2003/4/EC) on access to environmental information, currently implemented in Greece by Ministerial Decision HII 11764/653, requires public access to such information.

30. **Provisions concerning genetically modified organisms**

The Decree does not mention GMOs although these are, of course, an Annex III activity.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

The Greek Constitution provides that the State has an obligation to protect the natural and cultural environment and that everyone has a right to environmental protection.

There is no specific existing legislation in Greece that imposes liability for remediating contaminated land or remediating water pollution.

There is existing legislation that imposes liability for remediating biodiversity damage but that legislation does not impose complementary or compensatory remediation.
Hungary

1. **Existing national environmental legislation**

Hungary transposed the ELD by making major changes to Act LIII of 1995 on the General Rules of Environmental Protection (EPA), making major changes to various Government Decrees that regulated the protection of groundwater and surface water and adopting two Government Decrees on the system of preventing and remedying environmental damage and the remediation of biodiversity damage.

Prior to the ELD, Hungary had general legislation, set out in the EPA, that imposed liability for preventing and remediating damage to the environment. The legislation applied (and continues to apply) to any damage to the environment including land contamination, water pollution and damage to fauna and flora. Hungary did not have specific legislation that imposed liability for preventing and remediating damage to biodiversity other than this general legislation.

2. **Existing regimes for preventing and remediating environmental damage**

Until 1976, the sparse environmental legislation in Hungary was included in secondary legislation rather than in any specific environmental legislation. In 1976, the first environmental legislation was enacted. Act II of 1976, which was framework legislation, was however vague, making it difficult to enforce.

In 1995, the 1976 Act was superseded by more detailed environmental legislation. The EPA, which is also framework legislation, sets out, among other things, general principles of environmental law, controls on environmental permitting and liability for environmental damage.

Chapter IX of the EPA sets out the liability system for preventing and remediating damage to the environment. Article 101 provides that a person who poses a hazard to, or who pollutes or damages the environment (known as a “user of the environment”) must cease doing so, prevent further damage, and remediate the environment to its state before the damage. Liability is strict. A user of the environment includes, but is not limited to, an occupier of land such as a tenant as well as the owner or possessor of a mobile source of pollutants. The user of the environment may be a past, as well as a current, user. Liability for remediating damage to the environment is, therefore, retroactive.

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. Article 102(1) of the EPA provides that the owner of land on which there is a risk of, or actual, environmental damage is jointly and severally liable for its prevention or remediation. The landowner may be exempted from liability if it proves “beyond a reasonable doubt” that the actual user of the environment caused the risk or damage. The owner of a mobile source of pollutants is also jointly
and severally liable unless it names the actual user of the environment and proves beyond a reasonable doubt that the responsibility does not lie with him.

Further, the following persons are – under specific circumstances - jointly and severally liable for remediating damage to the environment: the legal successor of a user of the environment such as a business association/company that continues similar or complementary activities to those formerly performed by operators who are now a part of the business association/company; the shareholders of a company; the owner of a sole proprietorship; and executive officers who supported a resolution which they knew, or should have known, would cause damage to the environment. The provisions concerning executive officers are set out in the Hungarian Company Act No. IV of 2006. All the persons specified in this paragraph are also liable under the ELD regime (see section 6 below).

In addition to preventive and remediation requirements, articles 106 and 107 of the EPA provide for an environmental fine for persons who breach environmental requirements or who exceed pollution limit levels (see below).

**Water pollution**

As noted above, the liability provisions concerning the prevention and remediation of damage to the environment in the EPA apply to water. In addition, the most detailed remediation provisions prior to the legislation transposing the ELD applied to groundwater. In this respect, Government Decree 219/2004 (VII.21) on the protection of groundwater sets out special rules concerning soil and groundwater contamination. KvVM-EüM-FVM Decree 6/2009 (IV.14.) on the pollution limit values and measures for the protection of groundwater and geological substances sets out values which, if exceeded, may be considered, based on a risk assessment, to result in harm to human health or the environment. The pollution limit values relate to groundwater and to the soil and subsoil.

The legislation that transposed the ELD introduced similar remediation requirements to those applicable to groundwater for the remediation of surface water pollution.

**Land contamination**

As indicated above, the liability provisions concerning the prevention and remediation of damage to the environment in the EPA apply to land contamination. Also as noted above, KvVM-EüM-FVM Decree 6/2009 (IV.14.) on the pollution limit values and measures for the protection of groundwater and geological substances sets out values which, if exceeded, may be considered, based on a risk assessment, to result in harm to human health or the environment.

In addition, a person who owns contaminated land may transfer its liability for remediating the land when it sells the land provided that the landowner did not cause the contamination. The contractual documentation for the sale may also otherwise allocate such liabilities between the seller and the buyer. Such documentation does not, of course, bind a competent authority and is not administrative liability.

If the seller knows that its land is contaminated or knows that the land must be remediated and does not reveal such information to the buyer, the buyer is entitled to claim against the seller depending on the contractual provisions concerning the sale. In such a case, the buyer may be
entitled to damages or rescission of the sale contract. Again, however, such liability is civil, not administrative liability.

- **Biodiversity damage**

Prior to the legislation transposing the ELD, Hungary had enacted Act No. LIII of 1996 on nature protection and related Government Decrees. This legislation also included provisions that imposed liability for preventing or remedying damage to nature.

- **Other liability systems for remediating environmental damage**

Other liability systems for remediating environmental damage in Hungary include article 355 of the Civil Code which provides that the person responsible for the damage shall be liable for restoring it to its original state, or, if this is not possible or if the aggrieved party refuses restoration for a substantiated reason, he shall indemnify the aggrieved party for pecuniary and non-pecuniary damages.

- **Interface between the existing national liability regimes and the ELD regime**

The legislation transposing the ELD supplements the existing legislation in that it applies above a “significance” threshold for water damage. As described in section 14 below, the threshold for land damage under the ELD regime is low as is the threshold under the existing legislation. Further, the transposing legislation added detailed provisions for preventing and remediating environmental damage, including biodiversity damage.

The existing national administrative liability systems described above differ from the ELD regime in many respects including the following:

- The existing legislation does not include complementary and compensatory damage for water damage;
- There are no specific provisions in the EPA that allow any person to notify the competent authority about the damage. However, Article 99(b) of Act LIII of 1995 on the General Rules of Environmental Protection provides environmental non-governmental organizations with extensive rights, including the right to file a suit against a user of the environment (see section 20 below); and
- Liability under the EPA is retrospective as well as prospective, whereas liability under the ELD regime is prospective only from 30 April 2007.

### 3. Integration of the ELD into existing national legislation

- **Transposing legislation**

The main Act transposing the ELD is Act XXIX of 2007 on amendments to different environmental protection acts in respect of environmental liability (2007 Act).

The 2007 Act amended the following Acts:

- Act LIII of 1995 on the General Rules of Environmental Protection (EPA);
Implementation challenges and obstacles of the Environmental Liability Directive

Act LVII of 1995 on water management;
Act No. LIII of 1996 on nature protection; and
Act XLIII of 2000 on waste management.

The three Acts indicated in the last three bullet points do not have their own liability system; they refer to the 2007 Act.

In addition, four Government Decrees transposed the ELD. They are as follows:

- 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; and

Amendments to existing national environmental law

See above

Authorisation in legislation for other governmental entities to issue rules and regulations

The EPA authorises the Government to issue rules concerning financial security and environmental liability insurance coverage. These have not been issued as yet.

The EPA authorises the Government to decree the procedures for the prevention and remediation of environmental damage (see Decree 90/2007 above).

Relationship to other legislation

The transposing legislation refers, in several cases, to other legislation for more specific requirements. This is discussed below.

Guidance and other documentation

The governmental authorities have not published guidance.

Releases called “Official Releases of the Green Authority” have been issued to indicate relevant changes in environmental legislation, relevant decisions and the reasons for them.

4. Effective date of national legislation

April 30, 2007
5. **Competent authority(ies)**

The Minister in charge of the Environment and the Minister of the Interior perform the national level management of the remediation of damage with regard to:

- the National Inspectorate for Environment, Nature and Water;
- the National Park Directorates (NPI);
- the National Directorate of Water Management;
- the Directorates of Water Management (VIZIG); and
- the National Institute for Environment (NIE).

The Inspectorates as well as their supervising body, the National Inspectorate for Environment, Nature and Water, are the main competent authorities in applying the legislation that transposed the ELD.

The following authorities have competency - under particular circumstances described in the national legislation - in applying environmental liability provisions:

- directorates of disaster recovery - supervised by the National Directorate of Disaster Recovery;
- county-based policy administration services of public health - supervised by the National Public Health and Medical Officer Service; and
- the Hungarian Food Safety Office - as competent authority for issues concerning fisheries and forestry.

6. **Operators and other liable persons**

An operator is referred to as the "user of the environment" which can be deduced from the definition of "use of the environment", that is, "an activity involving the utilisation or loading [pollution] of the environment or a component thereof".

The above definition is broader than that in the ELD.

- Secondary liability (e.g., parent company)

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.

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.

Death or dissolution of responsible operator

See “Secondary liability” above.

Person other than an operator who may be liable

The owner and possessor/user of real property on which environmental damage or a risk of environmental damage occurs, are jointly and severally liable until and unless evidence is provided to the contrary. The owner is exempted from liability if the owner 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.

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.

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”.

7. **Annex III legislation**

Rebuttable presumption that operator’s activity caused environmental damage

The transposing legislation does not create a rebuttable presumption that an operator’s activity caused environmental damage.

However, as indicated above, the transposing legislation imposes liability on the owner and possessor/user of real estate on which there is a risk of, or actual, environmental damage unless and until the owner identifies the actual user of the property and provides proof beyond any reasonable doubt that the owner is not liable for the risk of, or actual, environmental damage. The owner and/or possessor/user must therefore rebut the presumption that it is liable.
Additional occupational activities subject to strict liability

The transposing legislation does not limit the application of strict liability for non-Annex III activities.

Spreading of sewage sludge for agricultural purposes

The transposing legislation does not include the spreading of sewage sludge for agricultural purposes as an Annex III activity.

8. **Standard of liability for non-Annex III activities**

The environmental liability system is based on the rules of administrative, civil and criminal liability. In administrative liability law (amended with rules pertaining to the ELD) no-fault liability is to be applied; in civil law no-fault/absolute liability exists for damages caused to third parties by the use of the environment; and fault based (intentional or negligent act or omission) liability is the standard in criminal law.

The standard of liability for non-Annex III activities is strict liability regarding administrative and civil liability and fault based regarding criminal liability.

9. **Exceptions**

The EPA provides that the user of the environment is exempt from administrative liability if it is able to prove that the imminent threat of, or actual, environmental damage:

- was caused by an act of armed conflict, war, civil war, armed hostilities, insurrection, or natural disaster; or
- is the direct result of the enforcement of a final and compulsory resolution of an authority or court.

The exception for natural disaster includes the ELD exception for a natural phenomenon of exceptional, inevitable and irresistible character.

Application to imminent threat of environmental damage as well as environmental damage

The exceptions in the EPA apply to an imminent threat of, and actual, environmental damage regarding administrative liability.

Differences with exceptions in the ELD

The following exceptions have not been adopted:

- 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
Implementation challenges and obstacles of the Environmental Liability Directive

That is, the transposing legislation does not mention the above exceptions. However, the EPA 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.

- Diffuse pollution exception

Hungary has not adopted the diffuse pollution exception.

10. Joint and several or proportionate liability

The scope of liability is joint and several liability.

- Mechanism for contribution between liable operators

The legislation transposing the ELD does not provide a mechanism for contribution between liable operators.

11. Limitation period

The transposing legislation does not include a limitations period. The transposing legislation did, however, amend the Act on Waste Management to include a limitation period of 30 years from the date of environmental damage caused by a waste disposal facility or from the date of the closure of the facility. The 30-years limitation period is also included in the new Act on Waste Management.

12. Defences

- Defences to liability or costs?

The following are exceptions/defences to costs:

- an armed conflict, war, civil war, armed uprising;
- a natural disaster; and
- execution of a valid authority or court decision containing obligation.

That is, the operator must carry out the preventive, emergency remedial actions and remedial measures and may then seek recovery of its costs.

- If defences to liability; suspension (or not) of the remediation notice during appeal

Not applicable

- Permit defence

Hungary has not adopted the permit defence.
State-of-the-art defence

Hungary has not adopted the state-of-the-art defence.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
  21.44%

- Extension of biodiversity to nationally protected biodiversity

The transposing legislation extends the ELD to "species subject to protection and/or an increased level of protection" and "protected natural areas of national significance".

- Biodiversity damage in the exclusive economic zone

Not applicable

- Water or water body

Liability applies to water damage as defined in the Water Framework Directive (2000/60/EC). Liability is not limited to surface water and groundwater bodies.

14. **Thresholds**

- Water damage

  The threshold is the same as in the ELD.

- Biodiversity damage

  The threshold is the same as in the ELD.

- National biodiversity damage

  The threshold is the same as in the ELD.

- Land damage

  The 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.
15. Standard of remediation

- Land

The standard of remediation for land is the same as the ELD.

- Biodiversity

  - Primary remediation

Decree 91/2007 specifically mentions caves in protected natural areas of national importance and in Natura 2000 areas.

Annex 2 to Decree 91/2007 provides criteria for the primary restoration and development of grassland and woodland habitats, and caves.

  - Complementary and compensatory remediation

The EPA provides that responsible operators “shall undertake compensatory remediation until the completion of remedial measures, to compensate for the interim loss of natural resources and services pending recovery of the damaged natural resources and/or impaired services”.

Annex No. 2 to Decree 91/2007 provides that “Until the regeneration of natural assets, areas and their services, compensatory remediation shall be carried out to compensate for the occurring temporary losses”. This compensation means additional improvements of natural resources and areas defined in Article 1, para. (1) being carried out in the damaged area or another area.

Annex 2 to Decree 9/2007 provides many examples of supplementary remediation. The Annex also provides examples of compensatory remediation including measures to restore grassland and woodland habitats and caves.

- Water

Amendments to Decrees 219/2007 and 220/2007, which transposed the ELD in respect of surface and groundwater, contain the regulation on primary, complementary and compensatory remediation. These remedial measures are the same as in the ELD.

  - Primary remediation

Annex 2 to Decree 91/2007 provides criteria for the primary restoration of aquatic habitats including restoring abiotic factors first, the importance of restoring former hydrological conditions or to ensure appropriate water quality, and reintroduction which can take place in the case of rare plant species and fish in order to restore the ecosystem.

Remediation of surface water and groundwater is regulated in separate legislation.

In respect of surface water protection, Annex 4 of Decree 220/2007 requires that – in order to define actions of primary intervention – during elaboration of the plan of intervention the followings are to be evaluated:

  - optional interventions for immediate restoration - close to the baseline conditions - of surface waters, and
  - the possibility of natural regeneration.
Although the legislation on groundwater protection (219/2007 Government Decree) does not use the terms primary, complementary or compensatory remediation, Annex 8 of that Decree provides for detailed regulation of plans of intervention in case of damage to groundwater.

- **Complementary and compensatory remediation**

The transposing legislation includes complementary and compensatory remedial measures for surface water and groundwater.

In respect of surface water protection, the plan of intervention, which is to be prepared, defines complementary and compensatory actions by evaluating the loss in surface water and services rendered by it to ensure that they are replaced with surface water or services equivalent to those lost, taking into account its similarity in type, quality and quantity.

Until the surface waters and their services are restored, compensatory remediation shall be carried out to compensate for temporary losses. This compensation means that additional improvements to surface water are carried out in the damaged area or another area.

### 16. Format of determination of environmental damage

The transposing legislation sets out general procedures to determine land damage, water damage and biodiversity damage.

Decree 91/2007 establishes the procedures for the Inspectorate – in cooperation with NPI, VIZIG and NIE – to carry out a determination of environmental damage including fact finding, submitting the plan to remedy the damage (plan of intervention) and any necessary monitoring.

In selecting works to remediate damage to groundwater and the subsoil and geological strata, the Inspectorate shall consider specified factors including the appropriateness of the measures the geographical, climatic, soil, wildlife, historical and other specified values, the use of the damaged area, the time for the remedial measures to take effect, and socio-economic aspects.

### 17. Powers and duties of competent authority

The competent authority has a duty to require an operator to “refrain from any conduct that may cause threats of danger or damage to the environment [and to require the operator to] stop their conduct causing threats of danger to the environment or their damaging the environment”.

The competent authority shall suspend or prohibit the continuation of the activity that poses a threat or damage until the operator has met conditions in the suspension or prohibition order.

If the activity is licensed by another authority, the competent authority shall request that authority or the court to issue the suspension or prohibition order.

This duty, which is not in the ELD, is similar to the regulation that was already in the EPA. Article 6 of the 2007 Act, as amended, specifies that this rule is compulsory in case of an imminent threat of, or actual, environmental damage.

- Inspections, investigations, studies and analyses

The competent authority has the power to carry out inspections, investigations, studies and analyses.
Information orders

The competent authority may order the operator to provide information of a direct threat of environmental damage, events connected to suspected direct threats, and losses from environmental damage.

The competent authority may issue supplementary information orders.

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

The competent authority has a duty to require an operator to carry out preventive actions.

Power or duty to require an operator to carry out remedial actions

The competent authority has a duty to require an operator to carry out remedial actions.

Power or duty of competent authority to carry out preventive measures

The competent authority has the power to carry out preventive measures itself or to hire others to carry out the works.

The VIZIG, under assignment from the Inspectorate, shall carry out preventive measures if:

- the environmental damage spreads from the operator’s property;
- the operator is unknown; or
- the operator fails to carry out preventive measures or carries them out inadequately.

The VIZIG must notify the operator if it considers that the operator has failed to carry out the measures or has carried them out inadequately.

If the central budget covers the cost of remedial measures for biodiversity damage because it cannot be charged to other persons, the NPI, VIZIG and the regional body of NIE as appropriate, have a duty to carry out the measures. That is, Article 56(1) of the EPA and Article 4(3) of Government Decree 91/2007 provide that it is mandatory for the Hungarian Government to carry out preventive measures if an operator does not do so or cannot be identified.

Power or duty of competent authority to carry out remedial measures

The competent authority has the power to carry out remedial measures itself or to hire others to carry out the works.

The VIZIG, under assignment from the Inspectorate, shall carry out remedial measures if:

- the environmental damage spreads from the operator’s property;
- the operator is unknown; or
- the operator fails to carry out preventive measures or carries them out inadequately.

The VIZIG must notify the operator if it fails to carry out the measures or carries them out inadequately.

Government Decree 91/2007 provides that it is mandatory that the competent authorities proceed in the above cases. Further, section 56 (1) of EPA prescribes that the central budget –
Implementation challenges and obstacles of the Environmental Liability Directive

which is adopted annually by the Parliament – shall cover the costs of preventive and remediation measures if these costs cannot be devolved to others.

- Form of preventive order

Article 72 of Act CXL of 2004 on the general rules of public administration official procedure and service (Ket.) sets out requirements for the form of resolutions/orders from competent (and other) authorities in administrative procedures.

- Form of remediation order

Article 72 of Ket. sets out requirements for the form of resolutions/orders from competent (and other) authorities.

In respect of surface water damage, the resolution/order from the competent authority shall indicate the extent of the damaged water, details of the owners, managers and users of the damaged water and the person responsible for carrying out monitoring of the remedial actions. It shall also include other specified details of the required monitoring works.

In respect of groundwater, the resolution/order from the competent authority shall include details specified in amendments to Decree 219/2004 on the protection of subsurface waters including a technical intervention plan submitted by the person responsible for the remediation.

In respect of biodiversity damage, the order must include identification of the damaged area, an obligation to remedy the damage, provisions for carrying and scheduling the remedial actions, the deadline for beginning and carrying out the remediation, approval of the monitoring to be carried out after fact finding, provisions to establish and operate the monitoring system during the remediation, entities to be involved from a professional point of view, and any other tasks that are required in the particular case including posting warning signs around the damaged area.

The transposing legislation does not indicate a deadline for a competent authority to issue a resolution/order requiring remediation. Article 33. par 1 of Ket. provides the general deadline of administrative proceedings of 30 days; this deadline applies to an order requiring remediation. The deadline can be extended under circumstances specified by law.

- Appeal against preventive or remediation order

Article 96 of Ket. provides for an appeal against a competent authority's resolution/order in the form of a submission for an independent legal remedy if it is not excluded by law. This appeal is to the administrative body that issued the decision of second instance.

There is also a further right to file suit against the decision in the administrative court if:

- an appeal against the decision fails; or
- the right of appeal is exercised.

- Sanctions for delay in complying with order requiring remediation

The transposing legislation does not mention sanctions.
Article 106 of EPA provides that a person who breaches the regulations aimed at the protection of the environment and contained in a legal rule or a decision of an authority or who exceed the standards established therein shall pay an environmental fine in conformity with the level, weight and recurrence of the environmental pollution and environmental damage they caused. (See Offences and sanctions below.)

- Formal consultees on contents of preventive and remediation orders

During investigation of environmental damage and in every stage of remediation, the Inspectorate must obtain the expert opinion of the following, as appropriate:

- the NPI;
- the VIZIG; and
- the Hungarian Food Safety Authority in its capacity as a forestry authority.

The following authorities are to be involved in the competent authority's determination of environmental damage, as appropriate:

- the regional institute of the State Public Health and Medical Service;
- the Hungarian Food Safety Office as the authority for soil protection, animal hygiene, forestry, hunting and fishing;
- the District Inspectorate of Mines; and
- the disaster management and law enforcement bodies.

- Recovery of implementation and enforcement costs

The competent authority shall recover its implementation and enforcement costs. Recoverable costs are “costs which are justified for the prevention of environmental damage or to restore the baseline condition”. They include:

- costs of assessing an imminent threat of, or actual, environmental damage;
- costs of assessing potential measures;
- costs of data collection;
- administrative and legal expenses, including fees of lawyers and notaries public;
- other general costs including monitoring and supervision costs; and
- “sums of any financial compensation”.

- Deadline for competent authority to seek recovery of costs

The deadline for the competent authority to demand reimbursement of its costs is five years from the date on which:

- measures have been completed, or
the user of the environment who caused the environmental damage has been identified, whichever occurs last.

**Additional information**


Furthermore, operators that apply technology hazardous to the environment but are not listed in Annex 2 of the Decree must also prepare and submit plant-based remediation plans if the inspectorate issues an order to do so.

Decree 90/2007 sets out extensive criteria for their preparation including criteria for their:

- contents;
- preparation;
- certification for persons preparing them; and
- maintenance, review and amendment.

Five originals of the plans must be prepared, of which one shall be sent to the inspectorate and one to the VIZIG and the NPI, depending on the territory of the operator's activities. Those inspectorates must then send data from the plans to the National Inspectorate General for Environmental Protection, Nature Conservation and Water (Inspectorate General) which is responsible for administering the national register.

The operator must review its remediation plan every five years. If the operator does not prepare or update a plan, the Inspectorate shall order the operator to do so.

The plans must specify, in particular, materials and instruments required for remedial works.

If plant-based or regional remediation plans (prepared by VIZIG) are available, remedial measures shall be based on these.

VIZIG shall ensure that there is a proper reserve stock of materials and instruments required for remedial works specified in the regional plans.

Data from the plant-based plans are collected and handled by the inspectorates. The inspectorates also assess and register potential pollution sources which pose an “extraordinary degree” of environmental damage. The national register based on the data provided by the inspectorates is administered by the Inspectorate General.

VIZIG organises and administers annual training on remediating damage for employees in the plants submitting the plant-based plans.

The following authorities carry out monitoring measures in order to detect environmental damage:
VIZIG;
the NPI for nature conservation; and
the forestry authority for forest protection, operating under other specific legislation.

18. **Duties of responsible operators**

A person who uses the environment "shall refrain from any conduct that may cause threats of danger or damage to the environment and stop their conduct causing threats of danger to the environment or their damaging the environment" (see "Power or duty to require an operator to carry out preventive actions" above).

- **Preventive measures**

The operator has a duty to prevent an imminent threat of, or actual, environmental damage.

The exceptions for "an armed conflict, war, civil war, armed uprising or natural disaster" and "execution of a valid authority or court decision containing obligation" do not apply to preventive actions, that is, the operator must carry out preventive actions.

If the operator is not capable of carrying out preventive measures on its own, the operator shall participate in carrying them out under the supervision of VIZIG.

- **Remedial actions (emergency actions)**

The operator has a duty to carry out emergency remedial actions.

Immediate action is required if the environmental damage endangers public health or safety or if "removal of the environmental damage can be implemented more effectively, more efficiently and more economically by immediate action or future damage can thereby be prevented".

During the removal of the damage, "steps shall be taken to ensure that the environmental damage should a) not spread over to other environmental elements, b) cause the smallest possible environmental load (pollution), c) not cause threats to the environment or any environmental impairment".

The exceptions for "an armed conflict, war, civil war, armed uprising or natural disaster" and "execution of a valid authority or court decision containing obligation" do not apply to emergency remedial actions, that is, the operator must carry out such actions.

If the operator is not capable of carrying out emergency remedial measures on its own, it shall participate in carrying them out under the supervision of VIZIG.

- **Remedial measures**

The operator has a duty to carry out primary remediation. This duty is the same as that in the ELD.

If the operator is not capable of carrying out remedial measures on its own, it shall participate in carrying them out under the supervision of VIZIG.
The duty to carry out complementary measures has two stages. If a primary remedial measure is unsuccessful, the operator "shall substitute the damaged environmental element or service with a suitable environmental element or service". If the substituted environmental element or service is ineffective, the operator "shall substitute the environmental element or service with a suitable environmental element or service – the cost of which should be identical to the estimated cost of the damaged environmental element or service".

Based on the EPA, the alternative environmental element or service must be "suitable" for substituting. According to the 91/2007 Government Decree (on establishing the extent of damage caused to the natural environment and on the rules of compensation for damage), complementary measures shall be in close proximity to the damaged natural resource.

The operator "shall take all the measures that, until the remedial measures have reached their full effect, are necessary for the temporary substitution of the service provided by the environmental element".

The exceptions for "an armed conflict, war, civil war, armed uprising or natural disaster" and "execution of a valid authority or court decision containing obligation" do not apply to complementary and compensatory remedial measures, that is, the operator must carry out such actions.

The legislation transposing the ELD does not indicate the form of a final report for a remediation project. However, in a case concerning damage to nature, the main content of the final report is regulated by the 91/2007 Government Decree 12, § (7)-(8); in a case concerning pollution to groundwater, it is regulated by the 2004 Government Decree.

Duty to notify / provide information when imminent threat of environmental damage occurs

The operator has a duty immediately to notify the inspectorate and VIZIG in case of an imminent threat of environmental damage. Details of the notification shall include the place, character and extent of the danger and/or damage to the environment. This duty applies regardless of whether the imminent threat has been dispelled by preventive actions.

The operator must “provide the information specified by the [competent authority] and by separate legislation”. The extent of this information thus depends on the order of the authority and the environmental medium affected by the threat of, or actual, environmental damage.

The operator must notify the competent authority if a threat of environmental damage actually becomes environmental damage.

Entity to which notification should be provided

The operator must notify an imminent threat of, or actual, environmental damage to:
- the competent inspectorate; and
- VIZIG.

Anyone else who is aware of damage to the environment may notify either the inspectorate, the VIZIG, the NPI or the Central Environmental Safety On-Duty Service (Központi...
Környezetbiztonsági Ügyelet (KBÜ) at VKKI. The KBÜ shall forward the notifications to the appropriate competent authority.

19. **Access to third-party land to comply with the ELD**

The owner or occupier of land on which preventive or remedial measures must be carried out must allow preventive and remedial measures to be carried out on its land.

The owner or occupier of the land is entitled to compensation.

20. **Interested parties**

**Qualification criteria for “sufficient interest”**

Any person including 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.

Any person includes individuals and businesses that are within the above areas; it is not limited to environmental organisations.

- Method of notifying interested parties of planned remedial measures

There is no specific legislative provision on this point.

- Information to be provided to competent authority

There is no specific legislative provision on this point. VIZIG and the NPI carry out inspections for environmental damage on receipt of notifications / comments by interested parties.

- Challenges to competent authority’s decision

Article 99(1)(b) of Act LIII of 1995 on the General Rules of Environmental Protection 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 right to file a suit against the user of the environment is more extensive than the more limited provisions in the ELD.

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.

- Duty on competent authority to respond to person making comments

There is no specific legislative provision on this point.
21. **Public access to information regarding environmental damage and related measures**

There are no specific provisions in the transposing legislation that provide public access to information concerning environmental threats, damage, or related measures. However, the regulation on access to environmental information implies such provisions.

Article 12 of the EPA contains the main rules on access to environmental information. Paragraph 2 provides that everyone has the right to qualifying environmental information of public interest.

Based on Article 51 of EPA, information regarding the state, utilisation and use of the environment shall be treated in accordance with the legal rules on data of public interest.

State bodies, local governments and other public entities that possess environmental information shall monitor within their scope of activities the state of the environment and its impact on human health, keep a record of the data thus obtained, and shall make them - by request – accessible, and shall disclose the environmental information designated in separated pieces of legislation.

Users of the environment are obliged to provide information to anyone by request in respect of their loading, utilisation, as well as posing a hazard to the environment.

Article 12 paragraphs 1-9 thus provide the right to access to environmental information in a more extensive manner than the provisions of the Aarhus Convention.

22. **Charges on land / financial security after environmental damage**

When the 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 (ie, 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.

23. Offences and sanctions

The transposing legislation partially provides for offences or sanctions.

Before transposition of the ELD, the Hungarian legislative system already regulated environmental liability on the levels of administrative, civil and criminal law as well.

As indicated above, article 106 of the EPA provides that persons who breach regulations aimed at the protection of the environment and contained in a legal rule or a decision of an authority or who exceed the standards established in them shall pay an environmental fine in accord with the level, weight and recurrence of the environmental pollution and environmental damage they caused.

The environmental fine does not exempt a person from liability under criminal law, liability for damages, or from obligations to restrict, suspend or ban the activities, to develop adequate protection and to restore the natural environment or the environment that existed before (Article 107 of the EPA).

As explained in the first paragraphs of this summary, implementation of the ELD in Hungary has been carried out, among other things, by adopting new regulations and by amending some earlier Government Decrees that regulate the protection of groundwater and the protection of the quality of surface waters (219/2004 and 220/2004). The latter Decrees already regulated offences and sanctions; these provisions were not significantly changed by transposition of the ELD.

The offences of breaching the regulations contained in the Decrees shall be punished by fines, namely a groundwater protection fine, or a surface water protection fine. Other examples of “environmental fines” are waste management fines, and air pollution fines.

Act No. IV of 1978 on Criminal Code (Articles 280, 281 and 281/A) ensures that criminal liability is applicable in the following cases:

- damaging the environment;
- damaging natural resources; and
- breaching waste management regulations.

Depending on the type of offence (felony or misdemeanour) and on the weight of its results, these acts may be punished by imprisonment, labour in the public interest, fine, prohibition from a profession, and prohibition from driving vehicles or expulsion.

Directors and officers liability for breaching legislation

The legislation does not indicate penalties for directors and officers for breaching the legislation transposing the ELD.
Article 102, para (5) of the EPA provides that owners and executive officers who have supported a resolution/taken a measure that they knew or should have known with reasonable care that it would cause environmental damage if carried out, bear unlimited, joint and several liability in the event of the termination of the business association for the company's liability for remediation and compensation for environmental damages, which the company has failed to satisfy.

- Publication of penalties

The transposing legislation does not mandate the publication of penalties.

24. **Registers or data bases of incidents**

Government Decree No. 90/2007 established a data base aimed to register information from plant-based plans.

Potential pollution sources which pose an “extraordinary degree” of environmental damage are also registered.

In its Article 49., EPA prescribes the establishment and operation of a monitoring network, the National Environmental Information System (collectively referred to as OKIR) - in accordance with the provisions set forth by the Government - for the monitoring of the state and use of the environment, and the measurement, collection, processing and registration of data on the utilization and loading thereof.

The OKIR shall be organised and set up in such a manner and with such a territorial density that on the basis thereof:

a) changes in the utilisation, loading and state of the environment can be determined quantitatively and qualitatively and can be compared internationally in a form that can also be evaluated together with social and economic relationships and from the aspect of the impacts on the health of the population;

b) causes of environmental impacts can be established with satisfactory accuracy (including also detailed breakdowns required for the establishment of the causal relationships of the damage);

c) hazards posed to the environment can be recognised as early as possible;

d) regulatory responsibilities can be fulfilled and the official measures can be taken by the authorities; and

e) it can be used for planning.

Government Decree No. 219/2004 on groundwater protection provides that the Minister responsible shall operate the environmental register of groundwater and geological media (FAVI). FAVI is part of the above mentioned OKIR and - regarding groundwater and geological media - contains hazards, pollution, damage to, and remediation, as well as their impact related information and data.
25. **Cross border damage in another Member State**

If an imminent threat of, or actual, environmental damage affects another Member State, the applicable governmental authorities shall cooperate with the Member States concerning preventive and remedial measures as well as providing information to those Member States.

If environmental damage may affect another Member State, the Minister of Rural Development shall provide appropriate information to that Member State.

If the competent authorities discover environmental damage in Hungary that did not originate in Hungary, the Minister shall notify the European Commission and other Member States of the damage, including a proposal for necessary measures to prevent or remediate the damage and the costs or carrying out such measures.

26. **Financial security**

The EPA requires “users of the environment” “to provide an environmental security and may be required – under the conditions set out in specific other legislation – to obtain environmental liability insurance for the financing of clean-up operations for any unforeseeable environmental damage that may result from their activities. Users of the environment may set aside provisions for environmental protection purposes as specified in the relevant government decree for any environmental liabilities they may have or are certain to have in the future”.

The Government shall issue a Decree specifying the form and extent of the security, conditions for using the security, rules of accounting and keeping records of it, and rules of the environmental protection insurance. The detailed regulation has not been issued yet.

27. **Establishment of a fund**

The transposing legislation does not establish a fund; however Article 57 of EPA had already established the environmental protection fund special appropriations chapter. This fund was set up for the promotion of the development of an environmentally safe economic structure, for the prevention of environmental damage, the remediation of environmental damage which has occurred, for landscape re-cultivation set forth in a separate Act, and for the conservation of nature preservation areas, the motivation and promotion of the most efficient alternatives, and the improvement of public environmental awareness and for environmental research.

28. **Reports**

The Minister in charge of environmental protection shall submit the report for Hungary to the European Commission on the experience gained in the application of the ELD, as set out in article 18 of the ELD, by April 30, 2013.

29. **Information to be made public**

The legislation transposing the ELD does not specify information that must be made public. Article 12, para. (3) of the EPA, however, provides that state bodies, local governments and other
public entities that possess environmental information shall monitor within their scope of activities the state of the environment and its impact on human health, keep a record of the data thus obtained, and make the data - by request – accessible, and shall disclose the environmental information designated in separated pieces of legislation.

The EPA describes decisions of the environmental authority that shall be made public.

Government Decree No. 311/2005 (XII.25) on public access to environmental information provides that the body that possesses environmental information shall electronically or otherwise - unless the law provides otherwise - publish environmental information, particularly the following documents:

f) international conventions, legislation, including the EU legislative instruments and their implementation reports;

g) policies, strategies, plans and programmes of the environmental sector, and their implementation reports;

h) reports on the state of the environment;

i) data arising from monitoring of activities having an effect, or likely effect on the environment;

j) environmental impact studies and risk assessments relevant to the environmental components; and

k) data regulated by separate pieces of legislation.

In case of an imminent threat to human health or the environment – regardless of whether it arose from human activity or natural causes – the body that possesses environmental information immediately publishes 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.

30. **Provisions concerning genetically modified organisms**

There are no specific provisions concerning genetically modified organisms in the legislation transposing ELD.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

Existing legislation imposed – and continues to impose – liability for preventing and remedying damage to the environment. This general legislation, which includes land contamination, water pollution and damage to fauna and flora, is retrospective as well as prospective (see section 2).

The existing legislation was – and is – broad. It applies to a “user of the environment”, a broader definition than an operator under the ELD. The legislation transposing the ELD adopted the same approach in that it also applies to a user of the environment.
Unlike the ELD, the owner of the land that is damaged is jointly and severally liable as well as the polluter. If the landowner proves beyond a reasonable doubt that the actual user of the environment caused the risk or damage, the landowner may be exempted from liability.

Various other persons may also be liable for preventing and remediating damage to the environment. They include the legal successor of a user of the environment, shareholders of a company, and the owner of a sole proprietorship. Executive officers may also be liable if they supported a resolution which they knew, or should have known would cause environmental damage.

The existing liability provisions concerning the remediation of damage to the environment as they apply to groundwater are the most detailed. Thus, contrary to the environmental legislation of many Member States which focuses on remediating contaminated land and also includes the remediation of groundwater; in Hungary, the legislation is the other way round. That is the detailed legislation imposes liability for remediating groundwater, which also includes soil contamination. As noted above, however, the legislation is general in that it applies to damage to the environment rather than being a specific regime for one environmental medium such as land or water.
1. **Existing national environmental legislation**

Environmental legislation in Ireland is set out in various statutes and regulations that are focused to a large extent on different environmental media and regulatory situations, such as water pollution, waste law, nature conservation and permitting.

The Irish Government transposed the ELD as stand-alone legislation to supplement the existing legislation rather than amending it.

2. **Existing regimes for remediating environmental damage**

When Ireland transposed the ELD, it already had a liability system for preventing and remediating water pollution. Ireland does not, however, have a dedicated regime for remediating contaminated land; instead, it relies on existing environmental legislation such as the waste and water pollution legislation. Ireland also had liability systems for remediating and restoring biodiversity damage at Natura 2000 sites and sites protected by national legislation, although these were, and still are, substantially more limited than the ELD and do not include complementary and compensatory remediation.

This section of the summary for Ireland describes the above liability systems and their relationship with the legislation that transposed the ELD into national law, commenting in particular on standards, specificity, precedence/subsidiarity, the interaction and interface between the ELD legislation and existing environmental legislation, and application of the thresholds for “significant environmental damage” under the ELD for biodiversity damage and water damage.

▶ **Water pollution**

The Local Government Water Pollution Act 1977-1990 (WPA) and regulations issued under it are the main Irish legislation for the control of water pollution. The Environmental Protection Agency (EPA) oversees local authorities in carrying out their duties regarding water pollution control. The EPA can give specific directions to local authorities and, if necessary, prosecute if directions are not complied with. The EPA is the competent authority for water pollution by persons to whom it has issued a licence. Waters controlled by the WPA include natural and artificial inland surface waters, coastal waters and groundwater.

The WPA authorises local authorities (and the EPA, as relevant) to issue administrative notices to require persons who are causing or permitting water pollution to cease the pollution and to mitigate or remedy its effects.

The WPA also authorises any person regardless of standing or interest in the matter (including but not limited to local authorities and the EPA) to seek an order from a court or an injunction from the High Court, to direct the person who is causing or permitting, or who has caused or permitted, polluting matter to enter the waters to terminate the entry and/or to mitigate and/or remedy its effects. Recipients of such orders are liable for the authority’s related costs.
The restoration standards under the WPA are broader than the actual mitigation or remediation of water pollution itself in that the standards extend to the effects of the entry of the polluting matter into waters. The mitigation and remedial measures may thus include replacing fish stocks, restoring spawning grounds for fish, and making alternative arrangements for the supply of water for commercial, industrial, domestic, agricultural, recreational and fish farming purposes.

The term “polluting matter” is defined broadly to include “any poisonous or noxious matter, and any substance (including any explosive, liquid or gas) the entry or discharge of which into any waters is liable to render those or any other waters poisonous or injurious to fish, spawning grounds or the food of any fish, or to injure fish in their value as human food, or to impair the usefulness of the bed and soil of any waters as spawning grounds or their capacity to produce the food of fish or to render such waters harmful or detrimental to public health or to domestic, commercial, industrial, agricultural or recreational uses”.

The WPA also requires a person who accidentally discharges, spills or deposits any “polluting matter” so that it enters or is likely to enter any waters to notify the local authority.

The WPA differs from the ELD (and its transposing legislation) in many respects including the following:

- The threshold for damage to water is significantly lower than the threshold in the ELD; the existing legislation refers to the entry of “polluting matter” into waters;
- Liability is not limited to damage to water bodies (see section 13, “Water or water body”, below);
- The mitigation of pollution and harm is permitted in some instances in contrast to the ELD, which provides that a competent authority must require an operator who damages water to return the water to its baseline condition and to “achieve the same level of natural resource or services as would have existed” prior to the damage;
- There is no liability for compensatory or complementary remediation with the possible exception of the ability of the court to require the provision of alternative supplies of water for domestic, commercial, industrial, fishery, agricultural or for recreational use (WPA section 10.8);
- There is no duty immediately to prevent environmental damage or to prevent further damage or immediately to carry out remedial actions;
- Liability is not limited to an “operator”;
- The permit defence and the state-of-the-art defence do not apply to the remediation of damage;  

---

80 The defences were in a draft Bill that may, or may not, be enacted.
There are no exceptions to liability;
There is no statute of limitations concerning remedial actions;
There are no provisions for “interested parties” to submit comments; and
The competent authority must apply to a court in some instances before an order may be issued.

Land contamination

The Irish Government has not enacted legislation to establish a dedicated regime for the remediation of land contamination. Even if it was to do so, the legislation would apply prospectively only because any retrospective application would be in breach of article 15.5 of the Irish Constitution, which provides in pertinent part that Parliament “shall not declare acts to be infringements of the law which were not so at the date of their commission”. The legislation that is generally used to require the prevention and remediation of land contamination is the Waste Management Act 1996-2010 with the caveat that the Act does not apply to land in situ, including unexcavated contaminated soil. The Water Pollution Act and the integrated pollution prevention and control regime are also used, as well as, for voluntary remediation for development, the planning regime. Remedial works are usually carried out pursuant to a waste licence.

Sections 57 and 58 of that Act provide that any person may seek an order (known as a clean-up order) from the court. The order may require the person who has held, recovered or disposed of waste, or is holding, recovering or disposing of it, in a manner that is causing or has caused environmental pollution, to mitigate or remedy its effects so that the waste no longer poses a risk of environmental pollution. A holder of waste includes the person who owns contaminated land; such liability in the absence of causation is due to the current owner being considered to be in control of holding the waste. Prior holders of waste include persons who caused its release or permitted its release.

More than one person may be liable for remediating the waste. Liability is joint and several. As a general rule, however, courts determine that the person who caused the contamination is liable for the majority of the clean-up costs, with the owner of the contaminated land being required to pay them if the polluter does not have sufficient funds to do so. If the owner cannot pay, the clean-up order may require the occupier of the land to pay for the remediation.

There is also an obligation under section 14 of the WPA to notify the competent authority of an accidental discharge which may enter, or is entering, waters. Further, a court may issue an order requiring remediation under section 10 of the WPA. Still further, section 10.5 of the WPA authorises the issuance of an administrative order to stop or prevent the continuing entry of polluting matter into waters or its removal from the waters.

---

81 See Magee v. Culligan [1992] 1 ILRM 223 (per Finlay CJ: provision applies to civil as well as criminal liability).
82 This amendment is made by Regulation 4 of SI No. 126 of 2011, which amends section 3(1) of the Waste Management Act 1996-2010. The amendment transposes article 2(1)(c) of Directive (2008/98/EC) on waste (Waste Framework Directive).
The legislation differs from the ELD (and its transposing legislation) in many respects including the following:

- Liability is focused on the presence of waste on land which, although broad, does not include all substances covered by the ELD;
- The Waste Management Act 1996-2010 does not extend liability to biodiversity damage;
- There is no liability for compensatory or complementary remediation;
- Liability is not limited to an “operator” but includes owners and occupiers of contaminated land who are liable due to their status as such;
- There is no statute of limitations for remediation requirements;
- The permit defence and the state-of-the-art defence do not apply to remediation requirements;\(^3\)
- There are no provisions for “interested parties” to submit comments; and
- The competent authority must apply to a court in some instances before an order may be issued.

Restoring biodiversity damage

There are two types of restoration orders.

First, the European Communities (Birds and Natural Habitats) Regulations 2011 (SI 477/2011) authorise the Minister for Environment, Community and Local Government to issue a Direction concerning damage to a Natura 2000 site as follows. If an activity, plan or project that has been carried out within or outside a Natura 2000 site has caused damage to the site or to a species or natural habitat by reason of which the site was selected as a Natura 2000, the Minister may issue a Direction to require the owner, occupier or user of the land, or the person who carried out the activity, plan or project, as the Minister considers appropriate, to restore the land.

The above Regulations also authorise the Minister to apply to a court for an order to require a person to take action or to refrain from taking action in order “to cease, avoid, reverse, reduce or eliminate the adverse effect, pollution, deterioration or disturbance” to a Natura 2000 site and/or species and habitats protected by the Birds and Habitats Directives.

The second type of restoration order is authorised by the Wildlife Act 1976-2000 and the Wildlife (Amendment) Act 2000 which govern the protection of wildlife and activities that adversely affect wildlife. Section 21 of the 2000 Act authorises the Minister to issue a Direction to the owner, occupier or user of a proposed or designated Natural Heritage Area to restore the site.

---

\(^3\) The defences were in a draft Bill that may, or may not, be enacted.
The legislation differs from the ELD (and its transposing legislation) in many respects including the following:

- Liability is focused Natura 2000 sites (and species and natural habitats protected by the Birds and Habitats Directives) and Natural Heritage Areas, not other natural resources;
- There is no liability for compensatory or complementary remediation;
- Liability is not limited to an “operator”;  
- There is no statute of limitations;
- The permit defence and the state-of-the-art defence do not apply;  
- There are no exceptions to liability; and
- There are no provisions for “interested parties” to submit comments.

Other liability systems for remediating environmental damage

Other liability systems for remediating environmental damage in Ireland include the following:

- Conditions in a licence for a waste management facility controlled under the Waste Management Act 1996-2010 to prepare a plan setting out measures to be carried out in the event of an accident or incident concerning the facility, to remedy any environmental effects from the disposal of the waste during the pendency of the licence, with the facility to be remediated a “satisfactory state” when operations at it terminate;
- Conditions in a licence for other facilities controlled under the Environmental Protection Act 1993-2003 and the EPA (Licensing) Regulations 1994-2008, which transposed the integrated pollution prevention and control Directive / industrial emissions Directive that require the remediation of pollution incidents during the pendency of the permit; with the site to be remediated to a “satisfactory state” at the termination of operations;  
- Alleviation of “the medium and long-term effects” of any accident under the European Communities (Control of Major Accident Hazards Involving Dangerous Substances) Regulations 2006 (SI No 74/2006) (which transposed the Seveso Directive);
- The Genetically Modified Organisms (Contained Use) Regulations 2001 and the Environmental Protection Agency Act 1992, as

---

84 The defences were in a draft Bill that may, or may not, be enacted.

85 The remediation standard is becoming more stringent with the transposition of Directive (2010/75.EU) on industrial emissions.
Implementation challenges and obstacles of the Environmental Liability Directive amended, authorise the EPA to serve a notice on a person who is using genetically modified organisms (GMOs), or to apply to the High Court for an order to prohibit or restrict any activity concerning the contained use of GMOs; the order requires such a person to take measures that are necessary to protect human health or the environment; and

- The Genetically Modified Organisms (Deliberate Release) Regulations 2003 and the Environmental Protection Agency Act 1992, as amended, authorise the EPA to serve an administrative notice on a user, or to apply to the High Court for an order to prohibit or restrict any activity, concerning the direct release of GMOs in order to protect human health or the environment.

There is not a clear interface between the existing national liability regimes and the ELD regime. The Screening Regulatory Impact Analysis (Screening RIA), issued in July 2008, for the ELD regime states that the transposing legislation is without prejudice to the generality of existing national legislation. The Screening RIA also states that liability-related actions to be taken when environmental damage (under the ELD) occurs, should be taken under the ELD regime instead of using existing powers under national legislation “because the scope and effect of domestic legislation is not as great as that of the Directive” (p. 73). Further the Screening RIA states that enforcement actions should not be carried out under both the ELD legislation and existing national legislation.

The above statements, however, rely on the EPA’s ability (as the only competent authority in Ireland) to be able promptly to recognise when the threshold for environmental damage under the ELD has been exceeded. This may, however, entail a long assessment process in some cases of water damage and biodiversity damage.

3. Integration of the ELD into existing national legislation

- Transposing legislation

The ELD is transposed in Ireland by way of the European Communities (Environmental Liability) Regulations 2008, SI 2008/547, as amended by the European Communities (Environmental Liability) (Amendment) Regulations 2011, SI 2011/307 (Regulations).


Transposition of a number of discretionary provisions of the ELD was discussed in the Environmental Liability Directive; Screening RIA, and an accompanying draft Bill which also preceded the introduction of the Regulations. While consideration was given to transposing these discretionary provisions, they were not subsequently included in the Regulations.
Amendments to existing national legislation

The European Communities (Birds and Natural Habitats) Regulations 2011, SI 2011/477 has been amended. Section 36 of the 2011 Regulations provides that before deciding to issue a Direction (paragraph (1)) or to seek a restoration warrant (paragraph (8)), the Minister shall consult with the Irish Environmental Protection Agency (EPA) regarding liabilities that may arise under the ELD.

Authorisation in legislation for other governmental entities to issue rules and regulations

The Regulations do not authorise other governmental entities to issue rules and regulations.

Relationship to other legislation

The Regulations do not provide for a relationship with other national legislation. The Guidance (see directly below) does, however, discuss other legislation, including financial provision conditions for IPPC and waste licenses.

Guidance and other documentation

The EPA has issued guidance entitled Environmental Liability Regulations; Guidance Document (July 2011) (Guidance).

The Environmental Policy Section of the Department of the Environment, Heritage and Local Government (now the Department of the Environment, Community and Local Government) issued a Screening RIA (see above).

4. **Effective date of national legislation**

1 April 2009

5. **Competent authority(ies)**

The competent authority is the EPA.

6. **Operators and other liable persons**

The definition of an “operator” is essentially the same as the ELD. The Regulations refer to persons who are considered to be operators under the national legislation that transposed the legislation listed in Annex III of the ELD.

Secondary liability (e.g., parent company)

The Regulations do not mention secondary liability of a parent company or any other person. See reference to Section 18, which provides for joint and several liability, in Section 9 below.\(^86\)

Death or dissolution of responsible operator

\(^86\) Whilst the Regulations do not clarify that the operator can be either a natural or a legal person, or a public or private entity, they state that "a word or expression that is used in these Regulations and also used in the [ELD] has the same meaning in these Regulations as in the [ELD]".
The Regulations do not mention the death or dissolution of a responsible operator.

The operator could, however, in certain situations, include a liquidator who carries out the activities formerly carried out by an insolvent company as well as a mortgagee in possession who carries out the activities of a defaulting borrower.

- Person other than an operator who may be liable

The Regulations state that only the operator may be liable.

7. **Annex III legislation**

- Rebuttable presumption that operator’s activity caused environmental damage

The Regulations do not establish a rebuttable presumption that an operator’s activity caused environmental damage.

- Additional “occupational activities” subject to strict liability

Although the Screening RIA and the draft Bill discussed the extension of occupational activities, this was not transposed in the Regulations.

- Spreading of sewage sludge for agricultural purposes

Although the Screening RIA and the draft Bill discussed the exclusion of the “spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes”, this was not subsequently incorporated into the Regulations.

8. **Standard of liability for non-Annex III activities**

The operator of a non-Annex III activity who causes an imminent threat of, or actual, environmental damage is liable if the operator “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”.

9. **Exceptions**

- Applicable to imminent threat of environmental damage as well as environmental damage

The exceptions apply to an imminent threat of environmental damage as well as environmental damage.

- Differences with exceptions in the ELD

There are no changes to the exceptions in the ELD.

- Diffuse pollution exception

The Regulations track the diffuse pollution exception in the ELD.
10. **Joint and several or proportionate liability**

Ireland has adopted joint and several liability when more than one operator is liable for the same imminent threat of, or actual, environmental damage.

Regulation 18, which concerns joint and several liability, provides that nothing in the Regulations shall be taken to affect the operation of the Civil Liability Act 1961 or Sections 9(1)-(2) of the Liability for Defective Products Act 1991.

- Mechanism for contribution between liable operators

The Regulations do not specify a mechanism for contribution between liable operators.

11. **Limitation period**

The limitation period is 30 years.

12. **Defences**

- Defences to liability or costs?

The defences are defences to costs.

- If defences to liability; suspension (or not) of remediation notice during appeal

Not applicable because the defences are defences to costs.

- Permit defence

Ireland has not adopted the permit defence.

Although the draft Bill, referred to above, contained a provision to include the permit defence, with the proviso that the defence would not apply to an operator, or the holder of the relevant deliberate release consent or authorisation, in respect of the cultivation, including field trials, of genetically modified organisms (GMOs). This was not subsequently incorporated into the transposing legislation. The draft Bill would also have limited the defence to remedial measures and not emergency remedial actions.

- State-of-the-art defence

Ireland has not adopted the state-of-the-art defence.

The draft Bill, referred to above, contained a provision to include the state-of-the-art defence, with the proviso that the defence would not apply to an operator, or the holder of the relevant deliberate release consent or authorisation, in respect of the cultivation, including field trials, of GMOs. This was not subsequently incorporated into the transposing legislation. The draft Bill also limited the defence to remedial measures and not emergency remedial actions.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)

13.17%
Ireland has not extended biodiversity to nationally protected biodiversity. The draft Bill contained a provision to extend biodiversity to nationally protected biodiversity. As noted above, the Bill may never be enacted or, if it is, its form may change substantially.

Biodiversity damage is damage out to 200 nautical miles, which is the limit of Ireland’s exclusive economic zone and its exclusive fishery limit.

The Regulations track the definition of water damage in the ELD. The Guidance states that the threshold for water is “any damage which adversely affects the ecological chemical, and/or quantitative status and/or ecological potential of water bodies as defined by the Water Framework Directive (2000/60/EC)”. The Guidance further specifies that the threshold for water damage is exceeded when damage to a water body causes its reduction to a lower status, as defined in the Water Framework Directive.

### 14. Thresholds

- **Water damage**

  The EPA has a comprehensive set of baseline data available for water quality due to the establishment of the national Water Framework Directive monitoring programme. Annex D of the Guidance sets out the baseline data.

  Surface waters are covered by the Regulations to 12 nautical miles from the outer limit of transitional waters.

- **Biodiversity damage**

  The threshold for biodiversity damage is essentially the same as the ELD. Annex C of the Guidance sets out the wide range of sources from which baseline data for biodiversity damage is available. The range for biodiversity damage is defined as the range within which all significant ecological variations of the habitat or species are included for a given biogeographical region and which is sufficiently large to allow the long term survival of the habitat or species.

- **National biodiversity damage**

  National biodiversity damage is not covered at this time.

- **Land damage**

  The Regulations define land damage the same as the ELD. The Guidance sets out the procedures for determining whether land damage has occurred, including a screening assessment and a site specific quantitative risk assessment.
15. **Standard of remediation**

- **Land**
  The standard of remediation is the same as the ELD. The Guidance refers, among other things, to breaking the source-pathway-receptor as a means of remediation.

- **Biodiversity**
  - Primary remediation
  The Guidance describes processes and sets out examples for primary remediation.

- **Complementary and compensatory remediation**
  The Guidance describes processes, including resource equivalency analysis and value equivalency analysis, and sets out examples for complementary and compensatory remediation.

- **Water**
  - Primary remediation
  See above.

- **Complementary and compensatory remediation**
  See above.

16. **Format of determination of environmental damage**

In assessing whether damage is environmental damage, the EPA will:

- direct the operator who caused the damage to identify and select remedial measures and submit such measures to the EPA;
- invite comments/observations from interested parties to assist in the decision-making procedure; and
- invite comments/observations from landowners, if entry onto their land is required, to assist in the decision-making procedure;

If the EPA determines that the damage is contaminated land, it issues a direction to the operator specifying the remedial measures to be carried out by the operator. The direction includes the deadline for carrying out the measures, and identifies the proposed level of monitoring and inspection to ensure that the measures are effective.

If the EPA determines that there has been environmental damage to biodiversity, it carries out a damage assessment to assess the significance of the damage according to criteria set out in the Regulations. These criteria are essentially the same as those in the ELD. The EPA may also request the operator to carry out a damage assessment.
17. **Powers and duties of competent authority**

- **Inspections, investigations, studies and analyses**

The Regulations provide for the appointment of “authorised officers” who have the power to enter premises at reasonable times between 9am and 6pm, or at any time if there is an imminent threat of environmental damage (subject to a warrant issued by a judge of the District Court in respect of dwellings). The Regulations also specify broad powers granted to an authorised officer to carry out investigations and inspections. The broad powers referred to above impliedly include the power to carry out studies and analyses.

- **Information orders**

The EPA may issue a direction that requires an operator to provide the information specified in the direction.

The EPA may also request information from a public authority on the performance of its statutory functions in respect of the prevention or remediation of environmental damage.

The Regulations specify that the following entities are public authorities:

- a Minister of the Government;
- a local authority;
- the Commissioners of Public Works in Ireland;
- a harbour authority;
- a harbour company;
- the Health Service Executive;
- a board or other body (but not including a company under the Companies Act) established by or under statute; and
- a company under the Companies Act in which all the shares are held (1) by or on behalf of or jointly with a Minister of the Government, or (2) by directors appointed by a Minister of the Government, or (3) by a board, company or other body as specified in this bullet point or the preceding bullet point.

An operator may appeal a direction to provide information.

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

The EPA has the duty:

- to require an operator who caused an imminent threat of environmental damage to take necessary preventive measures; and
- to identify necessary preventive measures that the operator must take, together with instructions to be followed by the operator in taking them.

The EPA also has a duty:
to require an operator who caused an imminent threat of environmental damage to take immediate practicable steps including but not limited to controlling, containing, removing or managing contaminants or causes of damage of which the operator is aware, or ought reasonably [to] be expected in the circumstances to form the opinion, that to do so would prevent (that is, emergency remedial actions):

- to require an operator who caused an imminent threat of environmental damage to take necessary remedial measures; and
- to identify necessary remedial measures to be taken by the operator and to give instructions to be followed by the operator in taking them.

It is an offence for an operator to fail to comply with a direction within the time limit specified in it.

The EPA may also direct a public authority to carry out or cause to be carried out such actions as the Agency considers necessary for the purposes of preventing environmental damage.

- **Power or duty to require an operator to carry out remedial actions**

The EPA has the duty to issue a direction that requires the carrying out of remedial actions to an operator who has informed the EPA of environmental damage or to any other operator who the EPA deems to be appropriate.

The EPA may also direct a public authority to carry out or cause to be carried out such actions as the Agency considers necessary for the purposes of remedying environmental damage.

- **Power or duty of competent authority to carry out preventive measures**

The EPA may carry out necessary preventive measures when it considers that doing so is appropriate and:

- the operator has failed to take the preventive measures or to comply with a direction within the time specified in it;
- the relevant operator cannot be identified; or
- the EPA is satisfied that the operator has a defence that the imminent threat of environmental damage was caused by either of the two mandatory defences in the ELD, that is:
  - the act or omission of a third party when the operator had appropriate safety measures in place; or
  - the operator or a third party were complying with an order or instruction of a public authority issued in the performance of its statutory functions and the order or instruction did not relate to an emission or incident that arose from the operator’s occupational activity.
Power or duty of competent authority to carry out remedial measures

The EPA may carry out necessary remedial measures but only "as a means of last resort" and only when it considers that carrying out such measures is appropriate for one or more of the following reasons:

- the operator failed to take the remedial measures that were required, or failed to comply with a direction to take reasonable practicable steps in respect of the environmental damage;
- the relevant operator cannot be identified; or
- the EPA is satisfied that the operator has a defence that the imminent threat of environmental damage was caused by:
  - the act or omission of a third party when the operator had appropriate safety measures in place; or
  - the operator or a third party were complying with an order or instruction of a public authority issued in the performance of its statutory functions and the order or instruction did not relate to an emission or incident that arose from the operator's occupational activity.

Form of preventive order

The EPA requires an operator to carry out preventive measures by issuing a direction to the operator who informed the EPA of the threat of environmental damage or to any other operator who the EPA deems to be appropriate. The direction:

- requires the operator to provide the information specified in the direction;
- requires the operator to take necessary preventive measures; or
- identifies necessary preventive measures to be taken and provides instructions to be followed by the operator in relation to taking them.

Form of remediation order

There is no specific form of order to an operator in respect of steps required to assist the EPA in determining whether environmental damage has been caused. The EPA shall, however, direct an operator who caused environmental damage to identify and choose what the operator considers are the remedial measures required to ensure that the environmental damage is remediated.

If the EPA determines that environmental damage has been caused, it shall issue a direction to the responsible operator that includes the following information:

- the environmental damage that has occurred and the remedial measures that the operator must take;
- when relevant, the order in which to take the remedial measures; and
when relevant, the monitoring and inspection that the EPA proposes in relation to the remedial measures until the EPA is satisfied that they are complete.

Appeal against preventive or remediation order
An operator may appeal a direction that requires it to carry out preventive measures, emergency remedial actions or remedial measures to the District Court.

The Regulations do not specify particular grounds for appeal.

Sanctions for delay in complying with preventive or remediation order
A delay in complying with a direction equates to a failure to comply with it. The sanctions set out below apply.

Formal consultees on contents of preventive and remediation orders
There are no formal consultees on the contents of directions for preventive or remedial measures. As required by the ELD, however, when deciding on remedial measures, the EPA is required to invite observations from interested parties (see Section 20 below).

The EPA may request a public authority (see definition of a public authority above) to provide information concerning its performance, either generally or in a specific case, of a statutory function in relation to preventing and remedying environmental damage. If a public authority receives such a request, it must comply with it.

The EPA may also, as it considers necessary for the purpose of preventing and remedying environmental damage, issue a direction to the public authority requiring it to carry out, cause to be carried out, or arrange for an action related to the relevant function to be carried out. If the public authority fails to comply with such a direction, the EPA may carry it out, cause it to be carried out, or arrange for it to be carried out and recover its costs of doing so from the public authority as a simple contract debt in any court of competent jurisdiction.

Further, the EPA shall:
- consider the report of the operator and may consult with the operator if the EPA deems it necessary to do so;
- invite observations from persons who are affected by the environmental damage or who have a sufficient interest in it; and
- invite comments/observations from the occupier or owner of land on which entry will be required to remediate the environmental damage.

If a local authority is the regulatory authority for an operator who is not licensed by the EPA, the EPA consults with the local authority on the damage assessment that it carries out after making a determination that damage is environmental damage (see section 15 above, “Biodiversity”).

Recovery of implementation and enforcement costs
The definition of “costs” in the Regulations is the same as in the ELD. The EPA may recover such costs as a simple contract debt in a court of competent jurisdiction.
Deadline for competent authority to seek recovery of costs

The limitation period for the EPA to bring a cost recovery action is five years from the date on which the preventive or remedial measures required under the Regulations have been completed or, if later, the date on which the EPA became aware of the identity of the operator.

18. **Duties of responsible operators**

- **Preventive measures**

An operator has a duty to take necessary preventive measures if the operator is aware, or ought reasonably to be expected in the circumstances to form the opinion that there is an imminent threat of environmental damage.

It is an offence to fail to comply with the above requirements. An operator, however, may appeal a direction to carry out preventive measures.

- **Remedial actions (emergency actions)**

An operator has a duty to “take all practicable steps to immediately control, contain, remove or manage contaminants or causes of damage when he or she is aware, or ought reasonably [to] be expected in the circumstances to form the opinion, that to do so would prevent:

- further environmental damage;
- damage to human health; or
- further impairment of services [from natural resources]”.

It is an offence to fail to comply with the above requirements. An operator, however, may appeal a direction to carry out emergency remedial measures.

- **Remedial measures**

The operator’s duty to carry out primary, complementary and compensatory remediation measures is the same as in the ELD. Neither the Regulations nor the Guidance specify detailed procedures for carrying out remediation projects, or a specified format, other than indicated in this summary.

- **Duty to notify / provide information when imminent threat of environmental damage occurs**

An operator has a duty to notify the EPA “as soon as possible” if the operator “forms, or ought reasonably [to] be expected in the circumstances to form, the opinion that preventive measures taken [by it without delay] do not dispel the imminent threat of environmental damage. The notification shall include details of the preventive measures that were taken as well as the imminent threat. A form that provides summary instruction and a list of information required for notification is available to download from the EPA’s website; see [www.epa.ie/whatwedo/enforce/liab/](http://www.epa.ie/whatwedo/enforce/liab/)

An operator has a duty to notify the EPA “without delay” if the operator is aware or “ought reasonably [to] be expected in the circumstances to form the opinion that his or her occupational activity caused the damage”.


Entity to which notification should be provided

Notification should be provided to the EPA.

19. **Access to third-party land to comply with the ELD**

The Regulations do not include any provisions with regard to access to carry out measures on third-party land. Both the Regulations and the Guidance, however, state that the EPA shall invite comments/observations from the owner or occupier of land on which entry may be required to carry out measures under the Regulations when the EPA is making a determination of remedial measures to respond to environmental damage.

The Screening RIA 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”.

20. **Interested parties**

- **Qualification criteria for “sufficient interest”**

A person has a “sufficient interest” if it can satisfy the EPA that “he or she is a member of an organisation that (a) promotes protection of the environment, and (b) has acted to promote protection of the environment during the period of 12 months before the person submits [observations] and requests [the EPA to perform its functions under the Regulations]”.

- **Method of notifying interested parties of planned remedial measures**

The Regulations do not specify any methods for notifying interested parties of planned remedial measures.

- **Information to be provided to competent authority**

The comments/observations to the EPA are to be accompanied by a report that contains all information and data relevant to the environmental damage. A form that provides summary instruction and a list of information required for submission of comments/observations concerning an incident that a non-operator considers is an imminent threat of, or actual, environmental damage is available to download from the EPA’s website; see www.epa.ie/whatwedo/enforce/liab/

The Guidance sets out details that should be provided, as a minimum, by an interested party.

According to the EPA’s procedures as set out in the Guidance, when it receives comments/observations about potential environmental damage, it may undertake a screening assessment first to determine whether the damage is environmental damage. This assessment will adopt a precautionary approach to assess whether or not the damage constitutes environmental damage. Where there is doubt, it is considered that the damage may be covered by the Regulations and further investigation may be required.
If the EPA makes a determination that the damage is not environmental damage, it will record its determination and, if relevant, pass the details to the relevant enforcement authority for the incident to be dealt with under other domestic legislation.

- Challenges to competent authority’s decision

The Regulations refer to “judicial review or ... any other legal proceedings” in respect of a challenge to the validity of a decision of the EPA.

Directions of the EPA with regard to prevention and remediation of damage may be appealed to the District Court.

- Duty on competent authority to respond to person making comments

The Regulations state that the EPA shall read the report submitted by the interested party and, if it is of the opinion that the report:

- shows that environmental damage exists, it shall consider the comments/observations, consult with the responsible operator and request his or her views in respect of the comments/observations; or
- does 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.

- Inclusion of interested party in any proceedings by the competent authority against an operator

The Regulations do not provide for the inclusion of any interested party in any proceedings by the EPA against an operator.

21. **Public access to information regarding environmental damage and related measures**

A register is being maintained and is available on request. Although the register is not yet available on the EPA’s website, it is planned to address this.

22. **Charges on land / financial security after environmental damage**

The Screening RIA discussed the potential for the EPA to recover its costs from a responsible operator through the courts as a simple contract debt, or through seeking security over property or other appropriate guarantees. Only the first of these provisions is provided for in the Regulations.

23. **Offences and sanctions**

A breach of the Regulations is an offence for which the person who commits it is liable:

- on summary conviction, to a fine not exceeding €5,000, imprisonment for a term not exceeding six months, or both; or
on conviction on indictment, to a fine not exceeding €500,000, imprisonment for a term not exceeding three years, or both.

The defendant has a defence to an offence under the Regulations if the defendant proves that they took all reasonable steps to avoid committing the offence.

The sanction for the offences of obstructing or interfering with an authorised officer or member of the *Garda Síochána* (who is acting under a warrant), impeding the exercise of such power by the officer or member, failing or refusing to comply with their requirement or request, to answer their questions, knowingly to provide false or misleading information, or falsely representing themselves as an authorised officer is a fine not exceeding €5,000, imprisonment for a term not exceeding six months, or both.

Directors and officers liability for breaching legislation

Directors, officers and managers may be convicted if the company’s offence is committed with their consent or connivance or is attributable to their neglect.

Publication of penalties

There is no mechanism to publish penalties for offences under the Regulations.

24. **Registers or data bases of incidents**

The Regulations require the EPA to establish and maintain a register, called the “Article 18 Register”. The EPA shall place in the Register all the following information and data in its possession in relation to each instance of environmental damage or liability arising from such an instance:

- the type of environmental damage, date of occurrence and discovery of the damage and the date on which proceedings were initiated under the Regulations;
- activity classification code of the liable person (or NACE code);
- whether the liable persons or an interested person brought an appeal or an application for judicial review;
- the outcome of the proceedings; and
- the date of closure of the proceedings.

In addition, if the EPA is of the opinion that it is required to do so for the proper performance of its duty to provide a report to the European Commission by 30 April 2013 (as set out in article 18 of the ELD), it may place in the Register the following information and data in its possession regarding each instance of environmental damage or liability arising from such an instance:

- whether the costs incurred in respect of preventive or remediation measures were:
  - paid directly by liable parties as the measures were taken;
• recovered from liable parties after the measures were taken; or
• have not been recovered from liable parties, together with reasons for not recovering them; and

- results of the actions to promote and implement financial security instruments used in accordance with Article 14(1) of the ELD; and
- an assessment of the additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce the Regulations.

25. **Cross border damage in another Member State**

If the Minister for the Environment, Community and Local Government is aware of environmental damage that may affect, or that originates in, another Member State, the Minister shall communicate appropriate and necessary information to the competent authority of that Member State in order to assist the Member State in relation to taking preventive and remedial actions in that Member State.

If the EPA becomes aware that a threat of, or actual, environmental damage has occurred in Ireland by an occupational activity carried out by an operator in another Member State, the EPA:

- shall notify the European Commission on the environmental damage;
- shall notify the competent authority of that Member State;
- shall make recommendations to the competent authority in that Member State and, if the competent authority agrees, also to the operator, regarding the preventive or remedial measures that the EPA considers are required; and
- may recover costs incurred in relation to preventive or remedial measures taken by it.

When the Minister for the Environment, Community and Local Government is notified by a competent authority in another Member State of environmental damage caused in that Member State by an occupational activity in Ireland, the Minister shall inform the EPA. The EPA shall then provide all information in its possession, which it considers appropriate, in relation to the environmental damage and, where it considers that it is appropriate, provide the recommendations of that competent authority to the operator.

26. **Financial security**

Ireland has not adopted mandatory financial security.

The EPA may request financial provision as part of the conditions of IPPC and waste licenses.
27. **Establishment of a fund**

The transposing legislation does not establish a fund.

The Screening RIA discussed establishing a fund but concluded that introducing a levy to provide money for such a fund was not feasible due to the lack of information available on potential incidents of environmental damage that could occur under the ELD. It stated that the issue of a dedicated fund may be reviewed at a later date but in the meantime, financing would be met by the Exchequer with specific arrangements in place to cater for incidents of environmental damage when the EPA was unable to seek recovery of costs.

28. **Reports**

The Guidance mentions preparation of the Member State report that must be submitted to the European Commission by 30 April 2013.

29. **Information to be made public**

There is no requirement to make information concerning implementation and enforcement of the Regulations public.

30. **Provisions concerning genetically modified organisms**

The Regulations do not make provisions concerning GMOs except with regard to the definitions of operator and occupational activities.

The draft Bill, referred to above, contained provisions that specified that the permit defence and the state-of-the-art defence do not apply to an operator, or the holder of the relevant deliberate release consent or authorisation, in respect of the cultivation, including field trials, of GMOs. These were not subsequently incorporated into the transposing legislation.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

Ireland had existing legislation for preventing and remediating water pollution when it transposed the ELD. Unlike Member States that have legislation to remediate contaminated land that is retrospective as well as prospective, the existing legislation that is used in Ireland to remEDIATE, as well as to prevent, contaminated land is waste legislation. This is because the Irish Constitution bars retrospective civil – as well as criminal – legislation.

Under the waste legislation, the owner of contaminated land may be liable for preventing and remediating the contamination as well as the polluter.

The existing water pollution legislation is much broader than the legislation transposing the ELD. The threshold for the prevention and remediation of water pollution is significantly lower than the threshold in the ELD; liability is not limited to an operator.
The existing legislation for preventing and remediating biodiversity damage applies to species and natural habitats protected by the Birds and Habitats Directives and nationally protected biodiversity in Natural Heritage Areas. The focus is on Natura 2000 sites but also includes species and habitats protected by the Birds and Habitats Directives outside those areas. The person who damages biodiversity can be ordered to restore it.
1. **Existing national environmental legislation**

Prior to the transposition of the ELD, Italian law imposed liability for preventing and remediating damage to land, water and the general environment. Some of that law imposed fault-based liability; some imposed strict liability. Some legislation provided for the payment of compensation in lieu of remediating contamination in certain instances.

In 2006, Italian environmental law was harmonised with the enactment of Law 152/2006 of 14 April 2006, which introduced the Environmental Code (Code). The legislation that transposed the ELD is set out in Part VI of the Code, which is entitled Provisions Related to Compensatory Protection against Environmental Damage. Thus, the Italian Government transposed the ELD in a single piece of legislation set out in a harmonised Code; the transposing legislation does not amend other legislation.

At the same time that the ELD was transposed into national law, the Italian Government repealed various provisions that had previously imposed liability for damage to soil, surface water and groundwater. The Italian Government also enacted legislation, largely based on some of the repealed legislation, to impose liability for damage to soil, surface water or groundwater that had occurred up to the date that the legislation transposing the ELD entered into effect. There is, thus, a bright line between this legislation and the legislation that imposes liability for environmental damage under the ELD regime.

2. **Existing regimes for preventing and remediating environmental damage**

Prior to the transposition of the ELD, liability for remediating environmental damage in Italy was imposed mainly, but not entirely, by two laws:

- Article 18 of Law No. 349/1986 of 8 July 1986 imposed fault-based liability on a person who willfully or negligently breached Italian law resulting in damage to the terrestrial or marine environment (also called environmental damage or ecological damage) for remediating the damage if possible, or for paying compensation if not; and

- Article 17 of Law No. 22/1997 of 5 February 1997 (also known as the Waste Management Act or the Ronchi Decree) 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.\textsuperscript{87}

Part VI of the Code repealed article 18 of Law No. 349/1986.

The Code also repealed article 17 of Law No. 22/1997. Article 17 was superseded by new provisions in Part IV of the Code. These provisions, which are modeled on article 17, also impose strict liability for remediating environmental damage. They apply only to environmental damage that was caused before 29 April 2006, when Law 152/2006 entered into force.

Further, the transposition of the ELD into Italian law had been preceded by Law No. 266/2005 of 23 December 2005, which contained “provisions for the formation of the annual and multi-annual budget”. Law No. 266/2005 authorised the Minister for the Environment to order a person who was responsible for environmental damage to remedy it to its state before the damage or, in specified circumstances, to pay an amount equivalent to the economic value of the damage within 60 days. The Law also set out provisions concerning environmental damage and its evaluation, remediation and liability. Part VI of the Code repealed the above provisions.

- Water pollution

Article 58 of D. Lgs. No. 152/1999 imposed fault-based liability on a person who caused damage to water, land or other natural resources by a water discharge to remediate and restore the damaged resources. Law 152/2006 repealed article 58.

Law No. 979/1982 of 31 December 1982 on the protection of the sea imposes liability for preventing or remediying damage to the marine environment.

- Land contamination

Article 17 of Law No. 22/1997 had entered into force on 16 December 1999 following the adoption of Ministerial Decree 471/1999 of 25 October 1999. As indicated above, article 17 was repealed by Part IV. New provisions imposing retrospective liability, modelled on article 17, are set out in Part IV of the Code.

Part IV imposes strict liability on a person who caused damage to soil, surface water or groundwater that exceeds specified limits for contaminants, or results in a significant risk to human health. Ministerial Decree 471/1999 sets out the applicable thresholds for concentrations of contaminants as well as procedures for remediation of the contamination. The concentration levels are applied by a risk-based approach.

Part IV requires a person who caused contamination to notify the relevant local authority within 24 hours if there is an imminent threat of damage from the contamination. The polluter must also carry out emergency measures to prevent further damage and to investigate the contamination. If the contamination exceeds the applicable specified concentration levels or poses a significant risk to human health, the person who caused the damage must remediate it.

\textsuperscript{87} Article 17 provided that: “... any person who exceeds the limits laid down in paragraph 1(a), albeit inadvertently, or creates a tangible and genuine risk of those limits being exceeded, shall be required, at his own expense, to take measures for the safety, decontamination and environmental reinstatement of the polluted areas and the installations which present a threat of pollution...” (translation from Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico, para. 16 (CJEU, Case No C-378/08, 2010).
The owner of the land on which the contamination exists, and any other person who learns of an imminent threat of damage from it also have a duty to notify the relevant local authority within 24 hours of the imminent threat. The current owner of the land is not liable for remediating the damage unless that person is responsible for the contamination. The current owner is, however, liable for carrying out any necessary measures to prevent further damage from the contamination (article 245).

If the person who caused the damage (the polluter) does not remediate the contamination, the competent authority or the owner of the site may do so and seek reimbursement of its costs from the polluter. The competent authority may also place a charge (lien) on the land; such a charge has priority over all other charges on the land. If the owner of a remediated site transfers it to another person, the competent authority's charge on the land is also transferred to that person. In addition, the competent authority may recover its costs by ordering a forced sale of the land.

The competent authority may also seek to recover its costs from the current owner of the site; such costs are limited to the market value of the site if the current owner is not the polluter. If the competent authority does so, it must show that the polluter could not be identified or that it was not possible to recover its costs from the polluter because, for example, the polluter was insolvent (article 253).

The practical effect of the above provisions means that if the competent authority remediates the contamination, the owner of the contaminated site is, in effect, liable for the costs up to the market value of the land. This has resulted, in some cases, of current owners remediating their land if the polluter cannot be identified or is dissolved or insolvent.

A former owner of a contaminated site is not liable for remediating the historic contamination unless the former owner is responsible for it.

Causing land to be contaminated is a criminal offence subject to a fine of up to €52,000 and, in the case of hazardous substances, imprisonment for up to two years. This liability equates to liability for the unlawful disposal of waste in some other Member States such as the UK.

In 1989, a programme began by which the regions identified potentially contaminated sites in their areas. The inventorying regime became more detailed under the Ronchi Decree. Under that Decree and continuing under the Code, inventories are compiled by regional, provincial and local authorities. Sites on the inventories are then prioritised for remediation. The Ministry for the Environment and the Environmental Protection Agency have responsibility for the most seriously contaminated sites, known as sites of national interest, in co-operation with the regional authorities. The sites are designated according to contamination at them having exceeded various specified criteria such that the site has been determined to be one where the levels of contaminants, physical or biological changes to soil, subsoil, groundwater or surface water endanger public health or the natural or built environment.

Restoring biodiversity damage

---

88 The full name of the Ministry for the Environment is the Ministry for the Environment, Land and Sea. The name change occurred in 2006; the prior name was the Ministry for the Environment and the Protection of the Territory.
Prior to transposition of the ELD, Law No. 349/1986 imposed liability for damaging the environment, as discussed above. This law was not, however, specifically targeted at liability for damage to protected species and natural habitats.

- Other liability systems for remediating environmental damage

Italian law also imposes civil liability for environmental damage. Article 2043 of the Civil Code imposes fault-based liability on a person whose act or omission (if the person had a duty to act but failed to do so) results in bodily injury or property damage. A subsequent owner of contaminated land may bring a claim against a prior owner or occupier who caused the contamination.

Further, article 2050 of the Civil Code imposes strict liability on a person who harms a person in the course of carrying out a dangerous activity. There is a defence of having taken all necessary measures to avoid the damage.

- Interface between the existing national liability regimes and the ELD regime

The existing legislation differs from Part VI of the Code in many respects including the following:

- Liability under the existing legislation is not limited to an operator but includes any person who causes environmental damage;
- Liability for damage to soil under the existing legislation is based on specified concentration levels whereas land damage under Part VI is based on a significant risk of an adverse effect on health – a much looser definition;
- The existing legislation did not specifically impose liability for damaging protected species and natural habitats whereas Part VI does so;
- Liability under existing law includes the payment of compensation equivalent to the damage under certain circumstances whereas the ELD does not allow for such compensation (see section 15 below);
- Liability under existing law provides for fault-based liability, as well as, strict liability depending on the legislation whereas the ELD mandates strict liability for Annex III activities (see section 7 below); and
- The permit defence and the state-of-the-art defence do not apply in the existing legislation whereas they apply in Part VI.

3. Integration of the ELD into existing national legislation

- Transposing legislation

Part VI was amended by Decree 135/2009 of 25 September 2009, article 5bis. The Decree was subsequently converted in Law n. 166/2009, Official Gazette n. 274, 24 November 2009, Ordinary Supplement n. 215/L.

- Amendments to existing national legislation

The legislation transposing the ELD did not amend existing national legislation. It did, however, result in a cut-off date for the application of the new legislation that superseded Law No. 22/1997, with that legislation applying before that date and the legislation transposing the ELD applying after that date.

- Authorisation in legislation for other governmental entities to issue rules and regulations

Part VI provides that the Minister for the Environment and the Ministers for the Economy and Finance and for Productive Activities may propose to the President of the Council of Ministers that the President makes a Decree for financial guarantees. They have not done so as yet.

- Relationship to other legislation

The legislation transposing the ELD is part of the Code.

- Guidance and other documentation

The governmental authorities have not published any guidance or other documentation on Part VI.

4. **Effective date of national legislation**

The date on which Part VI came into effect is 29 April 2006.

The Italian Government has made revisions to Part VI to bring Italy into compliance concerning the full transposition of the ELD.\(^{89}\)

5. **Competent authority(ies)**

The competent authority is the Ministry for the Environment in collaboration with regional, provincial and local authorities.

6. **Operators and other liable persons**

The phrase “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” in the definition of an operator in article 302(4) could include directors and officers (see section 23 below)

- Secondary liability (e.g., parent company)

Part VI does not provide for any secondary liability.

---

\(^{89}\) See article 5bis of Decree 135/2009 (Decreto legge 25 settembre 2009, n. 135 concernente disposizioni urgenti per l'attuazione di obblighi comunitari e per l'esecuzione di sentenze della Corte di giustizia delle Comunità europee); http://www.wipo.int/wipolex/en/text.jsp?file_id=230697
Death or dissolution of responsible operator

Article 311(3) states that “the debt is transferred to the successors within the limits of their actual enrichment”.

Person other than an operator who may be liable

Only an operator may be liable under Part VI.

7. **Annex III legislation**

There is nothing in Part VI of the Code that specifically provides that liability for environmental damage from Annex III legislation (which is set out in Annex 5 of Part VI) is strict liability. Further, there is no provision in Part VI that distinguishes between Annex III activities and non-Annex III activities. Therefore all operators are subject to the same liability regime regardless of the type of activity carried out by them.

Article 311 of Part VI is substantially the same as article 18 of Law 349/1986, which imposed fault-based liability. More precisely, article 311(2) provides:

“Any person who performs an unlawful act or who omits mandatory activities or behaviour, in breach of law, regulations or administrative provisions, with negligence, lack of skill, carelessness or breach of technical standards, causes damage to the environment by altering, impairing or destroying it, in whole or in part, shall be obliged to restore the situation which existed previously and, failing that, to pay compensation to the State by way of the proprietary equivalent”.\(^90\)

The phrase “with negligence, lack of skill, carelessness or breach of technical standards” would seem to be able to be interpreted only to impose fault-based liability. Indeed, it is a common view among legal experts that article 311 (as amended by article 5-bis law 166/2009) establishes a regime of fault-based liability, the only exception being provided by article 308(4) regarding the costs of preventive measures, emergency remedial actions and remedial measures if the operator can prove that the imminent threat of, or actual, environmental damage was caused by the act of a third party despite appropriate safety measures being in place or compliance with a compulsory order from a public authority.\(^91\)

---

\(^90\) Translation by Massimiliano Montini, Avosetta Questionnaire, Environmental Liability Directive, Report on Italy (Ghent, 1-2 June 2007).

\(^91\) Article 308(4) of Part VI provides that “the operator shall bear the aforementioned costs unless he/she can prove that the imminent threat of, or the actual, environmental 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”. This language literally mirrors article 8(3) of the ELD. Note, however, Ordinanza n° 321/2006, in which the Consiglio di Giustizia Amministrativa della Regione Sicilia (the highest administrative Court of Sicily), stated that “the balance point between the (constitutionally protected) rights to environmental protection, health and the freedom of private economic initiative” should be identified in the strict liability regime for undertakings which carry out hazardous activities.
As noted above, the European Commission has brought infraction proceedings against Italy, in part, due to the absence of the imposition of strict liability provisions for Annex III activities.92

- Rebuttable presumption that operator’s activity caused environmental damage

Part VI does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

The CJEU has, however, based on actions taken by Italian authorities, ruled, in a case in Sicily concerning the diffuse pollution exclusion, that if a competent authority has plausible evidence of a causal link, such as the location of an operator’s installation near diffuse pollution and a correlation between the pollutants that have been identified at the polluted area and substances used by the operator in connection with its activities, a rebuttable presumption can arise.93

- Additional occupational activities subject to strict liability

Italy has not established additional strict liability activities.

The transposing legislation does not distinguish between fault-based and strict liability for Annex III activities, which makes the transposition of Annex III (in Annex 1 of the transposing legislation) void.

- Spreading of sewage sludge for agricultural purposes

Italy has not exempted the spreading of sewage sludge for agricultural purposes from Annex III liability.

8. **Standard of liability for non-Annex III activities**

The standard of liability for non-Annex III, as well as Annex III, activities is fault-based. See section 7, above.

The standard for negligence under Italian case law includes, in addition to simple negligence and recklessness (gross negligence), inexperience and the failure to take appropriate preventive technical and procedural measures to avoid damage.94

9. **Exceptions**

- Application to imminent threat of environmental damage as well as environmental damage

The exceptions to Part VI apply to an imminent threat of, and actual, environmental damage.

- Differences with exceptions in the ELD

---

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

93 Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico, paras. 57-58 (CJEU, Case No C-378/08).

The ELD provides that the exception concerning natural disasters applies “to activities the sole purpose of which is to protect from natural disaster”. Part VI originally referred to the “main purpose” instead of the “sole purpose”, thus broadening the exception beyond that in the ELD.

This broadening was cured by Law 166/2009 (article 5-bis), which amended article 303 of Part VI. The revised article now mirrors the provision of article 4(6) of the ELD.\(^5\)

There is also an exception for “pollution situations in respect of which reclamation procedures have in fact been commenced or reclamation of the site has been commenced or has taken place in compliance with the relevant legislation in force, provided that no environmental damage remains at the end of this reclamation” (article 303(i)). This exception is not in the ELD.

**Diffuse pollution exception**

The diffuse pollution exception applies when “it has not been possible in any way to establish a causal link between the damage and the activities of individual operators”. See section 7 for its application in an Italian case.

**10. Joint and several or proportionate liability**

Part VI originally imposed joint and several liability but was amended in 2009 to impose proportionate liability.

New article 311(3), as amended by article 5-bis Law 166/2009 overturns the original regime of Law 152/2006, imposing proportionate liability on each individual responsible for the imminent threat of, or actual, environmental damage. This provision, therefore, reintroduced the regime set out in article 18 of Law 349/1986 (see section 2 above).

Further, the Supreme Court of Italy recently ruled that the new article 311(3) applies retroactively to all cases that are pending in the courts in respect of such proportionate liability under article 18 Law 349/1986 (with the obvious exception of *res judicata*).\(^6\)

**Mechanism for contribution between liable operators**

There is no mechanism for contribution between liable operators due to Part VI imposing proportionate liability.

**11. Limitation period**

The limitation period is 30 years; the same as the ELD (article 303(g)).

---

\(^5\) The amended article 303(2) provides: “*shall not apply to activities undertaken in condition of necessity and having the main purpose of serving national defence or international security nor to activities the sole purpose of which is to protect from natural disasters*."

12. **Defences**

- Defences to liability or costs?

Part VI does not indicate whether the defences are defences to liability or defences to costs.

- If defences to liability; suspension (or not) of remediation notice during appeal

Part VI does not mention suspension of a remediation notice during an appeal.

- Permit defence

Italy has adopted the permit defence.

- State-of-the-art defence

Italy has adopted the state-of-the-art defence.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)

19.17%

- Extension of biodiversity to nationally protected biodiversity


- Biodiversity damage in the exclusive economic zone

In 2012, Italy established an ecological protection zone in its Tyrrhenian, Ligurian and Sardinian waters. Part VI does not specifically state that biodiversity damage in that zone is covered (albeit Part VI was enacted before the zone was established).

- Water or water body

Part VI refers to “waters”. It is unclear, however, whether the threshold for water damage refers to waters or a water body. See section 14 below.

14. **Thresholds**

- Water damage

Article 300(2) of Part VI largely tracks the ELD in referring to water damage as an impairment to the baseline condition of “inland waters, by means of actions which have a significantly adverse impact on the ecological, chemical and/or quantitative status or on the ecological potential of the relevant waters [as defined in the Water Framework Directive]”. Article 300(2) further refers to “the coastal waters and to the waters included in the territorial sea by means of the abovementioned actions, even if they took place in international waters”.
Whereas article 311 of Part VI uses the term “damage to the environment”, article 300 sets out the definitions of environmental damage in the ELD, which appears to limit Part VI to the ELD.\textsuperscript{97}

- **Biodiversity damage**

Article 300(2) of Part VI refers to the Italian legislation that transposed the Birds and Habitats Directives (see section 13 above). The threshold is basically the same as in the ELD.

- **National biodiversity damage**

The threshold for all biodiversity damage is the same as the ELD.

- **Land damage**

The definition of land damage is basically the same as that in the ELD. Therefore, the threshold for land damage is the same as the ELD.

## 15. Standard of remediation

Article 311(2) of Part VI originally provided that:

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

Article 311(2), as amended by article 5-bis Law 166/2009, provides that:

"Any person who performs an unlawful act or who omits mandatory activities or behaviour, in breach of law, regulations or administrative provisions, with negligence, lack of skill, carelessness or breach of technical standards, causes damage to the environment by altering, impairing or destroying it, in whole or in part, shall be obliged to the actual restoration of the situation which existed previously and, failing that to the adoption of complementary and compensatory remediation measures under Directive 2004/35/EC in accordance to that provided under Annex II of the Directive, within the deadline set out by article 314(2) of this Decree. When the actual restoration or the adoption of complementary and compensatory remediation measures turns out to be totally or partially omitted, impossible or excessively onerous within the meaning of article 2058 Civil Code, or implemented partially or in a different way from the one prescribed, the operator shall alternatively pay compensation to the State by way of the proprietary equivalent determined under section 3 of this article, in order to finance operations ex article 315(5)”.

Quantification of the damage is carried out by the Ministry for the Environment in accordance with Annexes 3 and 4 of Part VI. These annexes are basically the same as Annexes I and II of the

\textsuperscript{97} See Massimiliano Montini, Avosetta Questionnaire, Environmental Liability Directive, Report on Italy (Ghent, 1-2 June 2007).
ELD. That is, they set out the criteria for determining the significance of biodiversity damage and a common framework for selecting the most appropriate measures to ensure remediation of environmental damage.

Monies paid in compensation for environmental damage, including monies from guarantees issued by the State to cover compensation, are payable into a Rotation Fund which is used, among other things, to remediate contaminated sites, including sites in the national programme, and for research in reducing greenhouse gas emissions and climate change (article 317(5)).

The European Commission has brought an infringement procedure against Italy, in part, due to the provisions permitting a liable operator to pay compensation instead of being required to remediate environmental damage. ⁹⁸

- **Land**

Part VI does not set out the standard of remediation for land. Part IV of the Code, which imposes retrospective liability for remediating damage to soil, surface water and groundwater refers to concentration levels of contaminants that must be remediated.

- **Biodiversity**
  - Primary remediation

Article 302 includes definitions of the conservation status of a protected species and a natural habitat from the ELD. Annex 3 to Part VI sets out an equivalent framework for appropriate measures to remedy biodiversity damage as Annex II of the ELD.

- Complementary and compensatory remediation

See above this section.

- **Water**
  - Primary remediation

See above this section.

- Complementary and compensatory remediation

See above this section.

### 16. Format of determination of environmental damage

Part VI states that a notification of remedial measures must include sufficient reasons for the decision of environmental damage. These reasons should be provided to the operator together with legal remedies available to the operator and deadlines for carrying out the measures.

---

⁹⁸ See Environment, Commission asks Italy to strengthen laws on environmental liability (IP/12/68, 26 January 2012); http://europa.eu/rapid/press-release_IP-12-68_en.htm
17. **Powers and duties of competent authority**

- **Inspections, investigations, studies and analyses**
  The Minister for the Environment and the regional, provincial and local authorities have the power to carry out inspections, investigations, studies and analyses. In order to carry out inspections, the Minister must have obtained the relevant authorisation issued by the competent authority, which authorisation must state the aim of the inspection.

- **Information orders**
  The Minister for the Environment may issue information orders concerning any damage that has occurred and emergency measures to be taken by the operator.

- **Power or duty to require an operator to carry out preventive measures**
  The Minister for the Environment may require an operator to carry out preventive measures, specifying the methodology to be followed.

- **Power or duty to require an operator to carry out remedial actions**
  The Minister for the Environment may require an operator to carry out remedial actions.

- **Power or duty of competent authority to carry out preventive measures**
  The Minister for the Environment may take preventive measures. Such measures must be:
  a) proportional to the level of protection intended to be achieved;
  b) non-discriminatory in their application and consistent with similar steps already taken;
  c) based on a consideration of the potential benefits and drawbacks;
  d) capable of being updated in the light of new scientific data”.

- **Power or duty of competent authority to carry out remedial measures**
  The Minister for the Environment has the power to carry out remedial measures.

- **Form of preventive order**
  Part VI does not specify the form of a preventive order.

- **Form of remediation order**
  Part VI states that a remediation order shall contain specific details, including the contested act or omission of the operator, identification and quantification of the damage, evidence showing that the operator is liable, and the deadline for complying with the order (article 314).

- **Appeal against preventive or remediation order**
  Part VI provides that sufficient reasons must be given for preventive or remediation measures and that the reasons must be provided to the operator “indicating the legal remedies at his disposal and the relevant time limits” (article 307).

Further, Part VI provides for an appeal to the regional administrative court in the area in which the environmental damage occurred within 60 days from notification of the order. In addition,
the operator may submit an appeal to the President of the Republic of Italy within 120 days of being notified of the order (article 316).

- **Sanctions for delay in complying with preventive or remediation order**

If a liable operator fails to carry out remedial measures within the deadline set out in the order “or where the restoration turns out to be impossible, in whole or part, or excessively onerous within the meaning of Article 2058 of the Italian Civil Code, the Minister for the Environment ... shall, by a subsequent order, direct the payment, within 60 days of notification, of a sum equal to the economic value of the established or remaining damage by way of compensation by pecuniary equivalent” (article 313(2)).

The order is to be made against the liable person “and also, jointly, against the party in whose effective interest the conduct giving rise to the damage took place or who has objectively derived a benefit therefrom, according to the findings of the investigation carried out, by avoiding the economic costs necessary in order to prepare the works, equipment and precaution in a preventive manner and behave as required by the applicable legislation” (article 313(3)).

Part VI sets time limits for compliance with the order, details regarding quantification, sanctions for failure to comply including a fine of three times the amount of the pecuniary administrative penalty and imprisonment, and payments of fines by instalments.

- **Formal consultees on contents of preventive and remediation orders**

Part VI does not specify any formal consultees on the contents of preventive and remediation orders. It does, however, provide that the Ministry for the Environment may make use of “public and private entities of high and proven technical and scientific qualifications who operate within the territory, within the limits of existing availability” in identifying, ascertaining and quantifying environmental damage (article 299(4)).

- **Recovery of implementation and enforcement costs**

The competent authority may recover costs incurred by it in enforcing the ELD regime. Article 302(13) sets out the definition of “costs” from the ELD.

- **Deadline for competent authority to seek recovery of costs**

The competent authority has five years to seek recovery of its costs.

### 18. **Duties of responsible operators**

- **Preventive measures**

Article 304 of Part VI provides that an operator must “take the necessary preventive and safety measures” within twenty-four 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

---

99 See Environment, Commission asks Italy to strengthen laws on environmental liability (IP/12/68, 26 January 2012); http://europa.eu/rapid/press-release_IP-12-68_en.htm
Implementation challenges and obstacles of the Environmental Liability Directive have permitted him to carry out the measures (see this section, “Duty to notify / provide information when imminent threat of environmental damage occurs” below).

- Remedial actions (emergency actions)

The operator has a duty to carry out remedial actions (article 305).

- Remedial measures

The operator must identify potential remedial measures within 30 days of the occurrence of the damage unless the operator has already taken emergency remedial actions (article 306).

- Duty to notify / provide information when imminent threat of environmental damage occurs

Article 301(3) of Part VI states that an operator must notify the following authorities of a risk “without delay”: “the Municipal authorities, the Provincial authorities, the Regional authorities or the authorities of the Autonomous Region in whose territory the adverse effect is likely to occur, as well as the Prefect of the Province who shall, within the next 24 hours, inform the Minister for the Environment and the Protection of the Territory”.

Article 301(2) further provides that the risk should be “identified following a preliminary objective scientific assessment”.

- Entity to which notification should be provided

As indicated above, the operator shall provide notification of an imminent threat of environmental damage to the municipal authorities, the provincial authorities, the regional authorities, or the authorities of the Autonomous Provinces in which the environmental damage is likely to occur as well as the Prefect of the Province who must then notify the Minister for the Environment within 24 hours.

19. Access to third-party land to comply with the ELD

Part VI does not mention access to third-party land to comply with the ELD regime.

20. Interested parties

- Qualification criteria for “sufficient interest”

The following persons may submit comments / observations:

- Regional authorities;
- Authorities of Autonomous Provinces;
- Local authorities;
- “[N]atural or legal persons affected by environmental damage or having an interest entitled them to participate in proceedings relating to taking precautionary, preventive or restorative measures [as set out in Part VI]”; and
NGOs that meet criteria set out in article 13 of the Law No. 349/1986 of 8 July 1986.

The authority to which the comments / observations should be submitted is the Minister for the Environment. The process by which the comment / observations are to be submitted to the Minister is by lodging them with the Prefectures / Territorial Government Departments.

Method of notifying interested parties of planned remedial measures

Part VI states that the Minister for the Environment shall invite interested persons and the owner of the land on which the remediation is to be carried out to submit their observations within 10 days, and shall take these observations into account in making the order. The date from which the 10-day period will run appears to be the date of the order because Part VI further provides that if there is an “extreme urgency for which reasons are adduced, the invitation may be included in the order, in which case the order may be amended as appropriate or else revoked, taking into account the status of the work in progress”.

Information to be provided to competent authority

Interested persons should “submit reports and observations, accompanied by documents and information”.

Challenges to competent authority’s decision

Interested parties who submit comments / observations may bring proceedings to annul actions taken in breach of Part VI and may “obtain compensation for the loss suffered because of delay on the part of [the Minister for the Environment] in the implementation of precautionary or preventive measures or measures to contain the environmental damage”.

Prior to bringing proceedings in the administrative court, the interested party must lodge opposition to the decision, act or failure to act with the Ministry for the Environment, or send such opposition by recorded delivery within 30 days of the time of notification of the decision or act. If the authority fails to act, the 30 days runs from the date of lodging the opposition with the Ministry for the Environment.

Duty on competent authority to respond to person making comments

The Minister for the Environment shall inform interested parties “without delay” after assessing their comments / observations (article 309(3)).

Inclusion of interested party in any proceedings by the competent authority against an operator

Part VI does not provide for the inclusion of an interested party in any proceedings by the competent authority against an operator. See also section 20 above regarding environmental NGOs not having the right to commence proceedings for compensation for environmental damage under Part VI.
21. **Public access to information regarding environmental damage and related measures**

Part VI does not mention public access to information regarding environmental damage and related measures.

22. **Charges on land / financial security after environmental damage**

Part VI provides, among other things, for "security over property or bank guarantees payable on first demand and excluding the benefit of preventive discussion".\(^{100}\)

23. **Offences and sanctions**

The failure to take preventive actions or to notify the relevant competent authority (see section 18) is punishable by an administrative fine of between €1,000 and €3,000 per day.

- **Directors and officers liability for breaching legislation**

Part VI does not mention the liability of directors and officers. The broad definition of an operator could, however, include directors and officers. The definition is a person "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" (article 302(4)).

- **Publication of penalties**

Part VI does not provide for the publication of penalties.

24. **Registers or data bases of incidents**

Part VI does not mention registers or data bases of incidents of environmental damage.

25. **Cross border damage in another Member State**

If the origin of the environmental damage is in Italy, the Minister for the Environment shall provide sufficient information about the damage to potentially affected Member States. If the origin of the damage is in another Member State and may affect Italy, the Minister for the Environment shall inform the European Commission and any concerned Member States. The Minister may recommend preventive or remedial measures and may also seek to recover the costs of such measures (article 318(4)).

26. **Financial security**

Article 318(3) of Part VI states that the President of the Council of Ministers may make a Decree following a proposal by the Minister for the Environment, the Minister for the Economy and

---

\(^{100}\) The guarantee on first demand is entitled *fideiussione a prima richiesta*. 
Finance and the Minister for Productive Activities “to lay down appropriate forms of guarantee and develop the supply of relevant [financial security] instruments”.

This Decree has not been made as yet.

27. **Establishment of a fund**

Italy has not established a fund under Part VI.

28. **Reports**

Part VI does not state that any reports should be prepared.

29. **Information to be made public**

Part VI does not specify any information that is to be made public.

30. **Provisions concerning genetically modified organisms**

Part VI does not mention GMOs.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

When Italy transposed the ELD, it already had environmental legislation for preventing and remedying damage to land, water and the general environment. The provisions are set out in the Environmental Code (see section 2).

Italian law imposes strict liability for the remediation of damage to soil, surface water and groundwater that exceeds specified limits for contaminants or that results in a significant risk to human health on the person that caused the damage. The law applies to damage that was caused before 29 April 2006, the date of transposition of the ELD into Italian national law. The legislation transposing the ELD applies to such damage after 29 April 2006. There is, thus, a bright line between the two pieces of legislation.

Under the above legislation (that is, the legislation that applies to damage caused before 29 April 2006), the current owner of the contaminated land is liable for remediating the damage only if it is responsible for the contamination. The current owner is, however, liable for carrying out any necessary measures to prevent further damage from the contamination.

If the person that caused the contamination fails to remediate it, the competent authority or the owner of the contaminated site may do so and seek reimbursement of its costs from the polluter. The competent authority may also seek reimbursement of its costs from the current owner if the polluter cannot be identified or is insolvent or otherwise not financially viable. Such costs are limited to the market value of the land unless the owner is the polluter. A former owner of a contaminated site is not liable unless the former owner is the polluter.
In transposing the ELD, Italy also repealed legislation that imposed liability on a person who wilfully or negligently breached Italian law resulting in damage to the terrestrial or marine environment including damage to fauna and flora. The law required the polluter to remediate the damage if possible or, if not to pay compensation.

Further, Italy repealed other legislation that imposed liability for remedying environmental damage on the person who was responsible for it or, in specified circumstances, to pay an amount equivalent to the economic value of the damage within 60 days.

Still further, Italy repealed other legislation that imposed fault-based liability for remediating and restoring damage to water, land or other natural resources on the person who caused the damage.

Prior national legislation that imposes liability for preventing and remediating damage to the marine environment continues to be in force.

In summary, the legislation transposing the ELD has superseded prior legislation that imposed liability for preventing and remediating land-based environmental damage. In order for current legislation to impose liability for the remediation of damage to soil, surface water and groundwater that was caused by incidents that occurred prior to the effective date of the transposing legislation, Italy enacted new legislation that applies retrospectively only.
1. **Existing national environmental legislation**

When the ELD was transposed into Dutch law, there was already a substantial body of environmental law, including administrative liability law, for preventing and remediating damage to soil, groundwater, surface water and, to a lesser extent, biodiversity.

The ELD was transposed into national law in the Netherlands by adding a new Title 17.2 to the Environmental Management Act (*Wet milieubeheer*) (Wm) and making minor amendments to the Economic Offences Act for offences and sanctions under Title 17.2. Title 17.2 is stand-alone legislation. It is short, being barely seven pages long and accordingly short on detail. Several provisions of the General Administrative Law Act (GALA) also apply to implementation of the ELD. Further, the Economic Offences Act and other legislation also applies to its implementation and enforcement.

The Dutch Government decided not to transpose the ELD by amending more specific legislation such as the Surface Waters Act (now the Water Act) and the Flora and Fauna Act for reasons of transparency, consistency, uniformity and legal clarity. Further, the Dutch Government, in accordance with its policy against gold-plating EU legislation, decided not to extent the scope of the ELD in the transposing legislation.\(^{101}\)

2. **Existing regimes for preventing and remediating environmental damage**

The Wm is the main environmental legislation in the Netherlands. It does not, however, incorporate Dutch environmental law. Notable exceptions include the Soil Protection Act (*Wet Bodembescherming*), as amended (SPA) (see below).

Chapter 17 covers unusual incidents with negative environmental impact at a Wm establishment. Title 17.1, which transposed the Seveso Directive, imposes a duty of care on the operator of such an establishment to take reasonable measures to prevent or reduce the effect of an unusual incident, including measures to be taken in the event that such an incident occurs. It also requires the operator to notify the competent authority of such incidents. Further, it requires the operator of the establishment to take measures to remedy damage from an unusual incident. The competent authority can take such measures if the operator fails to do so and then recover its costs.

Title 17.2 sets out measures to be taken in the event of environmental damage or an imminent threat of such damage. Such measures apply outside Wm establishments as well as within them.

Water pollution

The 2009 Water Act imposes liability for remediating water pollution or, in certain instances paying compensation, to a public authority if it carried out the required remediation measures. Liability for remediating groundwater contamination is covered by the SPA (see Land contamination below).

Land contamination

The SPA entered into force on 1 January 1987; it includes provisions for the prevention as well as the remediation of soil contamination. The SPA is highly complex and includes mechanisms for civil liability (article 75), as well as administrative liability (articles 13, 43 and 55b).

The scope of the duty to clean up soil depends on when the contamination occurred. If the contamination occurred before 1 January 1975, it is difficult to hold the polluter liable for remediating contamination caused by it. This is because liability for remediating contamination before this date 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. Due to the stringency of this test, in particular proving that the person was aware of the contamination before 1 January 1975, such contamination tends to be remediated by competent authorities at the cost of the government. This mechanism is primarily civil law (that is, tort and unjust enrichment; article 75); some administrative law mechanisms may also apply (articles 43 and 55b).

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. If they fail to do so, the competent authority may order either of them to carry out investigatory and remedial measures. If they still fail to carry out such measures, the competent authority may investigate and remediate the contamination and recover its costs from either of them.

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, nevertheless, such “pollution or harm occurs [the person carrying out the activities must] limit the pollution or harm and the direct effects and reverse them as much as possible”. If the person fails to carry out such measures, the public authority may order the person to carry them out or may take the measures itself and recover its costs from the person whose activities caused the contamination.

The owner or lessee of contaminated land may also be liable for investigating and remediating contamination that occurred on or after 1 January 1987. That is, if the polluter cannot be identified, no longer exists or is not financially viable, the owner or lessee must remediate the contamination if the contamination poses a risk to human health and the environment. The order requiring the owner or lessee to remediate the contamination cannot, however, be served if it proves that:

---

102 Article 13, SPA; Guidelines for Title 17.2 of the Dutch Environmental Management Act: measures in the event of environmental damage or its imminent threat, p. 35, chapter 2, section 1).
- it did not have a permanent legal relationship with the polluter when the contamination was caused;
- it was not directly or indirectly involved in the activity that caused the contamination; and
- when it acquired the freehold or leasehold interest in the land, it did not know or should not have known of the contamination, or on 1 January 1987, the owner or lessee and its successors in title satisfied the first two conditions.

Under the third bullet point above, if a long-term legal relationship existed at the time of the contamination, the owner or lessee must prove that it was not involved in the contamination and the contamination was not unlawful. If the owner or lessee is liable (as set out above), the liability continues after it disposes of its interest in the land.

The standard of remediation depends on when the contamination was caused. If the contamination was caused before 1 January 1987, the contamination must be remediated so that the land is suitable for the purpose for which it is being used. If the contamination occurred on or after 1 January 1987, the standard of remediation is higher.

As a general rule, prior to remediating contamination caused before 1987, the person who is carrying out the remedial measures must notify the competent authority and seek approval of the remediation plan. The SPA sets out criteria to be satisfied in the remedial works. Soil contamination must be registered in the Land Registry pursuant to the Immovable Property (Disclosure of Restrictions under Public Law) Act.

The SPA is more stringent than the legislation transposing the ELD. The lower threshold in the SPA means that it would apply to incidents below the threshold for land damage under the ELD.\textsuperscript{103} Thus, due to the legislation transposing the ELD being less stringent than the SPA, the Dutch Government anticipates that the transposing legislation “will not generally need to be applied” to soil contamination.\textsuperscript{104}

- Restoring biodiversity damage

The 1998 Nature Conservancy Act and the Flora and Fauna Act impose primarily ex ante liability for preventing and restoring environmental damage.

- Other liability systems for remediating environmental damage

The Civil Code does not contain a specific provision for compensation for environmental damage. Under the general tort law provisions (articles 6.162 \textit{et seq.}), liability is fault-based.

There is, however, a provision imposing liability for compensation from hazardous substances. A person may bring a claim under articles 6:175-178 of the Civil Code for compensation for bodily injury, property damage and pure economic loss if the person suffers damage from the use of

\textsuperscript{103} See Guidelines for Part 17.2 of the Dutch Environmental Management Act: measures in the event of environmental damage or its imminent threat, p. 35, chapter 2, section 1).

\textsuperscript{104} Guidelines for Part 17.2 of the Dutch Environmental Management Act: measures in the event of environmental damage or its imminent threat, p. 36, chapter 2, section 1)
hazardous substances for commercial purposes. A hazardous substance is one that is known to have properties that pose a serious danger to people and things. Some substances listed in Legislative Decree of 15 December 1994 are deemed to meet the criteria; others are decided on an ad hoc basis.

Liability is strict. Persons who may be liable to pay compensation include persons who store, transport, keep, load or receive hazardous substances. If more than one person causes damage, liability is channelled to the first person who carried out the activity when the damage occurred. This liability is, of course, civil liability and not administrative liability.

The Decree on Genetically Modified Organisms does not include specific provisions on liability for harm from GMOs. The standard tort provision in the Civil Code, therefore, applies. There is no threshold value for determining whether harm has been caused by GMOs. Instead, a preventive approach is taken in which it is assessed whether activities involving the use of GMOs are permitted.

Interface between the existing national liability regimes and the ELD regime

There are two major overlaps between Title 17.2 of the Wm and existing national law; they involve Title 17.1 of the Wm and the SPA.

As noted above, Title 17.1 of the Wm requires unusual incidents inside an establishment to be reported, and also requires the operator of the establishment to take measures to prevent, mitigate and remedy damage. Title 17.2 of the Wm, as transposed by the ELD, relates to incidents that occur outside as well as inside a Wm installation if they involve environmental damage from an unusual incident. Title 17.2, however, provides the competent authority with broader powers than those provided under Title 17.1. The Guidelines (see section 3 below), which are not legally binding, state that as long as it is unclear whether the thresholds for either Title 17.1 or Title 17.2 have been breached, Title 17.1 applies. If the competent authority decides that the threshold for Title 17.2 is exceeded, the authority should base further action on Title 17.2 as well as Title 17.1 (Guidelines, p. 70, chapter 8).

The SPA can apply inside as well as outside a Wm establishment. The Guidelines state that there is considerable overlap between the SPA and Title 17.2 of the Wm but do not state which should be applied. Section 22 of the Explanatory Memorandum explains the relationship between the two laws (see the reference to the Explanatory Memorandum in section 3 below).

The Guidelines state that Title 17.2 provides for compulsory cost recovery by competent authorities, noting that the SPA is not limited to professional operational activities (Guidelines, p. 71, chapter 8).

---

105 See Jan Jans, GMO Regulation in the Netherlands, Avosetta meeting, Siena (September 2006);
106 See Guidelines for Part 17.2 of the Dutch Environmental Management Act: measures in the event of environmental damage or its imminent threat, p. 35, chapter 2, section 2).
3. **Integration of the ELD into existing national legislation**

- **Transposing legislation**

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


- **Amendments to existing national legislation**

The Environmental Liability Act amended the Wm by adding a new Title 17.2, consisting of articles 17.6 to 17.18. The Act also inserted articles 18.2g into the Wm as well as article 17.7 of Title 17.2 after 16.53(2) in article 21.6(4). Further, the Environmental Liability Act amended the Economic Offences Act to provide that it applies to specified breaches of Title 17.2.

- **Authorisation in legislation for other governmental entities to issue rules and regulations**

Article 17.7(a)(ii) of Title 17.2 authorises the issuance of a general administrative order to extend activities subject to Annex III of the ELD; and, thus, to extend strict liability to such activities. Such a general administrative order has not been issued.

- **Relationship to other legislation**

As noted above, legislation such as the 1994 General Administrative Law Act and Economic Offences Act apply to Title 17.2 of the Wm.

- **Guidance and other documentation**

The following guidance is available: 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](http://ec.europa.eu/environment/legal/liability/eld_guidance.htm) and [www.infomil.nl](http://www.infomil.nl) (search for Handreiking milieuschade (in Dutch) (Guidelines).

The Guidelines set out an “Action plan for competent authorities when applying Title 17.2 of the Environmental Management Act”.

Appendix A of the Guidelines has links to the text of Title 17.2 of the Wm and the Explanatory Memorandum to the draft parliamentary bill, both of which are available only in Dutch.

4. **Effective date of national legislation**

1 June 2008

---

107 No 30 920, Voorstel van wet tot wijziging van de Wet milieubeheer in verband met de implementatie van richtlijn nr. 2004/35/EG (milieuaansprakelijkheid).
The Guidelines state that ELD incidents that have occurred since 30 April 2007 should be included in the report by the Netherlands to the European Commission under article 18 of the ELD (Guidelines, p. 61, chapter 5).

5. Competent authority(ies)

The competent authorities are national, provincial and municipal bodies and water boards. The identity of a competent authority concerned in a particular imminent threat of, or actual, environmental damage depends on whether:

- The activity results in an imminent threat of, or actual, environmental damage that is “carried out at a plant or in connection with setting up, modifying or operating at plant” (usually the council of the relevant local authority unless the Environmental Management Installations and Permit Order designates the Provincial Executive, the Minister for Infrastructure and the Environment or the Minister for Economic Affairs);

- The activity results in an imminent threat of, or actual, environmental damage that relates wholly or principally to waters (whether or not the activity is carried out at a plant or in connection with its establishment, modification or operations) (Minister for Infrastructure and the Environment for national waters; relevant water board for regional waters);

- The activity results in an imminent threat of, or actual, environmental damage that “is carried out outside the confines of a plant” and relates to land (several competent authorities may be involved);

- The activity results in an imminent threat of, or actual, environmental damage that “is carried out outside the confines of a plant” and relates to protected species (Minister of Agriculture, Nature and Food Quality);

- The activity results in an imminent threat of, or actual, environmental damage that “is carried out outside the confines of a plant” and relates to natural habitats;

- The activity results in an imminent threat of, or actual, environmental damage that “is carried out outside the confines of a plant” and relates to waters (Minister for Infrastructure and the Environment).

\[108\] The Minister for Housing, Spatial Planning and the Environment was the competent authority when Title 17.2 of the Wm was enacted. On 14 October 2010, the Ministry for Housing, Spatial Planning and the Environment was merged with the Ministry of Transport, Public Works and Water Management. The new Ministry is the Ministry of Infrastructure and the Environment.
Environment for national waters; relevant water authority for regional waters); and

- The activity results in an imminent threat of, or actual, environmental damage that “is carried out outside the confines of a plant” and relates to genetically modified organisms (GMOs) regardless of the location of activity or the environmental media affected by it (Minister of Infrastructure and the Environment) (article 17.9).

More than one management body may be designated as the competent authority in respect of an imminent threat of, or actual, environmental damage (see section 20 below).

6. Operators and other liable persons

The definition of an operator of the same as the ELD.

- Secondary liability (e.g., parent company)

Title 17.2 of the Wm does not mention secondary liability. However, case law under the General Administrative Law Act (Algemene wet bestuursrecht (Awb)) may apply to this issue.

- Death or dissolution of responsible operator

Title 17.2 of the Wm does not mention the death or dissolution of a responsible operator.

- Person other than an operator who may be liable

Only the operator may be liable under Title 17.2 of the Wm. However, case law under the General Administrative Law Act indicates that, under certain conditions, persons other than the operator may be held liable.

7. Annex III legislation

- Rebuttable presumption that operator’s activity caused environmental damage

Title 17.2 of the Wm does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

- Additional occupational activities subject to strict liability

Title 17.2 of the Wm includes a provision for “other activities as set out in a general administrative order” in addition to Annex III activities. No such order has been issued. Thus, the Annex III activities in the Netherlands are the same as under Annex III of the ELD.

- Spreading of sewage sludge for agricultural purposes

The spreading of sewage sludge for agricultural purposes is not exempted from Annex III.

8. Standard of liability for non-Annex III activities

The standard of liability for non-Annex III activities tends to be fault or negligence.
The Guidelines state that intent does not necessarily have to exist and that “the concept of liability based on fault requires the [operator] to have acted in a way deserving condemnation. [Fault of negligence exists if,] for example ... the [operator] took inadequate precautionary measures to prevent the damage, or the damage was due to carelessness on the part of its employees” (Guidelines, p. 23, chapter 4).

9. Exceptions

- Application to imminent threat of environmental damage as well as environmental damage

The exceptions apply to an imminent threat of, and actual, environmental damage.

- Differences with exceptions in the ELD

The exceptions are the same as those in the ELD.

In respect of the exception for “a natural phenomenon of exceptional, inevitable and irresistible character” (article 17.8(a)(ii)), the Guidelines state that liability exists “for damage caused by lightning, a normal storm, heavy rain, etc., but not in the case of a massive flood for example” (Guidelines, p. 32, section 1.3).

- Diffuse pollution exception

Title 17.2 of the Wm does not include an exception for diffuse pollution.

10. Joint and several or proportionate liability

Title 17.2 of the Wm does not mention joint and several or proportionate liability.

Chapter 5 of the General Administrative Law Act sets out provisions on administrative enforcement; these rules and the case law that interprets this chapter are, therefore, relevant. The rules and case law do not rule out joint and several liability. The key issue is the identity of the administrative offender(s).

- Mechanism for contribution between liable operators

Title 17.2 of the Wm does not specify a mechanism for contribution between liable operators. However, case law under the General Administrative Law Act may be relevant.

11. Limitation period

The limitation period is 30 years, the same as the ELD.

12. Defences

- Defences to liability or costs?

The defences of third party action despite appropriate measures and compliance with a compulsory order from a management body are all defences to costs.
Further, the permit defence and the state-of-the-art defences are also defences to costs but only after passing a reasonability check (see Explanatory Memorandum, section 11 (cost recovery)).

If defences to liability; suspension (or not) of remediation notice during appeal

Title 17.2 of the Wm does not mention the suspension (or not) of a remediation notice during an appeal. General Administrative Law Act governs administrative procedures and provides for the suspension of summary proceedings in certain circumstances.

Permit defence

The Netherlands has adopted the permit defence to a limited extent. Article 17.16(4), however, 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 mentions “exceptional circumstances” as being unreasonable.” Case law shows that exceptions to the recovery of costs are narrow. In respect of ELD incidents, the Guidelines note that the size of the costs cannot be a factor because considering the size would breach the polluter pays principle. They thus state that the risk of insolvency and possible loss of employment of the operator may not be considered in determining whether the defence applies (Guidelines, p. 60, chapter 4, section 4.4).

The reasonableness test does not permit a competent authority to waive any costs except the costs of remedial measures. That is, the test does not apply to administrative or legal costs or other costs under Title 17.2 of the Wm (Guidelines, p. 59, chapter 4, section 4.4).

State-of-the-art defence

The Netherlands has adopted the state-of-the-art defence to a limited extent. As with the permit defence, the state-of-the-art defence includes the phrase “in so far as [the costs] cannot, in whole or in part, be reasonably attributed to the operator” (article 17.16(4). 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 objective level of science and technology at the time of the activity, emission or event is the relevant issue (Guidelines, p. 58, chapter 4, section 4.4).

The discussion above, under permit defence, as to reasonableness factors also applies to its application to the state-of-the-art defence.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
  - 13.82%
- Extension of biodiversity to nationally protected biodiversity

The Netherlands has not extended biodiversity under the ELD to nationally protected biodiversity.

- Biodiversity damage in the exclusive economic zone

The Netherlands established an exclusive economic zone in 2000 for which it has claimed the right to exploit natural resources, including oil and gas. Biodiversity damage under the ELD therefore extends to that zone.

- Water or water body

Damage must be to a water body to be covered by the legislation transposing the ELD. The Guidelines note that the ELD “refers to ‘damage … of the waters concerned …’ and not to damage to bodies of water, but it does embody the idea of ‘status’ from the [Water Framework Directive]”. The Guidelines further note that “Underlying the Dutch legislation for implementing the objectives of the [Water Framework Directive] is the assumption that they apply only to surface waters, which are designated as bodies of water by [the Water Framework Directive]. Relatively small waters, such as polder canals, are often not designated as bodies of water” (Guidelines, p. 41, chapter 2, II).

The Guidance recommends ascertaining the status before the damage occurred by reference to monitoring and other data from the relevant water board.

14. **Thresholds**

- Water damage

The Guidelines set out detailed criteria for determining when the threshold for water under the ELD is exceeded (Guidelines, pp. 40-45, chapter 2, II). They state, among other things, that if the objectives in Dutch legislation concerning surface water bodies are stricter than those in the Water Framework Directive, they take precedence (Guidelines, p. 42, chapter 2, II).

- Biodiversity damage

The Guidelines set out detailed criteria for determining when the threshold for biodiversity under the ELD is exceeded (Guidelines, pp. 45-52, chapter 2, III).

The Guidelines recognise, among other things, the difference between the damage threshold under the ELD and the evaluation of reasons for granting a permit or exception under the 1998 Nature Conservancy Act (which has a nearly identical definition of favourable conservation status as the Habitats Directive) and the Flora and Fauna Act.
The Guidelines state that “The concept of significant adverse effect from the perspective of environmental liability has a different character than that of significant consequence in the 1998 Nature Conservancy Act and that of substantial influence in the Flora and Fauna Act”; this means that significance under the ELD regime must be decided on a case-by-case basis. That is, “significant consequence … relates to the conservation objective and not the baseline condition. Impeding improvement is considered damage from the standpoint of the Nature Conservancy Act, but not as regards environmental liability” (Guidelines, p. 52, chapter 2, III, Step 5).

- National biodiversity damage

National biodiversity damage is not covered by Title 17.2 of the Wm.

- Land damage

The threshold for land damage under Title 17.2 of the Wm is higher than it is under the SPA. As indicated above, however, it is highly likely that the SPA will continue to be applied to the prevention and remediation of contaminated land instead of Title 17.2 of the Wm.

15. **Standard of remediation**

- Land

The SPA sets out specific standards of remediation for contaminated land. As a general rule, contamination that has occurred since 30 April 2007 (when the ELD applies) must be removed (see section 14, Land damage, stating that Title 17.2 of the Wm will probably not be applied to land damage).

  - Biodiversity

    - Primary remediation

    The standard of remediation for biodiversity damage in Title 17.2 of the Wm is the same as the ELD.

    - Complementary and compensatory remediation

    The same criteria for complementary and compensatory remediation for biodiversity damage under the ELD apply.

- Water

  - Primary remediation

  The standard of remediation for water damage under Title 17.2 of the Wm is the same as the ELD.

  - Complementary and compensatory remediation

  The same criteria for complementary and compensatory remediation for water damage under the ELD apply.
16. **Format of determination of environmental damage**

Title 17.2 of the Wm does not specify a particular format for a determination of environmental damage. The Guidance does, however, describe an approach for each type of environmental damage.

17. **Powers and duties of competent authority**

- **Inspections, investigations, studies and analyses**
  
  Title 17.2 of the Wm does not provide for inspections, investigations, studies and analyses. Such powers and obligations, which apply to Title 17.2 as well as to other provisions of the Wm, are contained in other laws such as the General Administrative Law Act.

- **Information orders**
  
  The competent authority may require an operator to provide information of an imminent threat of environmental damage or a suspected case of an imminent threat. The competent authority may also require the operator to provide supplementary information on any environmental damage.

- **Power or duty to require an operator to carry out preventive measures**
  
  Title 17.2 of the Wm is confusing as to whether a competent authority has the power or a duty to require an operator to carry out preventive measures.

  Article 17.10(1)(c) of Title 17.2 provides that the competent authority may require an operator to carry out necessary preventive measures.

  Article 17.12(4) provides that the competent authority "shall require the operator to take the necessary measures [including preventive measures] without delay".

- **Power or duty to require an operator to carry out remedial actions**
  
  Title 17.2 of the Wm is also confusing as to whether a competent authority has the power or a duty to require an operator to carry out remedial measures.

  Article 17.10(1)(c) of Title 17.2 provides that the competent authority may require an operator to carry out preventive measures.

  Article 17.12(4) provides that the competent authority "shall require the operator to take the necessary measures [including emergency remedial actions] without delay".

  The competent authority may also require the operator to comply with instructions from the authority.

- **Power or duty of competent authority to carry out preventive measures**
  
  The competent authority may carry out preventive measures (article 17.10(2)). This power is not limited to situations when the operator fails to do so. The Guidelines provide the examples of failing to identify the operator, the operator failing to take preventive measures or carrying them out unsatisfactorily, or in an emergency. The competent authority must issue a ruling to justify measures taken by it and also if it takes such measures when the operator cannot be identified (Guidelines, p. 11, II, Step 6).
The competent authority may also require third parties to carry out preventive measures.

- **Power or duty of competent authority to carry out remedial measures**

The competent authority may carry out remedial measures. The competent authority may do so “at all times, irrespective of whether the [operator] takes measures” but must justify the measures by making a ruling (Guidelines, p. 12, III, Step 8).

- **Form of preventive order**

Title 17.2 of the Wm states only that a preventive order should be in writing and that the decision of the competent authority is a ruling which shall be notified to the relevant management body or public authority. More detailed rules are included in the General Administrative Law Act.

- **Form of remediation order**

Title 17.2 of the Wm provides only that a remediation order should be in writing and that the decision of the competent authority is a ruling which shall be notified to the relevant management body or public authority.

The procedure for issuing a remediation notice is as follows. The competent authority shall require the operator to identify potential remedial measures in accordance with Annex II of the ELD (the common framework for remediying environmental damage) and submit them to the authority (article 17.3(6)). The competent authority shall then decide on the remedial measures to be carried out by the operator, with reference to Annex II of the ELD. The competent authority may also require the operator to submit an assessment of the damage in, or following, its request for potential remedial measures (article 17.14(4)).

- **Appeal against preventive or remediation order**

The 1994 General Administrative Law Act applies to appeals against preventive and remediation orders / decisions. The person on whom an order is served may lodge an objection with the relevant competent authority no later than six weeks after the decision was made.

- **Sanctions for delay in complying with preventive or remediation order**

There are no specific sanctions for failing to comply with a preventive or remediation order. However, these are included in the General Administrative Law Act. See further section 23 on offences and sanctions below.

- **Formal consultees on contents of preventive and remediation orders**

Title 17.2 of the Wm does not specify formal consultees on the contents of preventive and remediation orders. It does, however, specify public authorities that can make comments (see section 20 below). In addition, according to the General Administrative Law Act, every person with a sufficient interest has the option to bring an action against the public authorities, thus providing an opportunity to comment on these orders.

- **Recovery of implementation and enforcement costs**

The definition of costs in Title 17.2 is the same as that in the ELD.
In addition, the Guidelines state that a competent authority is entitled to recover any compensation paid to the owner of third-party land for the inconvenience suffered by the owner (Guidelines, p. 14, IV, Step 10; see section 19 below).

- Deadline for competent authority to seek recovery of costs

The right to recover costs is limited to five years from the date on which the measures were completed, or the date on which the operator who caused the damage or created an imminent threat of damage was identified if that date is later.

18. **Duties of responsible operators**

   - Preventive measures
   
   The operator has a duty to carry out the necessary preventive measures without delay if there is an imminent threat of environmental damage.

   - Remedial actions (emergency actions)
   
   The operator has a duty to carry out emergency remedial actions without delay.

   - Remedial measures
   
   The operator has a duty to carry out remedial measures.

   - Duty to notify / provide information when imminent threat of environmental damage occurs
   
   The operator must notify the competent authority “of all relevant aspects of the situation as soon as possible” if there is an imminent threat of environmental damage. If the imminent threat is not dispelled despite such measures, the operator shall provide supplementary information on the situation. The competent authority shall then notify the relevant management body or public authority without delay.

   - Entity to which notification should be provided
   
   The relevant competent authority should be notified (see this section above).

19. **Access to third-party land to comply with the ELD**

   The owner or occupier of land on which an activity that caused an imminent threat of, or actual, environmental damage, or land affected by it, must consent to preventive or remedial measures being carried out on it. Providing such access is without prejudice to rights to financial compensation (article 17.11; Guidelines, pp. 11-12, II, Step 6; p. 13, III, Step 8; p 14, III, Step 9).

20. **Interested parties**

   Article 17.12(5) of Title 17.2 refers to person with a sufficient interest, such as NGOs, management bodies and public authorities as “interested parties” (see this section, Qualification criteria for “sufficient interest” directly below). It further states that they shall “have an opportunity to express their views and opinion without regard to [the competent authority requiring the operator to take the necessary measures without delay”. If “the situation is so
urgent that it is not possible to wait for their views or opinion", the competent authority is not required to seek their views and opinion.

In making a decision concerning the necessary measures to be adopted by the operator, the competent authority shall refer to the management bodies’ and public authorities’ views and opinion. The competent authority shall also notify the management bodies or public authorities of its decision.

If it is necessary to do so to protect the environment and if the competent authority in respect of an imminent threat of, or actual, environmental damage is the provincial executive, the mayor and aldermen or the executive committee of a water board, the Minister may require the relevant management board to reach a decision within a time set by the Minister on:

- taking preventive, emergency remedial actions, or remedial measures;
- establishing the identity of a responsible operator;
- the competent authority taking preventive, emergency remedial actions, or remedial measures itself; and
- a determination of remedial measures to be taken by an operator following a determining of environmental damage.

Qualification criteria for “sufficient interest”

Title 17.2 does not specify qualification criteria for “sufficient interest”. It simply states that “interested parties … may request the competent authority to issue a ruling for action to be taken", that is, requiring an operator to take preventive, emergency action and remedial measures (article 17.15(1)).

The 1994 General Administrative Law Act defines an “interested party” as:

- a person whose interests are directly affected by a decision;
- interests of administrative authorities, which are deemed to be their interests; and
- “the interests of legal entities are deemed to include the general and collective interest which they particularly represent pursuant to their objects and as evidenced by their actual activities”.

The above definition means that an environmental NGO, among others, may bring an application for judicial review in a Dutch court provided that its interests are affected. The

---

interests must not be defined too widely or too narrowly. A local NGO may only seek judicial review if local interests are affected.\textsuperscript{111}

- Method of notifying interested parties of planned remedial measures

Title 17.2 does not specify a method for notifying interested parties of planned remedial measures. However, the General Administrative Law Act does.

- Information to be provided to competent authority

Title 17.2 does not specify the information to be provided to a competent authority. It does, however, provide that the competent authority need not respond if insufficient data is provided (see this section below).

- Challenges to competent authority’s decision

The 1994 Administrative Law Act applies to an interested party’s challenge to the competent authority’s decision.

An interested party may lodge an appeal with the relevant competent authority and, if it has done so, may also apply to the Present of the Administrative Law Division of the Council of State for a preliminary injunction, within six weeks following the date on which the authority announced its decision.

- Duty on competent authority to respond to person making comments

The competent authority must issue a ruling on comments / observations that have been submitted to it. The ruling must be supported by reasons. If insufficient data is provided, the competent authority does not need to consider the comments / observations (Guidelines, p. 10, I, Step 4).

If more than one competent authority is involved, they must co-ordinate their handling of comments / observations and must take into account the inter-relationships between their individual rulings (article 17.9.6).

- Inclusion of interested party in any proceedings by the competent authority against an operator

Title 17.2 of the Wm does not provide for an interested party to be included in proceedings by the competent authority against an operator.

However, article 6:162 et seq. of the Dutch Civil Code provides that an interested party may bring a civil law action directly against an operator.

21. **Public access to information regarding environmental damage and related measures**

Title 17.2 of the Wm does not mention public access to information regarding environmental damage and related measures.

As with other Member States, Directive (2003/4/EC) on access to environmental information applies.

22. **Charges on land / financial security after environmental damage**

Title 17.2 of the Wm does not mention charges on land or financial security after environmental damage has occurred.

23. **Offences and sanctions**

The Economic Offences Act applies to the following offences under Title 17.2 of the Wm:

- The failure to take necessary preventive actions without delay;
- The failure to take emergency remedial actions without delay;
- The failure to allow preventive and remedial measures to be taken on third party land;
- The failure to notify the competent authority of an imminent threat of environmental damage as soon as possible or to provide supplementary information if the threat is not dispelled; and
- The failure to notify the competent authority of environmental damage as soon as possible; the failure to identify potential remedial measures and submit them to the competent authority for approval.

The Guidelines set out the penalty payment orders that may be imposed under Section 32 of Book 5 of the General Administrative Law Act (Guidelines, p. 67, chapter 7, section 7.1). They also set out offences concerning breaches of Title 17.2 of the Wm that fall under the Economic Offences Act, stating whether they are misdemeanours or crimes (Guidelines, p. 68, chapter 7, section 7.1).

- Directors and officers liability for breaching legislation

Title 17.2 of the Wm does not specify whether directors and officers may be liable for breaching the ELD regime.

- Publication of penalties

Title 17.2 of the Wm does not mention the publication of penalties.
24. **Registers or data bases of incidents**

Title 17.2 of the Wm requires competent authorities to submit data to the Minister for Infrastructure and the Environment for each incident of environmental damage and liability. There is a pro forma for submitting this data (see Guidelines, p. 15, V, Step 11).

25. **Cross border damage in another Member State**

The competent authority must inform the Minister of Infrastructure and the Environment if environmental damage has occurred or could occur outside Dutch territory. If the Minister receives such information, the Minister shall inform that government of the affected country or an authority or body designated by that government.

26. **Financial security**

Title 17.2 of the Wm does not require financial security for the ELD regime.

The Financial Security Decree previously authorised a competent authority to require an operator to have evidence of financial security to ensure compliance with the terms and conditions of a permit to manage or store waste provided these activities were carried out at an establishment in category 28 of the Environmental Management Installations and Permit Order as well as other establishments that had storage capacity of at least 10 cubic metres of hazardous waste, the cost of which was more than €10,000.

In 2010, the Dutch Government withdrew the Decree. Provisions for mandatory financial security do, however, continue to exist in more specific legislation. For example, such a provision exists in respect of selling contaminated land (article 55b(3), SPA).

27. **Establishment of a fund**

The Environmental Liability Act did not establish a fund.

28. **Reports**

Title 17.2 of the Wm simply states that the competent authority shall provide the Minister with information to enable the Minister to comply with the requirements for the Netherlands to submit a report to the European Commission under article 18 of the ELD.

Competent authorities are to report ELD incidents that have occurred since 30 April 2007, and should provide details of incidents once a year before 1 February (Guidelines, pp. 61-62, chapter 5).

Title 17.2 of the Wm does not provide for further reports on the ELD regime.

---

29. **Information to be made public**

Title 17.2 of the Wm does not specifically require information to be made public.

As in other Member States, Directive (2003/4/EC) on access to environmental information applies.

30. **Provisions concerning genetically modified organisms**

Title 17.2 of the Wm does not mention GMOs other than as indicated in Annex III of the ELD.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

When the ELD was transposed into Dutch law, existing law already imposed liability for preventing and remediating damage to soil, surface water, groundwater and, to a lesser extent, biodiversity (see section 2).

The legislation imposing liability for investigating, preventing and remediating contaminated land was particularly well developed. Liability imposed by the legislation depends on the time at which the pollution incidents that resulted in contamination occurred. Liability and the standard of remediation are less stringent for more historic incidents.

The person who carries out activities on or after 1 January 1987 has a duty to take all reasonable measures to prevent contamination if the person knows or might reasonably have suspected that the activities may cause soil to become contaminated. If contamination nevertheless occurs, the person who carries out the activities must remediate the contamination.

The owner or lessee of contaminated land may also be liable for investigating and remediating contamination that occurred on or after 1 January 1987 provided that the contamination poses a risk to human health or the environment. The owner or lessee has a defence to such liability if it shows that: (1) the contamination was caused by an unrelated third party and the owner or occupier was not directly or indirectly involved in the activity that caused the contamination, or (2) when the owner or lessee acquired the freehold or leasehold of the site, it did not know or should not have known of the contamination or, on January 1987, the owner or lessee and its successors in title satisfied condition (1) above.

The Dutch Government stated that due to existing legislation being more stringent that the legislation transposing the ELD, including a lower threshold for land contamination in the existing legislation, it anticipates, in respect of land damage, that it will enforce existing legislation rather than the legislation transposing the ELD.

The existing legislation imposing liability for remediating water pollution and preventing and restoring environmental damage continues in force. This legislation is less stringent that the legislation transposing the ELD.
Implementation challenges and obstacles of the Environmental Liability Directive
1. **Existing national environmental legislation**

In transposing the ELD, the Polish Government decided to adopt new legislation as well as, to a limited extent, amend several pieces of existing legislation. In some cases, the Government adopted more stringent provisions than those in the ELD, mainly in order to reflect existing law. For example, the ELD transposing legislation did not adopt the definition of an “operator” under the ELD but, instead, defines an operator more broadly as an entity that uses the environment (see sections 2 and 6 below); the definition that already existed under the Environmental Protection Law Act of 27 April 2001 (EPLA). Further, the Polish Government did not adopt the ELD threshold for land damage of a significant risk of an adverse effect on human health but, instead adopted a lower threshold that reflects existing law (although a Bill has been introduced to increase this threshold under the ELD transposing legislation – see section 15 below).

Further, in addition to supplementing existing national legislation, the legislation that transposed the ELD repealed articles 102-108 of the EPLA in respect of the remediation of soil and subsoil damaged after 30 April 2007. After that date, the transposing legislation applies instead of articles 102-108 (see below). As discussed in section 2 below, other existing legislation continues to apply when the legislation transposing the ELD does not apply.

2. **Existing regimes for preventing and remediating environmental damage**

When Poland transposed the ELD, it already had liability systems for preventing and remediating contaminated land as well as damage to Natura 2000 sites. In addition, article 362 of the EPLA applied (and still applies) to the remediation of environmental damage (including soil and subsoil contamination, water pollution, and damage to fauna and flora), when more specific legislation did not apply. Article 362 applied (and continues to apply) only if more specific legislation did not apply, that is, it was (and still is) applied “as a last resort”. Accordingly, article 362 applies, for example, to land and water damage that is not caused by an activity under Annex III of the ELD.

Article 362 is very general, both in its application and its scope. It imposes liability on a “user of the environment” who has caused a “negative impact on the environment”. The term “user of the environment” is particularly broad. It means any person who “uses” the environment regardless, among other things, of whether that person owns or occupies land.

Article 362 authorises a competent authority (the Starost (head of a district (powiat)) or the Marshall of the Voivodship (head of the self-governmental regional administration)) to issue a decision to require a user of the environment, to “limit its impact on the environment” and to restore the environment to its condition before the negative impact occurred.

---

113 See judgment of the Regional Administrative Court in Warsaw of 26 October 2007; IV SA/Wa 1694/07).
The "environment" to which article 362 applies is broad. As indicated above, it includes, but is not limited to, surface, coastal and ground water, fauna and flora and, when articles 102-108 of the EPLA do not apply, to soil and subsoil.

Article 362 does not specify a threshold for a “negative impact” on the environment. Neither does it specify the types of preventive or remedial measures that the user of the environment must carry out. Nor, indeed, does it authorise a competent authority to specify such measures in a decision; instead, the administrative decision may indicate only the result to be achieved and the deadline for its achievement. 114

Water pollution

Prior to the legislation transposing the ELD, competent authorities in Poland applied article 362 of the EPLA (described above) to water pollution. There was no specific administrative legislation concerning the remediation of water pollution.

Article 362 continues to apply to water pollution that is below the threshold of the ELD. In this respect, it continues to authorise a competent authority, among other things, to issue an administrative decision on a user of the environment who negatively impacts surface, coastal or ground water. The decision may include, among other things, removing the pollution from the water and restoring any flora and fauna that depend on the aquatic environment to their condition prior to the pollution, including restocking fish.

The regime for water pollution under article 362 of the EPLA differs from the ELD (and its transposing legislation) in many respects including the following:

- The EPLA does not impose liability for complementary or compensatory remediation;
- The EPLA does not provide any details on the meaning of a "negative impact on the environment" (there are no criteria how to assess this impact), nor are there any guidelines on how to determine the obligations of the liable person (i.e., how to determine the means of restoring the environment);
- The EPLA does not limit liability for preventing and remediating water pollution to specified activities; whereas the transposing legislation limits strict liability to activities in Annex III; and
- There are no specific provisions in the EPLA that allow any person to notify the competent authority about the damage (negative impact on the environment). However, according to general rules in the Administrative Procedure Code and the jurisprudence 115, "interested parties" (mainly neighbours) have a right to participate in the decision-making proceedings.

---

114 See Judgment of the Regional Administrative Court in Warsaw of 1 February 2005; IV SA/Wa 11/04.

115 See judgment of the Supreme Administrative Court of 15 September 2009; II OSK 1357/08.
Poland also had (and still has) other legislation that applies to water pollution prior to transposition of the ELD.

Articles 186-188 of the Water Law Act of 18 July 2001 authorise a third party to bring a claim for financial compensation (damages) against a person who causes damage to water. The Act is somewhat of a hybrid in that it provides for the administrative authority to set the amount of financial compensation to be awarded to the third party. If the third party does not agree, it may appeal the authority’s decision to the civil court. The Water Law Act is, however, civil, not administrative, liability legislation. It does not require the person who caused the damage to remediate it.

Further, article 162 of the Water Law Act authorises a competent authority to “summon” the holder of a permit for the use of water (i.e., for discharging wastewater into water, for drawing water, etc.) to “remove its neglect in water management” if that neglect may cause danger to human health. If the neglect is continuing, the authority may require the permit holder to cease carrying out the activity (use of water). This provision, however, does not require the restoration of the environment to its previous condition.

Land contamination

Articles 102-108 of the EPLA impose 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 in the Register of Land and Buildings is another entity, on that entity) regardless of whether the owner caused the contamination or carried out any activities on the land. The remedial works to be carried out by the liable person are set out in an administrative decision issued by the relevant competent authority. The Ordinance on soil quality standards, which came into force on 18 October 2002, established the standards for determining whether soil and subsoil are contaminated. The standards differ according to whether the land is protected areas, industrial areas (including roads, etc) and other areas. The standards are considered to be quite strict. Liability has also been imposed under the EPLA in one case on a company that contaminated groundwater, although that decision is controversial.

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. In such a case, the results of the risk assessment instead of the soil quality standards apply.

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, liability for remediating the contamination is transferred to that person provided the owner/title holder did not consent to, or know about, the contamination when it occurred. In order for the current owner/title owner to avoid liability, it must notify the competent authority of the environmental damage immediately after learning about it.

If the owner/title holder succeeds in proving that another person caused the contamination, the competent authority remediates the land and seeks the recovery of its costs from the person who contaminated the land. The competent authority cannot require the person who caused the contamination to carry out the remedial actions. In such a case, the person who contaminated
the land has no legal title to the land and, therefore, no right to access it to carry out any activities on it.

If the contamination by the other person occurred with the owner/title holder’s consent or knowledge, both parties are jointly and severally liable for its remediation.

If contaminants migrate from contaminated land to a third party’s land, the third party may bring an action against the owner/title holder of the contaminated land for the costs incurred by it in remediating it. Such an action, however, is based on the general rules of civil law and is brought before the civil court. The reimbursement of such costs is not regulated by the EPLA nor by any other environmental administrative provisions because it concerns a third party claim under civil law and not a requirement to remediate under administrative law.

The third party to whose land the contaminants have migrated may also bring an action against the owner/title holder of the contaminated land to require the owner/title holder to carry out measures to prevent the continued migration of contaminants. However, such an action is also based on the general rules of civil law and is brought before the civil court. As above, it is a third-party civil claim and not environmental administrative law.

A person who has sold contaminated land may be liable to the person who purchased the land due to having sold the land with a defect (a term that includes contamination), provided that the purchaser did not know that the land was contaminated when it purchased it. Again, however, such liability is based on the general rules of civil law and is brought before the civil court; it does not entail environmental administrative law.

The regime for remediating contaminated land, described above, focuses on the remediation of historic contamination (i.e. caused prior to 30 April 2007). As also described above, article 362 of the EPLA imposes liability on a user of the environment who negatively impacts on the environment to reduce its impact or to restore the environment to its former condition. A negative impact on the environment includes the contamination of soil and subsoil. However, for historic contamination, articles 102-108 of the EPLA and not article 362 of the EPLA applied. In respect of contamination caused after 30 April 2007, the ELD transposing legislation applies provided that the contamination is caused by an operation listed in Annex III of the ELD (as transposed into Polish law) and also provided that exceptions do not apply. If the ELD transposing legislation does not apply, article 362 continues to apply.\(^{116}\)

The regime for remediating contaminated land under articles 102-108 of the EPLA differs from the ELD (and its transposing legislation) in many respects including the following:

- The current owner/title holder of the contaminated land is liable for remediating contamination under the EPLA caused prior to 30 April 2007 but can avoid liability by proving that the person who contaminated the land after the owner/title holder possessed the land did so without the owner/title holder’s consent or knowledge;

---

\(^{116}\) See Supreme Administrative Court of Poland, order of 20 January 2012; II OW 97/11 (concluding that even though ELD regime did not apply to a release of hydrocarbons from the fuel tank of a vehicle carrying dairy produce, article 362 of the EPLA could still apply).
The ELD regime applies to land contamination only if activities in Annex III of the ELD cause the contamination; articles 102-108 applied (and continue to apply in respect of damage caused after 30 April 2007) to contamination irrespective of the operation that caused it; and

There are no specific provisions in the EPLA that allow any person to notify the competent authority about the damage (negative impact on the environment). However, according to the general rules of the Administrative Procedure Code and the jurisprudence, “interested parties” (mainly neighbours) have a right to participate in the decision-making proceedings.

Restoring biodiversity damage

Prior to the legislation transposing the ELD, Poland had legislation applying to biodiversity damage. Article 37 of the Natura Protection Act of 16 April 2004 applied to damage to Natura 2000 sites. In addition, article 362 of the EPLA applied to damage to areas and species protected under national law.

Article 37 of the Nature Protection Act authorises a competent authority (the regional director for environmental protection) to issue a decision to require a person whose activity may significantly affect a Natura 2000 site to cease carrying out the activity and to restore the site to its baseline condition before the damage. As with other Member States, this provision does not apply to activities that are expressly authorised under articles 6.3 to 6.4 of the Habitats Directive.

Article 37 of the Nature Protection Act continues to apply to damage to Natura 2000 sites as does the legislation transposing the ELD. The relationship between the two pieces of legislation should be clarified when the Bill to amend the transposing legislation is enacted. At that time, the transposing legislation will have priority to article 37.

The legal situation after the Bill is enacted into law will result in the following:

- The transposing legislation will apply to biodiversity damage under the ELD;
- Article 37 of the Nature Protection Act will apply to any damage to a Natura 2000 site to which the transposing legislation does not apply (although such instances are likely to be rare if they exist at all); and
- Article 362 of the EPLA will apply to all other biodiversity damage.

Other liability systems for remediating environmental damage

In addition to the legislation described above, existing environmental legislation in Poland includes the following, with the caveat that the following are civil (not administrative) law provisions:

---

117 See judgment of the Supreme Administrative Court of 15 September 2009; II OSK 1357/08.
According to article 323 of EPLA, environmental organisations (but not every member of the public), as well as the State Treasury and units of local/regional administrations are entitled to file a civil lawsuit against any person or entity that is causing (or is likely to cause) damage by exerting an unlawful impact on the environment. Such lawsuits may demand either restoration of the situation to bring it to compliance with the law or undertaking relevant preventive measures. In cases of activity carried out by any industrial plant, strict liability applies. For any other activity, fault based liability applies.

Article 326 of the EPLA authorises a person, including the relevant competent authority, that remediates environmental damage to claim compensation for the reasonable costs of such remediation; and

Article 57 of the Act on Genetically Modified Organisms of 22 June 2001 imposes strict liability on a person who carries out the contained use of genetically modified organisms (GMOs) or their direct release if the GMOs harm persons, property or the environment. If the environment as a public good (common good) is damaged, the State Treasury and qualified environmental organisations (see section 20 below) may remediate the damage and claim compensation from the person who harmed it.

Interface between the existing national liability regimes and the ELD regime

There are vastly more incidents of environmental damage under the ELD in Poland than in any other Member State. In 2009, the regional directors for environmental protection received 275 notifications for an imminent threat of, or actual, environmental damage. They required operators to carry out preventive or remedial measures in 84 cases, which consisted of 46 land damage cases, 13 land and water damage cases, three water damage cases, and 21 biodiversity cases.\(^{118}\)

In 2010, the regional directors received 364 notifications for an imminent threat of, or actual, environmental damage. They required operators to carry out preventive or remedial measures in 65 cases, which consisted of 33 land damage cases, 18 land and water damage cases, three water damage cases, and 11 biodiversity damage cases.\(^{119}\)

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

\(^{118}\) The regional directors decided not to initiate proceedings in 149 of the remaining cases, and continued to consider the remaining 46 cases.

\(^{119}\) The regional directors decided not to initiate proceedings in 210 of the remaining cases, and continued to consider the remaining 89 cases.
First, there is a relatively clear interface between the EPLA (articles 102-108) and the ELD regime for land contamination in the cut-off date of 30 April 2007. The transposing legislation provides that “existing provisions shall apply to environmental damage or to any imminent threat of environmental damage which occurred before 30 April 2007 or resulted from activities which were terminated before 30 April 2007”\(^{120}\). Although other Member States have also necessarily established a cut-off date, the identical threshold for damage to soil and subsoil in the EPLA and the ELD regime (see section 14 below) means that competent authorities enforce the ELD regime, rather than articles 102-108 of the EPLA, when the transposing legislation applies.

Moreover, for the land damage cases that occurred after 30 April 2007, the threshold is very low - it is not necessary that the contamination creates any risk to human health; it is sufficient that after the damage, soil fails to meet quite strict quality standards for soil (see sections 14 and 15 below). Whereas this factor may influence the number of land damage cases in Poland, however, it does not influence the number of water damage, and biodiversity damage cases.

Second, there is no requirement for an interested person who submits notifications to a competent authority concerning an imminent threat of, or actual, environmental damage to have a “sufficient interest” (see section 20 below). This means that in practice every person, including organisations and informal groups may submit such notifications than may submit them in most other Member States. In practice environmental NGOs in Poland are quite active in submitting such notifications.

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

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

---

\(^{120}\) Act of 13 April 2007 on the prevention and remedying of environmental damage, art. 35(1).
Fifth, the Polish Government has enacted detailed provisions to establish a register of notifications, including making the register available to the public, albeit that members of the public must know about the existence of the register in order to request details of it; it is not available on the internet. In contrast, some Member States have not adopted any provisions to establish a register or data base of ELD incidents, or have done so in a much more limited manner. Public knowledge of the ELD in Poland, therefore, has been facilitated compared to these other Member States.

3. **Integration of the ELD into existing national legal framework**

    - **Transposing legislation**
      
      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)

    - **Amendments to existing national environmental law**

      The 2007 Act made amendments to the following Acts:

      - Act of 20 July 1991 on the Environmental Protection Inspectorate;
      - Act of 3 February 1995 on protection of agricultural lands and forests;
      - Act of 27 April 2001 – Environmental Protection Act;
      - Act of 18 July 2001 – Water Act; and
      - Act of 16 April 2004 on nature protection.

    - **Authorisation in legislation for other governmental entities to issue rules and regulations**

      Article 10 of the 2007 Act authorised the Minister of the Environment to issue the Ordinance on assessment criteria for environmental damage.

      Article 14 of the 2007 Act authorised the Minister of the Environment to issue the Ordinance on types of remedial measures and on the conditions and manner in which they are carried out.

      Article 28a.3 of the Act on the Environmental Protection Inspectorate authorised the Minister of the Environment to issue the Ordinance on the register of imminent threats of environmental damage and environmental damages.
Relationship to other legislation

According to article 15.4 of the 2007 Act in a case when the competent authority issues a decision requesting the operator who caused an imminent threat of, or actual, environmental damage, to undertake preventive and remedial measures under the 2007 Act, article 362 of the EPLA does not apply. This means that provisions in the transposing ELD have priority. Article 362 of the EPLA authorises competent authorities (other than those responsible for the ELD transposing provisions) to issue a decision against an operator who causes a ‘negative impact on the environment’ (as indicated above, such a ‘negative impact’ is broader than the environmental damage as defined by the ELD, but may, in certain cases, be equal to that damage).

As indicated in section 2 above, article 37 of the Nature Protection Act continues to apply to damage to Natura 2000 sites as does the legislation transposing the ELD. This relationship between the two pieces of legislation, however, should be clarified when the Bill to amend the transposing legislation is enacted. At that time, the transposing legislation will have priority to article 37.

Guidance and other documentation

The Polish governmental authorities have not published any guidance or other documentation except for that indicated above.

4. Effective date of national legislation

30 April 2007

That is, the 2007 Act and Chapter 4a of the Act on the Environmental Protection Inspectorate, which transposed the ELD, came into effect on 30 April 2007. The Ordinances (Executive Regulations) entered into force later.

5. Competent authority(ies)

The competent authorities are the Regional Directors for Environmental Protection.

If an imminent threat of, or actual, environmental damage occurs in an area of two or more Regional Directors, the Regional Director that first obtained information about the damage is the competent authority and shall act in consultation with the other relevant Regional Directors.

The Minister for the Environment is the competent authority for GMOs.

6. Operators and other liable persons

The 2007 Act defines an operator as “an entity which uses the environment within the meaning of Article 3.20 of the Environmental Protection Act which carries out an activity involving a risk of environmental damage, or any other activity referred to in Article 2.1(2) of the 2007 Act causing environmental damage or an imminent threat of such damage”

There are three types of operators as follows:

- an entrepreneur as defined by the Act on Freedom of Business Activity Act of 2 July 2004, as amended, as a business entity and
natural persons who are involved in a business activity aimed at agricultural production, animal husbandry and breeding, gardening, vegetable growing, forestry and inland fishing and doctors in their own or specialist practices;

- an organisational entity which is not a business entity under the Act of 2 July 2004 (i.e. educational entities, health care entities); and

- a natural person who is not a entity, as described in the first bullet point above but who uses the environment in the scope in which a licence is required.

The definition of an operator is thus broader than that in the ELD. Strict liability is, however, limited to Annex III activities, although it is slightly extended by, for example, the introduction of gases and dust into the atmosphere.

The definition of an operator is also broadened by the definition of an “emission” to include “energies, such as heat, noise, vibrations, or electromagnetic field” as well as “substances or of their mixtures of solutions” and “organisms or microorganisms”.

- Secondary liability (e.g., parent company)

The legislation does not mention any secondary liability.

- Death or dissolution of responsible operator

The legislation does not mention the effect on liability of the death or extinction of a responsible operator.

- Persons other than an operator who may be liable

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.

7. **Annex III legislation**

- Rebuttable presumption that operator’s activity caused environmental damage

The 2007 Act legislation does not include a rebuttable presumption.

However, as indicated above, the owner of land on which there is an imminent threat of, or actual, environmental damage is jointly and severally liable for preventing or remediating the threat or damage unless the owner notifies the competent authority immediately after learning about the threat or damage.

- Additional occupational activities subject to strict liability

The following activities are in addition to those under the EU legislation specified in Annex III:
activities that require a permit to introduce gases or dust into the atmosphere.

- Spreading of sewage sludge for agricultural purposes

The introduction of sewage into water or soil is an Annex III activity.

8. **Standard of liability for non-Annex III activities**

Entities other than those who carry out Annex III activities, as described above, are liable for biodiversity damage if they have been "at fault". The term "at fault" in the 2007 Act encompasses both "gross negligence" and mere "negligence".

9. **Exceptions**

- Applicable to imminent threat of environmental damage as well as environmental damage

The 2007 Act applies to an imminent threat of environmental damage as well as environmental damage.

- Differences with exceptions in the ELD

There are no differences with exceptions in the ELD other than the following.

The 2007 Act includes an additional exception to those in the ELD for forest management carried out in accordance with the principles of sustainable forest management referred to in the Forest Act of 1991. This exception will be deleted by future amendments to the 2007 Act due to it being in breach of the ELD.

- Diffuse pollution exception

The exception for diffuse pollution is set out in the 2007 Act as an affirmative statement, ie, the Act "shall apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, coming from many sources, where it is possible to establish a causal link between the environmental damage or an imminent threat of such damage and the activities of entity which uses the environment".

10. **Joint and several or proportionate liability**

Liability is joint and several.

- Mechanism for contribution between liable operators

The 2007 Act does not indicate any mechanism for contribution between liable operators.

11. **Limitation period**

The limitation period is 30 years.
12. **Defences**

- **Defences to liability or costs?**

  The defences are defences to costs.

  An operator whose activity caused the imminent threat of, or actual, environmental damage must carry out preventive or remedial measures and may subsequently bring a cost recovery action against:
  
  - the third party that caused the imminent threat of, or actual, damage (the operator must have put in place appropriate safety measures); or
  
  - the public authority that issued the compulsory order.

- **If defences to liability; suspension (or not) of remediation notice during appeal**

  Not applicable

  - **Permit defence**

    The permit defence has not been adopted.

  - **State-of-the-art defence**

    The state-of-the-art defence has not been adopted.

13. **Scope of environmental damage**

The scope of land damage in Poland is extended to cover land on which there is **not** a risk to human health. The extension of the scope may, however, be deleted by a Bill that would amend the 2007 Act.

- **Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)**

  19.52%

  - **Extension of biodiversity to nationally protected biodiversity**

    Liability is extended to all species and natural habitats protected under the Polish Nature Conservation Act of 2004 in addition to species and natural habitats protected by the Birds and Habitats Directives.

    That is, the Act of 13 April 2007 applies to:

    - national habitats enjoying a form of nature protection within the meaning of the provisions of the Act of 16 April 2004 on nature protection or enjoying protection under Article 33.2 of that Act;

    - national habitats which belong to the type of habitats specified in the provisions issued under Article 28.1 of the Act of 16 April 2004 on nature protection;

    - habitats and the breeding grounds of protected species; and
breeding, moulting and wintering areas of migratory birds and staging posts along their migratory routes.

The provision for national habitats enjoying a form of nature protection within the meaning of the provisions of the Act of 16 April 2004 on nature protection or enjoying protection under Article 33.2 of that Act (above).

“Protected species” means:

- species protected within the meaning of the Act of 16 April 2004 on nature protection; and
- migratory bird species.

Biodiversity damage in the exclusive economic zone

The 2007 Act imposes liability for biodiversity damage in Poland’s exclusive economic zone.

Water or water body

The 2007 Act refers to “any damage that significantly adversely affects the ecological, chemical or quantitative status of waters”; it does not refer to water bodies.

14. Thresholds

If there is a “change in a natural resource status or the change of a natural resource service has a measurable, adverse effect on human health”, environmental damage has occurred.

This threshold applies to water, biodiversity and land.

Water damage

Water damage is “any damage that significantly adversely affects the ecological, chemical or quantitative status of waters”.

The threshold for damage to water is "a change or changes provoking one or more of the following measurable effects:

1) deterioration in the possibility of using bathing places for recreational purposes as a result of adverse changes in the quality of bathing water ...

2) deterioration in the conditions of abstraction and treatment of water for human consumption following adverse changes in the quality standards of that water ...

3) deterioration in the quality of inland waterways which are the natural habitat of fish and of coastal waters which are the habitat of crustaceans and molluscs ...

4) adverse changes to species composition, numbers and structure of the flora and fauna in surface waters, together with their environment

5) adverse changes to hydromorphological characteristics or physiocochemical conditions, including in particular changes which are the effect of violation of principles of sustainable water management and its protection ...

6) decrease of the level of groundwater resulting in adverse quantitative and qualitative changes in groundwater and the environment depending of this groundwater
Implementation challenges and obstacles of the Environmental Liability Directive

7) increase in the level of groundwater resulting in adverse quantitative and qualitative changes in groundwater and environment depending of this groundwater”.

**Biodiversity damage**

The threshold for damage to a protected species is "a change or changes provoking one or more of the following measurable effects:

1) destruction of or damage to the habitat of protected species;

2) adverse change to the status or service of population of protected species on the territory of a commune, a Voivodship, the country, the biogeographic region, or the European Community, consisting in particular of:
   a. decrease of the number of individuals in the population of protected species, decrease of their density, or the area covered;
   b. deterioration of the protected species' capacity for propagation, their spreading, or a deterioration of other vital functions; or
   c. increased mortality
   d. limited possibility of contact of protected species with neighbouring populations;

3) decrease of the area of protected species' habitat or adverse change to the utility for protected species of natural resources of its habitat in the territory of a commune or a Voivodship, the country, the biogeographic region, or the European Union;

4) deterioration in the possibility of conservation of protected species, including the possibility to achieve a favourable conservation status".

The threshold for damage to a protected natural habitat is "a change or changes provoking one or more of the following measurable effects:

1) destruction of or damage to a part of the protected natural habitat;

2) adverse change to the status or service of population of the protected natural habitat on the territory of a commune, a Voivodship, the country, the biogeographic region, or the European Union, consisting in particular of:
   a. loss of a part of its biological diversity; or
   b. loss or deterioration of specific features of its structure; or
   c. deterioration in its ecosystem services; or
   d. deterioration of landscape diversity which they create

3) deterioration in the conservation status of protected species typical for the protected natural habitat;

4) deterioration of the possibility of conservation of protected natural habitat, including the possibility to achieve a favourable conservation status".
National biodiversity damage

There are no separate threshold criteria for national biodiversity damage; the same standards apply as for species and natural habitats protected by the Birds and Habitats Directives.

Land damage

The threshold for land damage is "a change or changes provoking one or more of the following measurable effects:

1) failing to meet quality standards for soil or land ...
2) necessity to change present methods of using the land surface".

15. Standard of remediation

The transposing legislation defines “baseline condition” as “the condition and services of the environment and individual natural resources before the environmental damage had occurred, estimated on the basis of information available; in the case of land damage it shall mean conditions which conform to the standards of quality of soil and land within the meaning of the Act of 27 April 2001 – the Environmental Protection Act”.

Thus, the definition of “baseline condition” in the 2007 Act is broader than that in the ELD due, in particular, to the reference to the soil quality standards (see section 3, under Land contamination, above.

Land

See this section above.

Present and future risks to human health must be eliminated.

The soil and land must be restored to the condition “required by standards in the meaning of the provisions of the Act of 27 April 2001 – Environmental Protection Law”. These standards are considered to be quite strict. However, the Bill to amend the 2007 Act also contains amendments to the Environmental Protection Law that would amend the entire concept of soil protection in Poland. According to the Bill, the current standards would be abolished and the stringency of the legal regime for soil protection would be reduced.

The soil quality standards as provided by the legislation, are different for three groups: protected areas, industrial areas (including roads etc), and other areas. Therefore, the standards correspond to the use of land. However, the standards are still considered to be quite strict even if they differ for the various types of land (areas).

Biodiversity

Primary remediation

The transposing legislation does not specify any details for the standard of primary remediation for biodiversity.
The transposing legislation does not specify any details for the standard of complementary and compensatory remediation for biodiversity.

**Complementary and compensatory remediation**

Water

The transposing legislation does not specify any details for the standard of complementary and compensatory remediation for water.

16. **Format for determination of environmental damage**

The legislation does not specify any details for a determination of environmental damage.

17. **Powers and duties of competent authority**

**Inspections, investigations, studies and analyses**

The competent authority may issue a decision requesting the operator that caused an imminent threat of, or actual, environmental damage:

- to take measurements of the contents of substances in the soil, subsoil and water; and
- to monitor natural biological and landscape diversity.

The operator must keep the results of the above 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.

The competent authority shall determine the following in issuing its decision:

- type of measurements;
- methodology for measuring;
- timetable and form for submitting the results to the competent authority; and
division of obligations between operators when more than one operator caused the imminent threat of, or actual, environmental damage.

Analysis of the samples must be carried out by an accredited laboratory in conformance with Polish law.

If the operator has a certificate of a quality management system, it may carry out the above analyses in its laboratory provided the laboratory is also included in the quality management system.

- Information orders

A competent authority may require an operator “immediately [to] provide information on environmental damage or on an imminent threat of such damage” in addition to “a situation where there is a justified suspicion that such a threat or damage occurred”.

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

The competent authority has a duty to require an operator to carry out preventive actions if the operator does not carry them out.

- Power or duty to require an operator to carry out remedial actions

The competent authority has a duty to require an operator to carry out remedial actions if the operator does not carry them out.

- Power or duty of competent authority to carry out preventive measures

The competent authority must 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.

If the competent authority carries out preventive measures and considers that sampling and monitoring needs to be carried out, such sampling and monitoring shall be carried out by the Regional Environmental Protection Inspector.

If the competent authority has carried out preventive measures, it must demand reimbursement from the responsible operators except that it may decide not to seek recovery of the full costs if:

- the operator cannot be identified, enforcement proceedings cannot be brought against the operator or enforcement would be ineffective, or
- the cost of the enforcement actions would be greater than the amount that could be recovered.

- Power or duty of competent authority to carry out remedial measures

The competent authority must 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 the possibility of irreversible environmental damage.
If the competent authority carries out remedial measures and considers that sampling and monitoring needs to be carried out, such sampling and monitoring shall be carried out by the Regional Environmental Protection Inspector.

If the competent authority has carried out remedial measures, it must demand reimbursement from the responsible operators except that it may decide not to seek recovery of the full costs if:

- the operator cannot be identified, enforcement proceedings cannot be brought against the operator or enforcement would be ineffective; or
- the cost of the enforcement actions would be greater than the amount that could be recovered.

Form of preventive order

The request must specify:

- the scope of preventive measures and the method in which they are carried out including actions aimed at limiting environmental impact;
- status to which the environment is to be returned; and
- the deadline for completion of the measures.

See immediately below for procedure following completion of preventive measures.

Form of remediation order

The decision issued by the competent authority must specify:

- the status to which the environment is to be returned;
- the scope of remedial measures and the method in which they are carried out; and
- dates of commencement and completion of remedial measures.

After preventive or remedial measures have been completed, the competent authority shall 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 (ACC/PKD);

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 notification to the Chief Inspector of Environmental Protection may also include:

a description of the source of financing for the preventive and remedial actions;

“information on a direct bearing of costs by the responsible party”;

information of a full or partial recovery of costs from the responsible party as a result of enforcement proceedings;

information of a full or partial recovery of costs from financial security held by the responsible operator; and

the reason why the costs have not been fully or partially recovered.

If enforcement proceedings continue after completion of the preventive or remedial actions, information on the result of such proceedings, when they are completed.

The above information is included in the register of imminent threats of environmental damage and environmental damage (see “Register or data bases of incidents” below).

Appeal against preventive or remediation order


The operator may:

appeal against a competent authority’s decision;

file a complaint with the Voivodeship Administrative Court; or

submit a claim for cassation to the Supreme Administrative Court.

Sanctions for delay in complying with preventive or remediation order

The transposing legislation does not specify sanctions for a delay in complying with an order requiring remediation. There are, however, sanctions; see “Offences and sanctions” below.

Formal consultees on contents of preventive and remediation orders
The following are formal consultees on the contents of preventive orders and remediation orders, as appropriate:

- Water damage: Director of the Regional Water Management Board;
- Marine water damage: Director of the Maritime Office;
- Environmental damage caused by movement of a mining establishment: Director of the Regional Mining Office;
- Forests owned by State Treasury: Director of the Regional State-Owned Forests Directorate;
- National parks: Director of the National Park; and

The above authorities do not need to be consulted for emergency matters.

- **Recovery of implementation and enforcement costs**

The competent authority may recover the following costs:

- collecting data and assessing environmental damage;
- preparing and assessing preventive and remedial measures and alternatives to them;
- carrying out preventive and remedial actions;
- legal proceedings;
- enforcement;
- supervision and monitoring; and
- compensation to any third parties for access to their land to carry out preventive or remedial actions.

- **Deadline for competent authority to seek recovery of costs**

The deadline for a competent authority to seek recovery of the costs of its preventive or remedial measures is five years from:

- the date of the termination of the preventive or remedial actions, or
- the date on which the “direct perpetrator” that caused the imminent threat, or actual, environmental damage is identified (see article 23(3) of the 2007 Act),

whichever date is earlier.

**18. Duties of responsible operators**

- **Preventive measures**

The person who uses the environment has a duty immediately to take preventive measures.
Remedial actions (emergency actions)

The person who uses the environment has a duty “to take actions in order to limit damage to the environment, prevent further environmental damage and adverse effects on human health or further impairment of services of natural resources, including to immediately control, contain, remove, or otherwise manage the relevant contaminants or any other damage factors”.

The above duty equates to that in the ELD.

Remedial measures

A person who uses the environment has a duty to take remedial measures if environmental damage occurs. Prior to doing so, the operator must submit the proposed remedial measures to the competent authority for approval.

A request by the operator to a competent authority to agree on conditions regarding remedial measures shall include information on:

- the area in which the remedial measures will be carried out;
- services performed by the area which requires remedial measures;
- baseline condition of the environment in the damaged area;
- present condition of the environment in the damaged area;
- planned scope and method of remedial measures to be carried out; and
- planned date for the commencement and completion of the remedial measures.

The Ordinance of 4 June 2008 sets out the conditions and manner in which complementary and compensatory remedial measures must be carried out.

The Ordinance of 4 June 2008 also provides that complementary and compensatory measures that do not replace the damaged natural resources to the same quality shall be compensated by their quantity. Further, when additional natural resources or services are created, the “specificity of these measures shall be taken into account, as well as the length of time it will take for these measures to take effect”.

Duty to notify / provide information when imminent threat of environmental damage occurs

The entity which uses the environment must immediately notify the authority competent for the natural environment and the Regional Environmental Protection Inspector if an imminent threat of environmental damage occurs and preventive measures have not dispelled that threat.

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 (ACC/PKD) 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.

The competent authority must send a copy of the notification to the Chief Inspector of Environmental Protection.

Entity to which notification should be provided

Notification must be made to the relevant competent authority and the Regional Environmental Protection Inspector.

19. Access to third-party land to comply with the ELD

The owner of third-party land must allow the responsible operator and/or the competent authority to carry out emergency, preventive and/or remedial measures.

The landowner has the right to compensation from the competent authority for carrying out the above measures; the compensation shall be paid by the responsible operator.

If the landowner requests, the competent authority shall issue a decision determining the amount of compensation; that decision is final, which means that it may not be challenged to the administrative authority of the second instance (which is standard procedure under Polish law); however it may be challenged before the court (see below).

The competent authority may ask a chartered surveyor for an opinion on the amount of compensation.

A responsible operator may challenge the amount of damages by bringing proceedings against the competent authority’s decision in a common court.

Similarly, a responsible operator may bring such proceedings if a competent authority does not issue a decision by three months from the landowner’s request.

Any proceedings commenced by a responsible operator indicated above do not stay the execution of the competent authority’s decision on the amount of damages.

20. Interested parties

Any person may notify a competent authority about an imminent threat of, or actual, environmental damage; there is no limitation for a person who is, affected or likely to be affected by the damage, has a sufficient interest in environmental decision making relating to the damage, or alleges the impairment of a right.

Qualification criteria for “sufficient interest”

As mentioned above, any person may notify a competent authority, so no “sufficient interest” is needed.
The Polish legislator decided however to stress that if the imminent threat of, or actual, environmental damage "relates to the environment as a common good", a public administration body or an "environmental organisation" may notify a competent authority (which is a misleading and redundant provision because also every other person may notify the authority about a damage relating to the environment as a common good.

The definition of the "environmental organisation" provided for by Art. 3.16 of the Environmental Protection Act of 2001: "environmental organisation’ shall mean social organisations the statutory purpose whereof is to protect the environment”.

According to this definition "environmental organisation" is a kind of "social organisation" as referred to in Art. 5.5 of the Administrative Procedure Act, i.e. "professional, self-governmental, co-operative and other social organisations”.

Thus, the criteria for an 'environmental (ecological) organisation' are:

- an organisation has to exist formally, i.e. to be listed in a relevant official register (kept by a court or by a starost (head of poviat administration));
- have the statutory objective to protect the environment (the definition does not require that it is its sole objective; it may be discussed if it must be the main objective);
- it also stems from the mere essence of "social organisations“ that they act in public interest and are non-profit-making; and
- social organisations have to be independent, i.e. not connected with political parties or public authorities.

**Method of notifying interested parties of planned remedial measures**

The general rules of notifying interested parties as provided by the Administrative Procedure Code apply.

According to the Administrative Procedure Code, the competent authority, when initiating proceedings in a case, must identify the parties to the proceedings. The parties must then be individually notified about the various phases of the proceedings and the final decision.

**Information to be provided to competent authority**

The interested party must submit the following information to the competent authority:

- the full name of the person making the notification;
- the address of the person or the address of its registered office;
- indication of the type of environmental damage or an imminent threat of such damage;
- description of the environmental damage or imminent threat;
- location of the environmental damage or imminent threat;
- date of the environmental damage or imminent threat; and
Implementation challenges and obstacles of the Environmental Liability Directive

- documentation, as far as possible, evidencing the imminent threat of, or actual, environmental damage or the operator’s identity.

The competent authority must send a copy of the notification to the Chief Inspector of Environmental Protection if it considers that proceedings should be initiated.

- Challenges to competent authority’s decision

If the competent authority refuses to bring proceedings, any person who made a notification to the competent authority may lodge a complaint and bring an action in an administrative court.

In practice, the authorities consider all environmental damage to be damage to the environment, that is, damage to the common good. This includes damage that has been caused to a private person’s property.

- Duty on competent authority to respond to person making the notification

According to the general rules of administrative procedure, as provided by the Administrative Procedure Act, the competent authority has a duty to respond to the person making the notification.

There are no exceptions for frivolous notifications.

- Inclusion of interested party in any proceedings by the competent authority against an operator

Only a public administration body or an environmental organisation who made the notification to the competent authority 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.

21. Public access to information regarding environmental damage and related measures

The general rules for access to the environmental information (as provided by the Act of 3 October 2008 on Access to Environmental Information, Public Participation in Environmental Protection and Environmental Impact Assessment) and to the public information (as provided for by the Act of 6 September 2001 on Access to Public Information) apply.

22. Charges on land / financial security after environmental damage

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.
23. **Offences and sanctions**

The penalty for the following actions is a fine:

- failure by an operator to carry out preventive or remedial actions;
- failure by an operator to notify the competent authority and the Regional Environmental Protection Inspector of an imminent threat of, or actual, environmental damage;
- failure to consult with the competent authority concerning the conditions of remedial measures; and
- failure by a third party to allow preventive and/or remedial actions to be carried out on its land.

The aforementioned fine is a criminal sanction, imposed by the criminal court. It may be imposed only on natural persons (for example, directors or officers responsible for environmental protection within the company).

**Directors and officers liability for breaching legislation**

As indicated above, criminal liability as foreseen by the 2007 Act concerns only natural persons, for example, directors or officers responsible for environmental protection within the company.

The rules for calculating the amount of a fine are provided in Article 33 paragraphs 1 to 3 of the Penal Code as follows.

- A fine shall be imposed in terms of daily fines defining the number of daily fines to be levied and the rate of the fine. Unless otherwise provided by law, the lowest number of daily fines shall be 10, and the highest shall be 360 (Article 33, paragraph 1).
- The daily rate may not be lower than PLN 10 (€25) or higher than PLN 2,000 (€500) (Article 33, paragraph 3).

Therefore, the amount of a fine may fluctuate from PLN 100 (€25) up to 1,080,000 (€270,000).

**Publication of penalties**

The 2007 Act does not require publication of penalties. However, according to Art. 50 of the Penal Code, the court may decide to make the sentencing judgment public, if it considers it appropriate, in particular for social considerations.

24. **Registers or data bases of incidents**

The register, which is in electronic form, is to be carried out in the form of database. It contains data included in:

- the notifications about an imminent threat of, or actual, environmental damage received from the public; and
- the notifications about ending the remedial or preventive action carried out by the operator or the competent authority.
Details of information that competent authorities must send for the register / data base

The information described in “Notification of completion of preventive or remedial measures” above is recorded in the register together with:

- the register number;
- the identification number for the entry of data on an imminent threat of, or actual, environmental damage submitted by the competent authority to the Chief Inspector of Environmental Protection in the order of his receipt of the entry;
- the dates of the entries;
- the date on which the competent authority received a notification for an imminent threat of, or actual, environmental damage or the date on which the preventive or remedial measures for it were completed; and
- the name of the competent authority which received the notification,

The competent authority submits only justified notifications for which proceedings have been instituted to preventive or remedial measures.

Name of entity that keeps the register / data base

The Chief Inspector of Environmental Protection keeps a register of imminent threats to, and actual, environmental damage. The Chief Inspector shall send to the Minister of the Environment, summary information regarding the content of the register in respect of the previous year by the end of February each year. The legislation does not say what the Minister should do with the summaries. If the summaries are published, this would be only a matter of (good) practice and not a legal obligation.

The above procedure is planned to be changed by the Bill to amend the 2007 Act. According to the Bill, the General Director for Environmental Protection (Generalny Dyrektor Ochrony Środowiska) (and no longer the Chief Inspector of Environmental Protection) will have the duty to keep the register.

Further, under the Bill, the provisions on registers will be moved from the Act on Environmental Protection Inspectorate to the 2007 Act.

Method of publication of summaries, register, or data base (eg, summaries or all details from register)

The Ordinance of 26 February 2008 specifies the data to be contained in the register kept by the Chief Inspector of Environmental Protection as follows:

- number in the register;
- identification number of the notification;
- dates of the entries into the register;
dates of the notifications about an imminent threat of, or actual, environmental damage received from the public or the notifications about ending the remedial or preventive action carried out by the operator or the competent authority;

- name of the competent authority which received the notifications;
- description of the environmental damage or the imminent threat of damage (their kind, date and place of occurrence);
- description of the remedial or preventive action carried out until the notification was made;
- name and address of the operator who imminent threat of, or actual, environmental damage, a description of its activity according to the Polish Activity Classification Code (ACC/PKD);
- date of initiating the proceedings by the competent authority;
- copies of all administrative decisions issued in the case;
- information about appeals from the above decisions;
- information about court proceedings in the case;
- date of ending the remedial or preventive action; and
- description of the remedial or preventive action carried out and description of their ecological results.

The data from the register are made available to every interested person, on request submitted in written or electronic form.

The data are to be disclosed in the written or electronic form, within two weeks.

The provisions do not provide for any regulations regarding the content of the summaries sent to the Minister of the Environment.

25. Cross border damage in another Member State

If there is an imminent threat of, or actual, environmental damage from another Member State, the Polish competent authority may, through the Minister for the Environment, request that Member State:

- to carry out preventive or remedial actions, and
- reimburse costs incurred for preventive or remedial actions

When the Chief Inspector of Environmental Protection receives information on an imminent threat of, or actual, environmental damage from another Member State, the effects of which are likely to affect Polish territory, the Chief Inspector shall immediately provide the information to the competent authority in Poland. This provision does not apply to major industrial accidents within the meaning of the Act of 27 April 2001, the Environmental Protection Act.
For major industrial accidents (subject to the Seveso Directive), there is a different procedure for the cross border cases (regulated in Arts. 270-271b of the Environmental Protection Act). According to this procedure, the Voivodship Commandant of the State Fire Service who finds, on the basis of information received from the operator of a high-hazard establishment, that the possible impact of an industrial accident may have a transboundary range, shall immediately communicate information of importance for this case to the Minister of the Environment, in particular the safety report as well as internal and external emergency plans.

Having received the information referred to in paragraph 1, the Minister of the Environment shall immediately notify the State in the territory in which the effects of the accident may occur, of the location of the high-hazard establishment. Information on the safety report and the external emergency plan in its part concerning transboundary hazards, shall be enclosed with the notification.

Having received information from the Voivodship Commandant of the State Fire Service on the occurrence of an industrial accident in the territory of the Republic of Poland, the Minister of the Environment shall notify the State in the territory in which the effects of this accident may occur and communicate all the information of importance for this case.

If there is an imminent threat of, or actual, environmental damage that originates in Poland that is likely to affect the territory of another Member State, the Chief Inspector for Environmental Protection shall immediately provide information to the competent authority of the potentially affected Member State. This provision does not apply to major industrial accidents within the meaning of the Act of 27 April 2001, the Environmental Protection Act.

26. **Financial security**

The legislation does not require financial security.

However, the competent authority may require an operator to obtain financial security when the operator makes an application for an emission permit, in particular, where there is “a major deterioration of the condition of the environment”. Any such security may be a deposit, a bank guarantee, an insurance guarantee, or an insurance policy.

The competent authority’s power applies to all so-called emissions permits which include: integrated permits, permits for emissions into the air, permits for discharge of wastewater and permits for the production of waste. It also applies to Landfill Directive permits and to concessions for extraction of mineral resources.

The Minister of the Environment has the right to issue an Ordinance that lists categories of installations that must have financial security as well as the methods of determining the amount of the financial security.

The Minister has not issued this Ordinance.

27. **Establishment of a fund**

The transposing legislation does not establish a fund.
28. Reports
The transposing legislation does not provide for the publication of reports on ELD incidents (other than summaries) or the implementation of the 2007 Act.

29. Information to be made public
Summary information of ELD incidents is prepared on an annual basis. As indicated above, the legislation does not require publication of the incidents. Information about the incidents would, however, be available on request under the general rules on access to environmental information.

30. Provisions concerning genetically modified organisms
The Minister for the Environment is the competent authority for GMOs.

31. Key features and differences in legislation transposing the ELD and existing legislation
When Poland transposed the ELD, it already had liability systems for preventing and remediating contaminated land as well as damage to Natura 2000 sites. Poland did not have a specific liability system for preventing and remediating water pollution; instead, the general environmental legislation was applied.

The following regime for preventing and remediating contaminated land applies only to contamination that has been caused before 30 April 2007. After that date, the legislation transposing the ELD applies.

The liability system for preventing and remediating contaminated land imposes liability on the current owner of the land (or the person who registered title to the land if that person was another entity) regardless of whether that person caused the contamination or carried out any activities on the land. If the contamination of the soil or subsoil was caused before 1980, the owner/title holder can show that the contamination does not pose a threat to human health or the environment by means of a risk assessment. If contamination was caused after that date, soil quality standards apply. The owner/title holder of the land can avoid liability by notifying the competent authority immediately the contamination is discovered and by proving that another person contaminated the soil or subsoil after the owner/title holder took possession of the land provided that the owner/title holder did not consent to, or know about the contamination when it occurred. In such a case, the competent authority remediates the contamination and seeks recovery of its costs from the person who contaminated the land; the authority cannot order the person who caused the contamination to carry out the remedial measures. If the owner/title holder consented to the contamination or knew about it, it is jointly and severally liable with the person that caused the contamination.

Also prior to the ELD, Poland had legislation that authorises a competent authority to require a person whose activity may significantly affect a Natura 2000 site to cease carrying out the
activity and to restore the site to its baseline condition before the damage. This legislation continues to apply but the legislation transposing the ELD has priority.

In addition, Poland has general environmental legislation which imposed – and continues to impose – liability for remediating environmental damage on a “user of the environment” that has caused a “negative impact on the environment”. The environmental damage to which the general legislation applies is broad; it includes soil and subsoil contamination, water pollution (including surface, coastal and ground water) and damage to fauna and flora. The threshold for such a negative impact is not specified in the legislation nor are the types of preventive or remedial measures to be carried out. The general legislation was used – and continues to be used – when more specific legislation does not apply.
1. **Existing national environmental legislation**

Portugal transposed the ELD in a single law: Decree-Law No. 147/2008 of 29 July 2008 (Decree-Law 147/2008). This law did not amend other environmental laws. Other environmental laws, however, apply to Decree-Law 147/2008, in particular Law No. 50/2006 of 29 August 2006, as amended, which is the Environmental Basic Framework for Administrative Offences.

Until Portugal transposed the ELD, it did not have legislation that imposed liability for carrying out preventive and remedial measures for contaminated land, water pollution, biodiversity damage or general environmental damage although there were special provisions in legislation relating to water pollution and contamination caused by waste.

2. **Existing regimes for preventing and remediating environmental damage**

The preamble to Decree-Law 147/2008 (the transposing legislation) states that the principles in that Decree-Law are already contained in existing legislation, in particular Articles 41 and 48 of the Environment Framework Law\(^{121}\) and articles 22 and 23 of Law No. 83/1995 of 31 August 1995 (Law on Procedural Participation and Popular Action).

- The preamble further states that “this legislative framework has been difficult to implement in practice as a result, in particular, of a lack of clarity and consistency among the various legal rules”. It notes the following problems: the reluctance of an injured party to bring an action against the polluter due to the dispersal of environmental damage and the consequent costs / benefits of bringing such an action;
- Multiple parties being potentially liable for environmental damage which may result in difficulties in proving causation;
- Latency periods involved in environmental damage claims;
- Technical difficulties in proving the origin of the damage and, consequently attributing responsibility to the person(s) who caused it; and
- Guaranteeing that the polluter has sufficient financial capacity to pay remediation costs and to internalise the social cost.

---

The preamble concludes that Decree-Law 147/2008 should resolve the difficulties concerning environmental liability in the Portuguese legal system and should help achieve “genuine sustainable development”.

In order to resolve the above difficulties, Decree-Law 147/2008 covers not only administrative liability for environmental damage but also civil liability for such damage (see this section below).

As indicated above, prior to Decree-Law 147/2008, Portugal did not have specific legislation imposing liability for environmental damage.

- Water pollution

Law No. 58/2005 of 29 December 2005, as amended, is the main legislation concerning surface and ground water management, including pollution. The relevant competent authorities are the Water Authority and the relevant Hydrographic Regions Administrations (Administrações das Regiões Hidrográficas).

There is no Portuguese legislation that specifically imposes liability for damage caused by marine pollution.

- Land contamination

Portugal does not have specific legislation that imposes liability for remediating contaminated land. The current owner of the land is, therefore, responsible for remediating any contamination on it subject to a right to bring a contribution action under civil law against the person who negligently caused or contributed to the damage, including a former owner or occupier. If the seller of the land failed to disclose the contamination, the buyer may bring an action against the seller. Such actions, however, are brought under civil law not administrative law.

Decree-Law No. 178/2006 of 5 September 2006, as amended, on waste management concerns the management of waste on land and may, therefore, be applied to soil contamination. Orders may be made under that law to require the producer or possessor of waste to carry out preventive and remedial measures. The application of Decree-Law No. 178/2006 is, however, limited because unexcavated contaminated soil is not defined as waste under the revised Waste Framework Directive.122

If contaminated soil is remediated, a licence is required under Decree-Law 178/2006. The Coordination Commission for Regional Development (Comissão de Coordenação e Desenvolvimento Regional) is the responsible authority for granting the licence.

It is also a crime under the Criminal Code to contaminate soil and groundwater.

- Restoring biodiversity damage

Decree-Law No. 140/99 of 24 April 1999, as amended, which transposed the Bird and Habitats Directives, imposes liability on an operator who breaches the relevant legislation to restore the damage.

122 See article 2(1)(c) of Directive (2008/98/EC) on waste.
Other liability systems for environmental damage

Civil liability for environmental damage also exists in Portuguese law. Article 483 of the Civil Code is the main article in Portuguese law for a general regime of fault-based civil liability. Article 483 is comprehensive and imposes liability on a person whose act or omission harms another person when the act or omission is intentional or negligent. Thus, whilst article 483 does not specifically establish civil liability for environmental damage, it includes it albeit with a fault-based standard.

Strict liability for compensation under Portuguese law is the exception rather than the norm. The exception for environmental liability is set out in article 41(1) of Law No. 11/87 of 7 April 1987, which provides that “there is an obligation to indemnify, irrespective of any fault, whenever someone has caused significant damage to the environment as a result of a particularly dangerous activity, even though he has complied with the law and all technical rules that are applicable”. The words “significant damage” and “particularly dangerous activity” are not defined but are decided on the basis of the facts and circumstances of each case. There is a defence to such liability if the person carrying out the dangerous activity proves that it took all reasonable means to prevent such damage.

Article 41(2) of Law 11/87 provides that the amount of the indemnity for such environmental damage will be established by a regulation (that is, a Decree-law (Decreto-lei or Portaria)). That regulation has not been issued as yet.

Article 43 of Law 11/87 provides for mandatory insurance for persons who carry out classified activities that may have an adverse effect on the environment. Again, however, the regulation to bring this requirement into force has not been issued as yet.

This does not mean that mandatory insurance does not exist in Portugal for environmental damage. Portaria 1235/2003 requires the operator of classified industrial activities that may involve a high risk to the environment to have liability insurance for potential damage from those activities. The required limit is €100,000, and includes civil liability for damage caused by fire, accidents involving inflammable and explosive materials and reservoirs, use of some mechanical devices and loading and unloading operations. The limit also includes first party cover for damage to third party neighbouring property as a result of water or soil contamination from a sudden and accidental event. Thus, the mandatory insurance has a wide scope and a low limit.

---

123 Article 483 of the Civil Code provides that "Whosoever with intent or due to negligence unlawfully infringes the right of a third party or any legal provision established to protect the third party’s right must undertake to indemnify the damaged party for the damages resulting from the infringement" (translation from Henrique dos Santos Pereira, Portugal, Mark Brumwell (editor), Cross-Border Transactions and Environmental Law, p. 269, 278 (Butterworths, 1999).

124 See Henrique dos Santos Pereira, Portugal, Mark Brumwell (editor), Cross-Border Transactions and Environmental Law, p. 269, 278 (Butterworths, 1999).

125 See Avosetta Questionnaire Portugal, Enforcement of EC Environmental Law in Portugal; www-user.uni-bremen.de/~avosetta/portugalerp2009.pdf

126 See Avosetta Questionnaire, Environmental Liability Directive, Portugal (Ghent, 1-2 June 2007); www-user.uni-bremen.de/~avosetta/portenvliabdir.pdf
Further, Law 11/87 authorises any citizen to bring an action to demand the cessation of an action that is causing environmental damage. That is, article 40(4) of Law 11/87 states that “citizens, whose right to a healthy and ecologically balanced environment is being threatened or damaged, can ask, in the general conditions of the law, for the ceasing of the causes of violation and [compensation]”. Interface between the existing national liability regimes and the ELD regime

Due to the limited amount of legislation before the transposition of the ELD that required a person whose activities caused an imminent threat of, or actual, environmental damage to prevent or remediate it, the interface between existing law and the legislation transposing the ELD is much less complicated in Portugal than in many other Member States.

The Portuguese transposing legislation is, however, highly unusual in that it imposes civil liability as well as administrative liability for environmental damage. Such civil liability is outside the scope of the ELD.

Chapter II of Decree-Law 147/2008, which consists of articles 7-10, covers civil liability. Article 7 provides: “Anyone who, by virtue of carrying on an economic activity listed in Annex III to this decree-law, which forms an integral part of the latter, violates the rights or interests of others by means of harm to any environmental component shall be obliged to remedy the damage resulting from such violation, irrespective of the existence of negligence or fraud”.

Article 8 provides: “Anyone who fraudulently or negligently violates the rights or interests of others by means of harm to an environmental component shall be obliged to remedy the damage resulting from such violation”.

Article 9 states that: “The remediation to be made pursuant to [strict liability for Annex III activities and negligence or fault for non-Annex III activities] may be reduced or excluded, taking into account the specific circumstances, where the negligent conduct of the injured party has contributed to the cause or exacerbation of the damage”.

Article 10 provides:

1 - The injured parties referred to in the articles above cannot demand reparation or compensation for the damage claimed to the extent that such damage is remedied under the terms of the following chapter.

2 - Claims by injured parties in any trials or proceedings shall not exonerate the operator responsible from the full and effective adoption of the preventive and remedial measures that result from the implementation of this decree-law nor shall impede the actions of the administrative authorities to this end”.

In summary, Decree-Law 147/2008 authorises a cause of action for compensation against an operator whose activities cause environmental damage. An Annex III operator is subject to strict liability; a non-Annex III operator is subject to fault-based liability (fraud or negligence). Article 9 sets out a contributory negligence defence which limits the damages payable to an injured

---

127 See Avosetta Questionnaire, Environmental Liability Directive, Portugal (Ghent, 1-2 June 2007); www-user.uni-bremen.de/~avosetta/portenvliabdir.pdf
Implementation challenges and obstacles of the Environmental Liability Directive

person if that person's negligence has contributed to the environmental damage or its exacerbation.

Article 10(1) provides that a person who is injured by environmental damage does not have a claim for compensation against the operator if the damage has been prevented or remediated under the administrative liability regime set out in Decree-Law 147/2008. Finally, article 10(2) provides, in effect, that any claim for compensation is secondary to the administrative liability regime in that the claim does not exonerate the liability of the operator for carrying out preventive and remedial actions and that it cannot impede actions of the competent authorities in implementing the administrative liability regime.

The introduction of mandatory financial security for environmental damage into Portuguese law is not a break with tradition; mandatory insurance for environmental damage already existed for some operators.

3. Integration of the ELD into existing national legislation

- Transposing legislation
  
  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)

- Amendments to existing national legislation
  
  Neither Decree-Law 147/2008 nor the amendments to it amended existing national legislation.

- Authorisation in legislation for other governmental entities to issue rules and regulations
  
  Article 22 of Decree-Law 147/2008 provides that the Portuguese Government shall 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.

  This order has not been issued as yet.

- Relationship to other legislation
  
  Some existing Portuguese legislation fills gaps in the ELD. For example, Law 83/1985 concerns requirements to be met by environmental NGOs to have a “sufficient interest” (see section 20 below). Law 50/2006 applies in respect of sanctions for breaches of Decree-Law 147/20008 (see section 23 below).

- Guidance and other documentation
  
  The following guidance is available in Portuguese:
4. Effective date of national legislation

1 August 2008

5. Competent authority(ies)

The APA is the competent authority for the implementation of Decree-Law 147/2008 in Continental Portugal.

The APA, the General Inspectorate for Agriculture, the Sea, the Environment and Spatial Planning (IGAMAOT - Inspeção-Geral da Agricultura, do Mar, do Ambiente e do Ordenamento do Território) and the Nature and Environment Protection Service of the National Republic Guard (Serviço de Protecção da Natureza e do Ambiente da Guarda Nacional Republicana), known as SEPNA, have inspection roles regarding compliance with Decree-Law 147/2008. The police may also provide any necessary assistance.

6. Operators and other liable persons

The definition of an operator is the same as that in the ELD.

> Secondary liability (e.g., parent company)

Article 3(1) of Decree-Law 147/2008 provides: “Where the harmful activity is attributable to a legal person, the obligations specified in this decree-law shall be assumed jointly and severally by the respective directors, managers or executives”. Thus, if a company is liable for preventing or remediating environmental damage, the responsible directors, offices and managers may be personally liable. Such liability is joint and several (see section 10).

Article 3(2) provides: “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 article thus allows the APA to pierce the corporate veil in certain limited circumstances.

> Death or dissolution of responsible operator

Decree-Law 147/2008 does not mention the death or dissolution of a responsible operator.

---

128 The Water Authority and the Hydrographic Regions Administrations were merged with APA I.P. pursuant to Law No. 56/2012 of 12 March 2012.

129 The competent authority was initially the General Inspectorate for the Environment and Spatial Planning (Inspeção-Geral do Ambiente e do Ordenamento do Território) (IGAMAOT) prior to structural changes in government departments.
Person other than an operator who may be liable

Decree-Law 147/2008 does not mention any person other than an operator who may be liable but does refer to a “third party” (see section 17, Deadline for competent authority to seek recovery of costs). This reference may simply be due to the ELD itself mentioning the potential liability of third parties, but this is not clear.

7. **Annex III legislation**
   - Rebuttable presumption that operator’s activity caused environmental damage
   - Additional occupational activities subject to strict liability
   - Spreading of sewage sludge for agricultural purposes

Decree-Law 147/2008 does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

Decree-Law 147/2008 does not include any additional activities subject to strict liability.

Portugal has exempted the spreading of sewage sludge for agricultural purposes from Annex III activities.

8. **Standard of liability for non-Annex III activities**

   The standard of liability for non-Annex III activities is negligence or fraud.

9. **Exceptions**
   - Application to imminent threat of environmental damage as well as environmental damage
   - Differences with exceptions in the ELD

   ELD exception: “a natural phenomenon of exceptional, inevitable and irresistible character”.

   Decree-Law 147/2008 exception: “A natural phenomenon of totally exceptional, unforeseeable or, although foreseen, inevitable character”.

   The difference between the exceptions in the ELD and Decree-Law 147/2008 may, of course, be due to the translation of the above clause but, if not, the exception in Portugal is narrower and, thus, more stringent than the ELD.

   - Diffuse pollution exception

   The diffuse pollution exception applies when “it is possible to establish a causal link between the damage and the harmful activities”.

   In respect of the causal link, article 5 of Decree-Law No. 147/2008 provides 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 Decree-Law 147/2008 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.

10. **Joint and several or proportionate liability**

Decree-Law 147/2008 imposes joint and several liability. See, however sections 6 and 23 concerning the liability of directors and officers for the debts of a company.

Article 4(1) states that “If liability lies with several persons, all shall be jointly and severally liable for the damage, even if fault rests with one or more persons, without prejudice to the corresponding right to recourse that they may mutually exercise”.

Article 4(2) states that “Where it is not possible to identify the degree of participation of each of the persons responsible, liability shall be assumed in equal shares”.

Article 4(3) states that “Where liability lies with several persons who are subjectively liable under this decree-law, the right of recourse among such persons shall be exercised to the extent of the respective faults and consequences resulting therefrom, the faults of those persons responsible being presumed to be equal”.

Article 4 of Decree-Law 147/2008 thus 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. Mechanism for contribution between liable operators

Decree-Law 147/2008 does not specify the mechanism for contribution between liable operators (that is, whether the operator who paid remedial costs may bring a contribution action under civil law) although, as noted above, it does specify the applicable criteria.

11. **Limitation period**

The limitation period is 30 years.

12. **Defences**

Defences to liability or costs?

All four defences are defences to costs.

Article 20(1) states that “The operator shall not be required to bear the costs of the preventive or remedial measures” when the imminent threat of, or actual, environmental damage was caused by a third party despite appropriate safety measures, or resulted from compliance with a public authority’s compulsory order or instruction.
Article 20(2) states that “Without prejudice to [article 20(1)], the operator shall be obliged to adopt and implement the measures to prevent and remedy environmental damage under this decree-law, enjoying a right of recourse, where applicable, against the third party liable or against the administrative entity that gave the order or instruction”.

Article 20(2) thus obliges an operator to carry out measures to prevent or remediate an imminent threat of, or actual, environmental damage and then seek to recover its costs (which, of course, it may not be able to do so from a third party).

Article 20(3) provides that “the operator is not required to bear the costs of the preventive or remedial measures adopted” if the permit or state-of-the-art defences apply.

Article 20(2) does not limit its application to article 20(1), therefore, it also applies to article 20(3).

- If defences to liability; suspension (or not) of remediation notice during appeal
  Decree-Law 147/2008 does not mention the suspension (or not) of a remediation notice during an appeal.
- Permit defence
  Portugal has adopted the permit defence.
- State-of-the-art defence
  Portugal has adopted the state-of-the-art defence.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
  20.92%
  - Extension of biodiversity to nationally protected biodiversity
    Portugal has extended biodiversity damage under the ELD to nationally protected biodiversity.
  - Biodiversity damage in the exclusive economic zone
    Portugal has established an exclusive economic zone in which marine Natura 2000 sites exist. It is not clear from Decree-Law 147/2008, however, whether the ELD applies to the marine Natura 2000 sites. Further, Portugal has not published any guidance on the application of the ELD to such zones.
    If the ELD does apply to biodiversity in the exclusive economic zone, marine insurance policies (which are very different from environmental insurance policies for land-based operations) would apply.
    - Water or water body
      It is not clear from Decree-Law 147/2008 whether the threshold for water damage under the ELD is waters under the Water Framework Directive or water bodies under that Directive. The APA has not published any guidance on this issue.
14. **Thresholds**

- **Water damage**
  The threshold for water damage is the same as that in the ELD. Annex V of Decree-Law 147/2008 sets out the common framework on remedying environmental damage from Annex II of the ELD.

- **Biodiversity damage**
  The threshold for biodiversity damage is the same as in the ELD. Annex IV to Decree-Law 147/2008 sets out Annex I of the ELD on the significance of biodiversity damage. Annex V sets out the common framework on remedying environmental damage from Annex II of the ELD.

- **National biodiversity damage**
  The threshold for nationally protected biodiversity is the same as for biodiversity under the Birds and Habitats Directives (see this section above).

- **Land damage**
  The threshold for land damage is the same as in the ELD.

15. **Standard of remediation**

- **Land**
  Decree-Law 147/2008 does not specify the standard for remediation of land damage but simply includes the definition of land damage under the ELD.

- **Biodiversity**
  - **Primary remediation**
    Decree-Law 147/2008 does not specify the standard for the remediation of biodiversity damage but simply includes the definition of biodiversity damage under the ELD.
  - **Complementary and compensatory remediation**
    Decree-Law 147/2008 does not specify the standard for remediation of biodiversity damage. Annex VI of the Decree-Law sets out the common framework on remedying environmental damage from Annex II of the ELD; that framework defines complementary and compensatory remediation.

- **Water**
  - **Primary remediation**
    Decree-Law 147/2008 does not specify the standard for the remediation of water damage but simply includes the definition of water damage under the ELD.
  - **Complementary and compensatory remediation**
    Decree-Law 147/2008 does not specify the standard for remediation of water damage. Annex VI of the Decree-Law sets out the common framework on remedying environmental damage from Annex II of the ELD; that framework defines complementary and compensatory remediation.
16. Format of determination of environmental damage

Decree-Law 147/2008 does not set out the format for a determination of environmental damage. It does, however, set out procedures, as described below.

Article 16(1) of Decree-Law 147/2008 provides a deadline of 10 days after the occurrence of environmental damage for the operator to submit proposed remedial measures to the APA unless the APA has already specified or implemented such measures.

The APA then considers the comments of the operator, the owner of the land on which the remedial measures are to be carried out (if different from the operator), and any interested parties. The APA then determines the remedial measures to be carried out – in accordance with the common framework in Annex V of the Decree-Law (which tracks Annex II of the ELD) – and notifies its decision to such persons.

17. Powers and duties of competent authority

- Inspections, investigations, studies and analyses

A competent authority may enter premises to carry out inspections, investigations, studies and analyses.

More precisely, article 15(3)(b) of Decree-Law 147/2008 provides that [a competent authority] has the power to “collect, by means of inspection, inquiry or other appropriate means, the necessary information for a complete analysis of the accident at a technical, organizational and managerial level, with the collaboration of other public entities with environmental powers, whenever necessary”.

- Information orders

The APA has the power to issue orders seeking information from an operator “on any imminent threat of environmental damage or in suspected cases of such an imminent threat”. The APA also has the power to order an operator to provide supplementary information on the environmental damage that has occurred.

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

The APA has the power to require an operator to carry out necessary preventive measures. Further the APA has the power to “give instructions to the operator to be followed on the necessary preventive measures to be taken or, where applicable, cancel these”. Decree-Law 147/2008 does not specify the grounds for cancellation of such instructions.

- Power or duty to require an operator to carry out remedial actions

The APA has the power to require an operator to carry out remedial actions and to give mandatory instructions to the operator on the necessary remedial measures.

- Power or duty of competent authority to carry out preventive measures

The APA has the power to require an operator to carry out preventive measures, specifically when the imminent threat has not been dispelled despite the operator’s preventive measures or when the severity and consequences of the damage justify the APA doing so.
Article 17(1) of Decree-Law 147/2008 specifically provides that the APA may only take preventive measures as a last resort when: The operator fails to carry out preventive actions; It is not possible to identify the liable operator; or The operator is not obliged to bear the costs of preventive measures, as set out in the Decree-Law.

Article 17(2) states that the APA may carry out preventive measures “[i]n extreme cases for individual and property”. In such a case, the APA may take such actions / measures without having to follow the procedures in the Decree-Law.

The cost of preventive measures carried out by the APA, as indicated above, is to be borne by the operator.

Power or duty of competent authority to carry out remedial measures

The APA has the power to carry out “necessary remedial measures where the severity and consequences of the damage require such”. The cost of the remedial measures is to be borne by the operator.

Article 17(1) of Decree-Law 147/2008 specifically provides that the APA may only take preventive measures as a last resort when:

- The operator fails to carry out emergency remedial actions;
- The operator fails to carry out remedial measures including those specified by the APA;
- It is not possible to identify the liable operator; or
- The operator is not obliged to bear the costs of remedial actions or remedial measures, as set out in the Decree-Law.

Article 17(2) states that the APA may carry out remedial actions and remedial measures “[i]n extreme cases for individual and property”. In such a case, the APA may take such actions / measures without having to follow the procedures in the Decree-Law.

The cost of actions / measures carried out by the APA, as indicated above, is to be borne by the operator.

Form of preventive order

Decree-Law 147/2008 does not specify the form of a preventive order.

Form of remediation order

Decree-Law 147/2008 does not specify the form of a remediation order. Section 16 above describes the procedure for a determination of environmental damage.

Appeal against preventive or remediation order

Law No. 50/2006, as amended, provides for judicial review of a resolution (order) issued by an administrative authority.
Sanctions for delay in complying with preventive or remediation order

See section 23 below.

Formal consultees on contents of preventive and remediation orders

Decree-Law 147/2008 does not provide for formal consultees on the contents of preventive and remediation orders. Article 16(4) states, however, that the APA “may ask other public entities with environmental powers or powers in other relevant areas, depending on the sector of activity and the type of damage, to help to determine the remedial measures and such entities shall be required to provide the help requested at the earliest opportunity”.

Recovery of implementation and enforcement costs

The definition of costs tracks that of the ELD.

Deadline for competent authority to seek recovery of costs

The APA has five years from the date of completion of preventive and remedial measures to recover costs incurred by it in carrying out those measures. If the operators or third parties are identified at a later date, the five year limitations period commences on the date on which an operator or third party is identified.

18. Duties of responsible operators

Preventive measures

An operator has a duty to carry out preventive measures if there is an imminent threat of environmental damage. Further, an operator has a duty to carry out measures to prevent further damage if it has caused environmental damage.

Remedial actions (emergency actions)

An operator has a duty to carry out emergency remedial actions immediately. Article 15(1)(b) specifies that this duty arises despite any notification or administrative act.

Remedial measures

An operator has a duty to carry out remedial measures.

Duty to notify / provide information when imminent threat of environmental damage occurs

Article 14(4) of Decree-Law 147/2008 refers to a “verified imminent threat of environmental damage” in respect of an operator’s immediate duty to notify the competent authority.

The duty to notify includes providing information on “all aspects related to the existence of a verified imminent threat of environmental damage, of the preventive measures adopted and of the success of these damage prevention measures”.

If it is confirmed that the imminent threat of environmental damage may affect human health, the APA shall inform the regional or national health authority about the scope of the damage.
The operator must notify the APA of environmental damage, including all relevant facts, by no later than 24 hours after it occurs. The operator has a duty to “keep the information provided up-to-date”.

Entity to which notification should be provided

The entity to be notified is the APA.

19. Access to third-party land to comply with the ELD

Decree-Law 147/2008 does not mention access to third-party land to comply with the ELD.

20. Interested parties

Article 52 of the Portuguese Constitution provides, among other things, that “every citizen” has the right to make petitions, protests, claims or complaints to governmental authorities.

Further, Law 35/1998 of 18 July 1998 grants environmental NGOs rights of access to justice; such rights include bringing administrative actions.

Qualification criteria for “sufficient interest”

Decree-Law 147/2008 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” (article 18(2)(b)); it does not specify any criteria to determine which persons have a “sufficient interest”.

Article 18(2) is, however, considered to be comprehensive. In order to be considered a “party with an interest”, a person just has to: (a) have been or may come to be affected by environmental damage; (b) have a sufficient interest in the environmental decision process concerning the environmental damage or imminent threat of that damage; or (c) invoke the breach of a right or legitimate interest protected by the law”. Therefore, practically anyone may be considered to have an “interest”. This concept will undoubtedly become more defined in time by court decisions and legal doctrine.

Law 83/1985, which applies to associations and foundations, 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.\(^\text{130}\)

Method of notifying interested parties of planned remedial measures

Decree-Law 147/2008 does not specify any particular method to notify interested parties of planned remedial measures.

Article 21 states that communication shall be by electronic means, not only for comments / observations by interested parties but for all communications under the Decree-Law.

\(^\text{130}\) See Avosetta Questionnaire Portugal, Enforcement of EC Environmental Law in Portugal; www-user.uni-bremen.de/~avosetta/portugalresp2009.pdf
Information to be provided to competent authority

Article 18(1) states that interested parties should submit their comments / observations together with "relevant information and data in their possession". Article 18(3) states that the APA may request supplementary data and information if the information and data that were initially submitted raise questions.

Challenges to competent authority’s decision

Decree-Law 147/2008 does not specify the method of challenging the APA’s decision. Law No. 50/2006, as amended, provides for judicial review of a resolution (order) issued by an administrative authority.

Duty on competent authority to respond to person making comments

The APA has 20 days to determine the viability of the comments / observations. That is, the APA must decide whether environmental damage exists and whether the comments / observations are legitimate. The APA shall then notify the interested parties as to whether it has acceded to or refused the request.

If the APA approves the request, it shall notify the operator. The operator has 10 days to provide its comments.

When the APA has received the operator’s comments, it shall decide on the measures to be adopted, having also consulted with the regional health authority if human health is concerned.

Inclusion of interested party in any proceedings by the competent authority against an operator

Decree-Law 147/2008 does not provide for the inclusion of an interested party in proceedings by the APA against an operator. Law 83/1995, however, provides environmental NGOs with extensive rights including the right to participate in administrative environmental proceedings.

21. Public access to information regarding environmental damage and related measures

Decree-Law 147/2008 does not specifically provide for public access to information regarding environmental damage and related measures although it does provide for the publication of penalties for offences in accordance with Portuguese environmental law (see section 23).

As with other Member States, the legislation transposing the Environmental Information Directive (2003/4/EC) applies.

22. Charges on land / financial security after environmental damage

The APA may recover costs incurred by it in carrying out preventive and remedial measures from the operator, "inter alia via security over property or other appropriate guarantees". This is the same language as in the ELD.
23. **Offences and sanctions**

Article 26 sets out offences for breaching the Decree-Law. The offences are categorised as very serious environmental offences, serious environmental offences, and minor environmental offences. This is the same categorisation that is used for other administrative environmental offences in Portuguese law.

The very serious environmental offences are as follows:

- Failure to carry out preventive measures required by, or as specified by, the APA when avoidable damage is caused as a result of the failure;
- Failure to adopt remedial measures required by, or as specified by, the APA the effect of the measures is undermined by the failure;
- Failure to notify the APA of an imminent threat of, or actual, environmental damage when the result is to cause or exacerbate the damage; and
- Failure to have valid and effective financial security when required to have such security.

Some of the above offences are classified as serious, rather than very serious, environmental offences depending on the consequences of the operator’s breach of the Decree-Law. For example, the failure to carry out preventive measures required by the APA is a serious environmental offence if it does not result in avoidable damage.

In addition to the above penalties, the APA may, simultaneously with a fine on the operator, “impose any additional penalties that are deemed appropriate, in accordance with the provisions of Law No. 50/2006 of 29 August 2006, as amended. That law established a legal framework for breaches of environmental law; prior to its enactment the general framework for breaches of administrative law applied. Law 50/2006 specifies the sanctions that may be imposed.

The general procedure for the breach of an administrative law begins with the filing of a complaint by a public official or individual and ends with the APA (or other relevant authority) issuing a resolution imposing a sanction (if the competent authority concludes from its examination and assessment of the evidence that a breach has occurred). The resolution is subject to judicial review.

With the exception of the police authorities, the supervising authorities (see section 5 above) are responsible for bringing proceedings in relation to the above offences and for deciding to impose fines and additional penalties. If an instigating entity is not competent to bring such proceedings, they shall be brought by IGAMAOT.

Proceedings for the above offences are brought separately from proceedings concerning an operator’s responsibility to prevent or remediate environmental damage. Evidence produced at either one can, however, be used in the other.
Directors and officers liability for breaching legislation

Decree-Law 147/2008 does not specifically provide for directors’ and officers’ liability for breaching the Decree-Law. Article 3(1), however, states that when liability is attributable to a legal entity, its directors and officers are jointly responsible for the obligations of the legal entity. This means, for example, that if a company cannot pay its debts, including debts concerning the environment, the directors and officers may be personally liable for those debts.

Publication of penalties

Article 27(2) of Decree-Law 147/2008 states that, in accordance with article 38 of Law 50/2006 (see above), 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.

The administrative authority may also, when necessary, order the provisional seizure of goods and documents under the terms of article 42 of Law 50/2006.

24. Registers or data bases of incidents

Decree-Law 147/2008 does not provide for the establishment of a register or data base of ELD incidents.

25. Cross border damage in another Member State

If environmental damage in Portugal affects or could affect another Member State, the APA shall immediately inform the governmental department responsible for foreign affairs, environment and, where applicable, health. The government department responsible for environment shall then, in collaboration with the APA and via the Ministry of Foreign Affairs:

- Provide competent authorities in the affected Member States with all relevant information to enable them to adopt appropriate measures; and
- Establish mechanisms for collaborating with those competent authorities to facilitate the adoption of all necessary measures to prevent and remedy the environmental damage.

If there is an imminent threat of, or actual, environmental damage in another Member State that may affect Portugal, the APA shall:

- Notify the European Commission;
- Make recommendations concerning preventive and remedial measures to the competent authorities of that Member States; and
- Subsequently begin procedures to recover costs incurred by adopting preventive or remedial measures in accordance with the Decree-Law.
26. **Financial security**

Article 22 of Decree-Law 147/2008 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”.

Article 22 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. Decree-Law No. 29-A/2011 provided for the potential definition of minimum amounts of financial security instruments by:

- 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.

The requirement for mandatory financial security for operators entered into force on 1 January 2010. At that time, the APA sent letters to a group of Annex III operators to provide evidence of a financial guarantee to include:

- Type, characteristics and amount of the financial guarantee(s) that were in place and their respective costs (i.e. insurance premiums);
- Methodology adapted in order to constitute the guarantee that was in place;
- The rationale behind the calculation of the amount of the financial guarantee and its annual costs; and
- A copy of a document establishing proof that the guarantee existed.

The following guidance has been prepared but has not been adopted as yet:

---

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

document establishing financial guarantees (Documento Constituição de Garantia Financeira), which includes the proposal to exclude low risk activities from the obligation to have a financial guarantee; and

Methodological guide for the establishment of financial guarantees (Guia Metodológico para a constituição de Garantia Financeira), which includes risk methodology to support the establishment of the financial guarantee, a proposal for the exemption of low risk activities, simplified risk methodology, and an approach to determine minimum values.

27. Establishment of a fund

Law No. 50/2006 of 29 August 2006 established the Environmental Intervention Fund (Fundo de Intervenção Ambiental) (EAF). The EAF is an environmental guarantee and recovery fund. It provides money, among other things, for preventing and remedying environmental damage for “orphan” sites, that is, when it is not possible to recover funding to prevention and remediation measures from liable operators. 133

Article 23(2) provides for a tax to be levied on mandatory financial security (see section 26 above) with a maximum of one per cent of such insurance, banking and financial instruments. The purpose of the tax is to finance the costs of public action to prevent or remedy environmental damage in accordance with the Decree-Law.

Article 23(3) states that the amount of the tax and the rules governing payment are to be set out in an order to be approved by the government departments responsible for finance, environment and economy. The proceeds from the tax “represent the full and exclusive revenue of the EIF”.

28. Reports

Decree-Law 147/2008 does not provide for any reports other than directing the APA to prepare and submit the report that Portugal must submit to the European Commission by the APA by 30 April 2013 in accordance with article 18(1) of the ELD. Annex IV of the Decree-Law sets out Annex VI of the ELD, which describes the contents of that report.

29. Information to be made public

Decree-Law 147/2008 does not specifically provide for information to be made public other than the publication of penalties for offences in accordance with Portuguese environmental law (see section 23).

30. Provisions concerning genetically modified organisms

Decree-Law 147/2008 does not mention GMOs other than in Annex III. Therefore, financial security for GMOs is required (see section 27 above).

31. **Key features and differences in legislation transposing the ELD and existing legislation**

When Portugal transposed the ELD, it did not have legislation that imposed liability for carrying out preventive and remedial measures for contaminated land, water pollution, biodiversity damage or general environmental damage although there were special provisions in legislation relating to water pollution and contamination caused by waste. Further, Portugal did not have any legislation that specifically imposed liability for marine pollution.

Under the existing legislation, the current owner of land was – and still is – responsible for remediating any contamination. The owner may then bring a contribution action under civil law against the person who negligently caused or contributed to the damage, including a former owner or occupier.

Existing waste management law may be applied to require the producer or possessor of waste to carry out preventive and remedial measures. That law is, however, limited because unexcavated contaminated soil is not waste under the Waste Framework Directive (2008/98/EC).

Due to this lack of existing legislation, the legislation transposing the ELD into Portuguese established a civil liability, as well as an administrative liability, system.
1. **Existing national environmental legislation**

By the time that Romania joined the EU on 1 January 2007, it had enacted many laws to transpose EU environmental legislation into national law as well as having existing national environmental law.

Under such national environmental law and prior to the ELD, Romania had specific legislation, set out in various laws, which imposed liability for preventing damage to the environment, but not for remediating it. The legislation applied (and continues to apply, as further amended and updated) to any damage to the environment including land contamination and water pollution. Also, Romania had general legislation that imposed liability for preventing damage to fauna and flora, whether or not protected by law.

Although it had enacted, and applied, various environmental laws, Romania recognized its lack of legislation for remediating environmental damage in the legislation that transposed the ELD, namely, Government Emergency Ordinance No. 68/2007 on environmental liability with regard to preventing and remediating environmental damage (GEO 68/2007). The preamble includes the following statement, recognizing that:

“the continuing absence of legislation with regard to environmental liability may have serious consequences in this field due to the fact that a legal framework obliging the operators to adopt measures and apply practices in order to minimise damage risks or to take the necessary remedial measures in case of damage, does not exist”.

Romania transposed the ELD in a single piece of legislation.

2. **Existing regimes for preventing and remediating environmental damage**

Prior to the transposition of the ELD, the main laws imposing administrative liability for environmental damage were:

- Government Emergency Ordinance 195/2005, as amended, on environmental protection (GEO 195/2005);
- Law No. 107/1996 of 25 September 1996, the “Water Management Law” (Legea apelor) published in the Romanian Official Gazette, Part I. No. 244/8 October 1996 (WML); and
- Law No. 347/2004 of 14 July 2004, the “Mountain Law” (Legea muntelui).

The liability provisions of GEO 195/2005, which cover a wide range of environmental matters, are focused on land contamination, while also taking into consideration some general aspects regarding flora and fauna. Since it came into force in 1996, the WML has included provisions that

The Mountains Law contains provisions that impose liability for preventing damage to land, micro flora and micro fauna.

Water pollution

Liability for water pollution is imposed both by GEO 195/2005 and the WML.

GEO 195/2005 imposes strict liability on natural and legal persons for ceasing and preventing water pollution. In addition, a person who causes water pollution is liable for the cost of remediating the damage, removing its negative consequences, and restoring the water or body of water to its condition before the damage. A person who breaches the provisions of GEO 195/2005 is liable for a fine of up to 50,000 lei (approximately €11,100). A person who knowingly causes water pollution that is likely to endanger human, animal or plant health plant is liable for imprisonment up to five years.

In addition, the WML imposes strict liability for remediating water pollution on the person who caused the pollution. Whilst the polluter pays principle is applied to any kind of pollution, contamination or damage with respect to the environment, as a practical matter, the water management unit (if pollution is attributable to such a unit) or a person is responsible for the cost of investigating and remediating any pollution regardless of whether the pollution occurs on its land or a third party’s land, unless the unit or person can show that another person caused the contamination. That is, as a general rule, the owner or occupier of land or a water management unit, is liable for remediating pollution unless the owner, occupier or water management unit can prove that another person or water management unit caused the contamination.

A water management unit is any entity that uses water for processing and that has obtained a water management permit. In order to obtain a permit, the applicant may have to show that it has prepared a plan to prevent and remEDIATE accidental pollution.

If the water management unit or person remediates the contamination, it may then bring an action against the polluter to recover its costs. As a practical matter, of course, this may not always be feasible.

If more than one person carried out the activity that caused the pollution, liability is joint and several. The person who has paid the investigatory and remediation costs may then bring contribution actions against other liable persons.

The WML also includes a provision that requires persons to notify the competent authority immediately when a pollution incident occurs. The failure to notify is an offence subject to an administrative fine of up to 40,000 lei (approximately €8,800).

Rules on evaluating and remediating water pollution are set out in the WML.

Land contamination

GEO 195/2005 imposes strict liability for remediating land contamination on the person who caused the contamination. As a practical matter, however, the owner or occupier of land is responsible for the cost of investigating and remediating any contamination, including historic contamination, unless the owner or occupier can show that another person caused the
contamination. This is largely because the competent authorities tend to contact the owner or occupier to investigate and remediate the soil and groundwater.

In accordance with Romanian civil law, if the owner or occupier remediates the contamination, it may then bring an action against the polluter to recover its costs. As above, this may not always be feasible.

If more than one person carried out the activity that caused the contamination, liability is joint and several. This is the case regardless of whether the persons who caused the contamination owned or occupied the land at different times. The person who paid the investigatory and remediation costs may then bring contribution actions against other liable persons.

GEO 195/2005 also includes a provision that requires persons to notify the competent authority immediately when a pollution incident occurs. The failure to notify is an offence subject to an administrative fine of up to 50,000 lei (approximately €11,100).

GEO 195/2008 does not contain a permit defence.


- Restoring biodiversity damage

GEO 195/2005 imposes strict liability for remediating damage to flora and fauna, regardless of whether they are protected by law, on the owner of the land on which the damage occurred. In addition, landowners have an obligation to prevent damage to wild flora and fauna on their land, in the sense of maintaining an ecological balance and preserving biodiversity, as well as of exploiting resources in a durable manner, so as not to harm the environment or human health.

Also, landowners must notify, and obtain approval from, the relevant competent authority prior to burning plant matter on their land. The failure to do so is subject to a fine of up to 50,000 lei (approximately €11,100).

- Other liability systems for remediating environmental damage

The main provisions for civil liability (tort liability) were article 998 et seq. of the Civil Code, which authorised a claim for compensation based on fault. On 1 October 2011, a new Civil Code (liability in tort, article 1349) entered into force which introduced a statute of limitation of 10 years for civil liability for environmental damage (article 2518 point 3). Liability continues to be based on fault.

3. Integration of the ELD into existing national legislation

- Transposing legislation


Amendments to existing national legislation

GEO 68/2007 did not amend existing national legislation.

Authorisation in legislation for other governmental entities to issue rules and regulations

GEO 68/2007 does not authorise other governmental entities to issue rules and regulations.

Article 33(1) of GEO 68/2007, however, provides for a Governmental Decision to be made within 12 months of the enforcement of GEO 68/2007 to encourage the development of financial security instruments and markets.

Relationship to other legislation

Article 3(3) of GEO 68/2007 specifically provides that it is without prejudice to EU and national legislation which “shall regulate more severely the operation of any of the activities falling within the scope of this ordinance [and] shall stipulate rules on conflicts of jurisdiction”.

Guidance and other documentation

The Romanian Government has not published guidance or other documentation concerning the ELD regime.

4. Effective date of national legislation

GEO 68/2007 applies to environmental damage that occurs after 30 April 2007.

5. Competent authority(ies)

The competent authority responsible for establishing and taking preventive and remedial measures and for assessing the significance of environmental damage is the County Environmental Protection Agency (CEPA) (Agenţia Judeţeană de Mediu). CEPA is to co-operate with the County Committees of the Environmental National Guard (Comisariat Judeţean al Gărzii Nationale de Mediu) in establishing preventive measures. In doing so, CEPA may also co-operate with:

- Water Basin Divisions;
- Scientific Councils for protected natural ranges;
- County Offices for Pedological and Agrochemical Studies; and
- Forestry and Hunting Territorial Inspectorates.

In assessing the significance of environmental damage and establishing remedial measures, CEPA may also co-operate with the above authorities and the National Environmental Protection Agency.

Representatives of all the above authorities shall:

- Analyse information and documents submitted to them by CEPA; and
Submit their opinions to CEPA within 24 hours for preventive measures and five days for remedial measures, both from the date of receipt of the above information or documents from CEPA.

The competent authority for observing an imminent threat of, or actual, environmental damage and for identifying liable operators is the Environmental National Guard operating through county committees.

6. Operators and other liable persons

The definition of an operator in GEO 68/2007 is the same as that in the ELD.

- Secondary liability (e.g., parent company)

GEO 68/2007 imposes joint and several liability on, among others, a consortium or multinational companies (see section 10 below). The potential thus exists for a parent company to be primarily liable together with a subsidiary that is the operator.

- Death or dissolution of responsible operator

GEO 68/2007 does not mention the death or dissolution of a responsible operator.

- Person other than an operator who may be liable

Only the operator may be liable.

7. Annex III legislation

- Rebuttable presumption that operator’s activity caused environmental damage

GEO 68/2007 does not establish a rebuttable presumption that an operator’s activity caused environmental damage.

- Additional occupational activities subject to strict liability

No additional activities are subject to strict liability.

- Spreading of sewage sludge for agricultural purposes

The spreading of sewage sludge for agricultural purposes is listed as an exception rather than an exclusion from strict liability under Annex III (see section 9 below).

8. Standard of liability for non-Annex III activities

The standard of liability for non-Annex III activities is fault or negligence.

9. Exceptions

- Application to imminent threat of environmental damage as well as environmental damage

The exceptions apply to an imminent threat of, and actual, environmental damage.
Differences with exceptions in the ELD

GEO 68/2007 lists “the use for agricultural purposes of the mud resulted from the urban sewage water treatment stations, treated in accordance with an approved standard” as an exception to the ELD.

This exception is less stringent than the ELD, which provides that the spreading of sewage sludge for agricultural purposes may be excepted only from Annex III and not the ELD (ELD, Annex III).

Diffuse pollution exception

The diffuse pollution exception applies "where it is possible to establish a causal link between the damage and the activities of individual operators”. This is the same as the ELD.

10. Joint and several or proportionate liability

GEO 68/2007 applies joint and several liability for preventing and remediating environmental damage.

Article 31(3) 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”.

Article 31(3) is unclear. 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”. Further, in most jurisdictions, courts rarely conclude that the corporate veil may be pierced; this would be a significant exception to that general rule.

Mechanism for contribution between liable operators

Article 31(2) of GEO 68/2007 states that “The effects of passive solidarity, including cost allocation among codebtors shall be realised pursuant to the provisions in force, taking into consideration the dispositions referring to liability division between the producer and user of a product”.

11. Limitation period

The limitation period is 30 years; the same as the ELD.

12. Defences

Defences to liability or costs?

The defences of damage “caused by a third party [that] occurred despite the fact that appropriate safety measures were in place” and compliance with a compulsory order from a public authority appear to be defences to costs. Article 27(2) of GEO 68/2007 provides that in such a case, “the state, through its legal representatives, shall take the appropriate measures to enable the operator to recover the costs incurred”. Whether the defences are defences to liability or costs, however, is not entirely clear.
GEO 68/2007 does not indicate whether the permit and state-of-the-art defences are defences to liability or costs.

- If defences to liability; suspension (or not) of remediation notice during appeal

GEO 68/2007 does not indicate whether a remediation notice may be suspended during an appeal.

- Permit defence

Article 28(a) of GEO 68/2007 sets out the permit defence.

- State-of-the-art defence

Article 28(b) of GEO 68/2007 sets out the state-of-the-art defence.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
  
  22.66%

- Extension of biodiversity to nationally protected biodiversity


That is, article 2(17)(a) defines protected species and natural habitats as “species mentioned in Annexes 3, 4A and 4B to the Government Emergency Ordinance no. 57/2007 concerning the regime of protected natural areas, conservation of natural habitats, of flora and wild fauna, approved with amendments and supplements through Law no. 49/2011, with future amendments and supplements [and] habitats of species of migrating birds or of species listed in Annex 3 as well as the natural habitats listed in Annex 2 and the breeding or resting sites of the species referred to in Annexes 4A and 4B to the Emergency Ordinance no. 57/2007, approved with amendments and supplements through Law no. 49/2011, with future amendments and supplements”.

That is, Romania has extended biodiversity damage under the ELD to nationally protected biodiversity.

- Biodiversity damage in the exclusive economic zone

Romania has declared an exclusive economic zone in which the exploitation of oil and gas has been proposed. Biodiversity damage under the ELD, therefore, applies to that zone.

- Water or water body

WML refers to waters under the Water Framework Directive and also to water bodies under that Directive, with regard to damage. It is thus unclear whether water damage under the ELD must be damage to “waters” or damage to “water bodies”. The prevailing notion in the WML, however, is on damage to “waters”.

---

Implementation challenges and obstacles of the Environmental Liability Directive | 291
14. **Thresholds**

- Water damage
  
  The threshold for water damage is the same as the ELD.

- Biodiversity damage
  
  The threshold for biodiversity damage is the same as the ELD.

- National biodiversity damage
  
  The threshold for biodiversity damage is the same as the ELD.

- Land damage
  
  GEO 68/2007 has the same definition of land damage as the ELD.

15. **Standard of remediation**

- Land
  
  The standard of remediation for land damage is the same as the ELD.

- Biodiversity
  
  - Primary remediation
    
    The standard of remediation for biodiversity damage is the same as the ELD.
    
    - Complementary and compensatory remediation
      
      Complementary and compensation remediation are the same as the ELD.

- Water
  
  - Primary remediation
    
    The standard of remediation for water damage is the same as the ELD.
    
    - Complementary and compensatory remediation
      
      Complementary and compensatory remediation are the same as the ELD.

16. **Format of determination of environmental damage**

  GEO 68/2007 does not indicate a specific format for a determination of environmental damage.

17. **Powers and duties of competent authority**

- Inspections, investigations, studies and analyses

  CEPA may require an operator to inspect, investigate and carry out studies and analyses in respect of environmental damage. Operators must submit assessments of environmental damage to CEPA within three days of their completion.
Information orders

CEPA may require operators to provide information on an imminent threat of environmental damage or a suspected case of an imminent threat as well as to provide supplementary information on environmental damage and measures taken to remediate it.

CEPA may also require operators to provide information and data in respect of environmental damage. The information and data is to be provided to CEPA within three days of their completion.

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

CEPA has the power to require an operator to carry out necessary preventive measures.

Power or duty to require an operator to carry out remedial actions

CEPA has a duty to require an operator to carry out remedial actions. GEO 68/2007 sets out details of the procedure to be followed including inviting interested parties and persons on whose land the remedial measures are to be carried out to submit comments / observations. This invitation is to be made within five days from the date on which the operator submitted proposed remedial measures (which is to be within 15 days from the date of the damage) or from the notification date for the damage.

Power or duty of competent authority to carry out preventive measures

CEPA has the power to carry out necessary preventive measures but only if:

- CEPA has ordered the operator to carry out such measures and the operator has failed to do so,
- The operator cannot be identified; or
- The operator is not required to bear the costs of such measures.

Power or duty of competent authority to carry out remedial measures

CEPA has the power to carry out remedial measures. Article 16(2) states that these may be taken only “as a means of last resort” if:

- CEPA has ordered the operator to carry out such measures and the operator has failed to do so,
- The operator cannot be identified; or
- The operator is not required to bear the costs of such measures.

Form of preventive order

The order should set out the reasons for CEPA’s decision to issue the preventive order and should include information on deadlines and administrative review proceedings under Administrative Law No. 554/2004, as amended. CEPA shall issue the order to the operator within 24 hours from the date the decision to issue a preventive order is made.

Form of remediation order

The remediation order should explain the reasons for CEPA’s decision to issue it and should include information on deadlines and administrative review proceedings under Administrative
Law No. 554/2004, as amended. CEPA shall issue the order to the operator within 24 hours from the date of its decision to issue a remedial order. In making its decision, CEPA shall take into account any comments / observations received from interested parties (see section 20) and the person on whose land the remediation is to take place. The person in charge of CEPA shall submit its decision concerning the remedial measures and/or the priority of remediating the environmental damage within five days from receipt of those comments / observations.

Appeal against preventive or remediation order

GEO 68/2007 does not specify the procedure for appeals against preventive or remediation orders. The procedures set out in Administrative Law No. 554/2004, as amended, apply to such administrative review proceedings.

Sanctions for delay in complying with preventive or remediation order

GEO 68/2007 does not specify sanctions for a delay in complying with a preventive or remediation order. See section 23 below on offences and sanctions.

Formal consultees on contents of preventive and remediation orders

GEO 68/2007 does not indicate any formal consultees on the contents of preventive and remediation orders.

Recovery of implementation and enforcement costs

GEO 68/2007 has the same definition of “costs” as the ELD.

Article 32(1) of GEO 68/2007 provides that CEPA “should ensure that the costs for preventive and remedial measures incurred are to be recovered from the operator or, as the case may be, from the third party who caused the damage or imminent threat.

Article 32(2) provides that CEPA “shall be entitled to 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 pursuant to [GEO 68/2007] within 5 years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is later”.

Article 32 tracks article 10 of the ELD in referring to a third party who has caused an imminent threat of, or actual, environmental damage. The identity of the third party, however, is unclear.

Deadline for competent authority to seek recovery of costs

The deadline for CEPA to seek recovery of its costs is five years (see above).

18. **Duties of responsible operators**

Preventive measures

An operator has a duty to carry out preventive measures. The measures are to be proportional to the imminent threat, shall prevent the damage from occurring and shall be taken in accordance with the precautionary principle. The operator must notify CEPA and the County Committee of the Environmental National Guard of the measures that have been taken and their effectiveness within one hour of their completion.
If an imminent threat of damage remains in spite of preventive measures having been taken, the operator shall, within six hours of realizing that the measures were ineffective, notify CEPA and the County Committee of the Environmental National Guard about:

- The measures that were taken to prevent damage;
- The situation after the preventive measures were taken; and
- Any additional measures that were taken to prevent the situation getting worse.

Remedial actions (emergency actions)

An operator has a duty to carry out remedial actions immediately environmental damage occurs.

Remedial measures

An operator has a duty to carry out remedial measures after having identified potential measures in accordance with the common framework set out in Annex 2 of GEO 68/2007 (which is the same as Annex II of the ELD) and having submitted the potential measures to CEPA for its approval within 15 days from the date of the damage. When the measures to be carried out have been determined by CEPA, with the co-operation of the operator, the operator has a duty to carry them out.

Duty to notify / provide information when imminent threat of environmental damage occurs

An operator has a duty to notify CEPA and the County Committee of the Environmental National Guard within two hours after an imminent threat of environmental damage, as well as carrying out necessary preventive measures. In doing so, the operator shall provide:

- Data that identifies the operator;
- The time and place of the imminent threat of environmental damage;
- Natural resources that may be adversely affected;
- Measures taken to prevent environmental damage; and
- Any other information that the operator considers to be relevant.

An operator has a duty to notify CEPA and the County Committee of the Environmental National Guard within two hours after environmental damage occurs. In doing so, the operator shall provide:

- Data that identifies the operator;
- The time and place of the environmental damage;
- Characteristics of the environmental damage;
- Causes of the damage;
- Natural resources that were adversely affected;
- Measures taken to prevent further environmental damage; and
Any other information that the operator considers to be relevant.

Entity to which notification should be provided

The notification is to be provided to CEPA and the County Committee of the Environmental National Guard.

19. **Access to third-party land to comply with the ELD**

GEO 68/2007 provides that CEPA has the power to require preventive and remedial measures to be taken on third-party land. Third parties are required to allow such measures to be taken on their land. Article 7(3) provides that “These measures are not to lead to the property’s loss of value”.

GEO 68/2007 does not specify a mechanism for compensation to the owner of the third party land if damage nevertheless occurs, leading to a loss in value of the land.

20. **Interested parties**

NGOs were granted rights in Romania under Government Ordinance No. 26/2000, as amended, on associations and foundations. Further, GEO 195/2005 provides that environmental NGOs may submit comments to administrative authorities and/or courts concerning environmental matters.

Moreover environmental NGOs are authorised to bring judicial proceedings concerning environmental issues directly against operators under the ELD regime.

GEO 68/2007 provides that interested parties can submit comments / observations “in writing or through any electronic means of communication”.

Qualification criteria for “sufficient interest”

GEO 68/2007 states that “Any other non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be entitled to address to the County Committee or the Environmental National Guard and to [CEPA], deeming to have rights or interests capable of being impaired”.

GEO 68/2007 does not specify what Romanian law requires in this regard.

Method of notifying interested parties of planned remedial measures

CEPA shall notify interested parties of proposed remedial measures within five days after an operator has submitted such proposed measures to CEPA for approval (see section 17). Interested parties then have 15 days in which to submit their comments / observations.

Information to be provided to competent authority

An interested party shall accompany its comments / observations with “relevant information and data” to support those comments / observations.

Challenges to competent authority’s decision

GEO 68/2007 provides that interested parties “shall have access to a competent administrative court to review the procedural and substantive legality of the decisions, acts or failure to act of
the competent authorities”. This language closely tracks article 13(1) of the ELD, whilst identifying that the appropriate forum for an appeal is an administrative court.

GEO 68/2008 further notes that the interested party’s request to the court shall include remedies “in accordance with provisions under Law No. 554/2004 [on administrative litigation,]” as amended.

- Duty on competent authority to respond to person making comments

If CEPA considers that the information accompanying the comments / observations “show in a plausible manner that environmental damage exists, [CEPA] shall consider any such observations and requests for action and shall request the relevant operator in writing to make his views known with respect to the request for action and the accompanying [information] within 5 days from the receipt of the request for action”. The operator has five days to submit its observations. CEPA shall then inform the interested parties who submitted the comments / observations “of its decision to accede to or refuse the request for action” within 15 days from the date of the submission of the request to the operator. CEPA shall provide reasons for its decision, information concerning time limits, and administrative review proceedings in the scope of administrative procedural law under Law No. 554/2004, as amended.

If CEPA has received comments / observations concerning an imminent threat of environmental damage, CEPA shall respond to persons who submitted comments / observations only after having taken appropriate action.

- Inclusion of interested party in any proceedings by the competent authority against an operator

GEO 68/2007 does not mention the inclusion of an interested party in any proceedings by the competent authority against an operator.

21. Public access to information regarding environmental damage and related measures

GEO 68/2007 does not indicate any specific measures for public access to information regarding environmental damage and related measures. As in other Member States, Directive (2003/4/EC) on access to environmental information applies; in Romania it has been transposed by the Government Decision No. 878 from 28 July 2005.

22. Charges on land / financial security after environmental damage

Article 29(2) of GEO 68/2007 states that CEPA “shall recover, inter alia, via security over property or other appropriate guarantees from the operator (garnishment) who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions” set out in it. This is identical language to that in the ELD.

Article 29(3) further provides that the registration of the security over property shall be noted in the Land Registry Office.
23. **Offences and sanctions**

Article 40 of GEO 68/2007 sets out various penalties for breaches of articles in that legislation. The penalties differ depending on whether a natural person or a legal person is responsible for the breach. The following are the penalties, which are to be applied by the Environmental National Guard, with reference to Governmental Ordinance No. 2/2001 on the legal regime of violations, as amended and supplemented by Law No. 180/2002, as may be amended or supplemented:

- A fine of between 5,000 and 10,000 lei (€1,142 - €2,284) for a natural person and between 10,000 and 20,000 lei for a legal person for failing to submit specified assessment results and other information concerning environmental damage to CEPA within three days from their completion notifying CEPA and the County Committee of the Environmental National Guard within six hours from the time that measures to prevent an imminent threat of environmental damage were seen to be ineffective;

- A fine of between 25,000 and 40,000 lei (€5,711 - €9,137) for a natural person and between 50,000 and 80,000 lei (€11,421 - €18,273) for a legal person for failing to notify CEPA and the County Committee of the Environmental National Guard of an imminent threat of, or actual, environmental damage within two hours and/or failing to carry out emergency remedial actions;

- A fine of between 40,000 and 50,000 lei (€9,137 - €11,421) for a natural person and between 80,000 and 100,000 lei (€18,271 - €22,838) for a legal person for failing to allow preventive or remedial measures to be carried out on its property, failing to carry out necessary preventive measures in the event of an imminent threat of environmental damage, failing to carry out remedial measures, and failing to propose remedial measures to CEPA for approval within 15 days following environmental damage; and

- A fine of between 40,000 and 50,000 lei (€9,137 - €11,421) for a natural person and between 80,000 and 100,000 lei (€18,273 - €22,838) for a legal person for failing to comply with an order from CEPA to provide information or carry out necessary specified preventive measures, or failing to comply with an order from CEPA to provide supplementary information concerning environmental damage, to carry out emergency remedial actions or to carry out necessary specified remedial measures.

If a person who breaches the above provisions pays the fine “on the spot or within 48 hours from the date of drawing up the report” or its service on the person who breached the provision, the amount of the fine is half of the minimum amount of the fine.

If any of the above breaches endangers the life or health of one or more persons, the sanction is one to three years imprisonment or a fine.
If a breach is a penalty under article 182 (regarding serious injuries to persons) of the Penal Code, the penalty is two to 10 years imprisonment if intentional and three months to two years imprisonment if unintentional.

If a breach results in the death of one or more persons, the penalty is 10 to 25 years imprisonment if intentional and one to five years imprisonment if unintentional.

- Directors and officers liability for breaching legislation

GEO 68/2007 does not mention the liability of directors and officers.

- Publication of penalties

GEO 68/2007 does not indicate that penalties are to be published.

24. **Registers or data bases of incidents**

GEO 68/2007 does not specify any registers or data bases for ELD incidents.

25. **Cross border damage in another MS**

If environmental damage from Romania affects or is likely to affect another Member State, CEPA, through the Central Public Authority for Environmental Protection, is to co-operate with competent authorities from those Member States, including an appropriate exchange of information to ensure that preventive or remedial action is taken. Such co-operation shall take account of bilateral agreements that are in force that deal with environmental protection and water management.

If the environmental damage has occurred in Romania, CEPA, through the Central Public Authority for Environmental Protection, shall provide sufficient information to competent authorities in potentially affected Member States within 24 hours from being notified of the damage. These actions are to be supported by the Ministry of Foreign Affairs.

The information shall include:

- The time and place of the environmental damage;
- Characteristics of the environmental damage;
- Natural resources affected by the damage;
- Measures taken to prevent further environmental damage; and
- Any other relevant information.

If the County Committees of the Environmental National Guard identify environmental damage in Romania which originates from another Member States, they shall report the damage to the European Commission through the Central Public Authority for Environmental Protection, supported by the Ministry for Foreign Affairs.

The Central Public Authority for Environmental Protection may:

- Make recommendations for preventive and remedial measures; and
- Seek to recover costs incurred in carrying out such measures.
26. **Financial security**

Article 33(1) of GEO 68/2007 provides that measures shall be taken through a Governmental Decision to be made within 12 months of the enforcement of GEO 68/2007 to encourage the development of financial security instruments and markets. Article 33 closely tracks article 14(1) of the ELD.

Article 33(2) provides that in developing the financial security instruments, the following factors are to be taken into consideration:

- The financial guarantee is to be established in consideration of the danger posed by proposed or actual activity;
- The danger posed by an activity is to be established with respect to potential damage to the environment; and
- The potential damage is to be assessed on the basis of assessments of its impact on the environment and/or risk assessments to be submitted by operators.

The above provision appears to apply to mandatory financial security requirements but this is not entirely clear. Romania has not introduced mandatory financial security as yet.

27. **Establishment of a fund**

The Romanian Government has not proposed establishing a fund. Article 34 of GEO 68/2007, however, provides that “Costs of preventive and remedial measures shall be allocated through Governmental Decision to the Central Public Authority for Environmental Protection from the governmental emergency fund for financing the emergency situations with regard to preventing effects of imminent threat of damage and/or remedying the effects produced by environmental damage”.

28. **Reports**

Article 45 of GEO 68/2007 provides that the National Environmental Protection Agency shall prepare a report on its implementation by 31 December 2012, to include the information set out in Annex 6 (which is the same as set out in Annex IV of the ELD). The National Environmental Protection Agency shall submit this report to the Central Public Authority for Environmental Protection by 31 January 2013, which in turn must submit the report to the European Commission by 31 March 2013.

29. **Information to be made public**

GEO 68/2007 does not indicate that any information shall be made public.

30. **Provisions concerning genetically modified organisms**

GEO 68/2007 does not mention GMOs.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

When Romania transposed the ELD, it had general legislation that imposed liability for preventing and remediating environmental damage, with a focus on remediating contaminated land.

The general legislation imposes strict liability for remediating contaminated land on the person or persons that caused the contamination; liability is joint and several. As a practical matter, the competent authorities tend to contact the owner or occupier of the land, who is responsible for the cost of investigating and remediating any contamination, including historic contamination, unless they can show that another person caused the contamination. If the owner or occupier remediates the contamination, they may then bring a contribution action against the person or persons that caused it if, of course, they can find that person.

In a similar manner, the same general legislation imposes strict liability on a person who caused water pollution for ceasing, preventing and remediating the pollution. Remediation includes removing the negative consequences of the pollution and restoring the waters to their condition prior to the damage. As a practical matter again, the person or water management unit (if pollution is attributable to such a unit) is responsible for the cost of investigating and remediating the pollution regardless of whether the pollution occurs on its land or a third party’s land unless they can prove that another person caused the pollution. If the person or unit remediates the pollution, they may bring a contribution action against the person or persons that caused it if, again, they can find that person.
1. **Existing national environmental legislation**

The Spanish Government transposed the ELD by an Act (Environmental Liability Act, Law 26/2007 of 23 October 2007, as amended by Real Decreto-Ley 8/2011 of 1 July (ELA)) and a Decree (Ministry of the Environment and Rural and Marine Affairs, Royal Decree 2090/2008 of 22 December (Decree 2090/2008)). The transposing legislation introduced a stand-alone liability system; it did not amend existing environmental legislation. This manner of enacting environmental legislation is common in Spain, in which there are a substantial number of national and regional environmental statutes and secondary legislation concerning different environmental media, such as water and land, and regulatory contexts.

2. **Existing regimes for preventing and remediating environmental damage**

The obligation on persons who cause environmental damage to remediate it is enshrined in article 45 of the Spanish Constitution.\(^{134}\) Article 45 applies to the Spanish legislatures who must enact legislation in accordance with it.

When Spain transposed the ELD, it already had legislation to remediate water pollution and contaminated land. Legislation that requires persons to take preventive measures, to remediate pollution or contamination was, however, scarce. Spain had no specific legislation to require persons who caused a threat of, or actual, biodiversity damage, to prevent or remediate it.

- **Water pollution**

The national legislation for water pollution is the Water Act, as amended by Royal Decree 1/2001 of 20 July, which provides that a person who pollutes water is liable for remediating it. The threshold for liability is low. The standard of liability is strict. The scope of liability is joint and several, subject to a competent authority allocating liability between multiple persons when feasible to do so.

In particular, a person who is responsible for polluting waters must remediate them to their condition before the pollution occurred. If it is not feasible to do so, or if the damage is irreparable, the liable person must pay a compensatory amount determined by the Spanish Government.

---

\(^{134}\) Article 45 provides that: “(1) Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it. (2) The public authorities shall concern themselves with the rational use of all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity. (3) For those who violate the provisions of the foregoing paragraph, penal or administrative sanctions, as applicable, shall be established and they shall be obliged to repair the damage caused”. 
The national legislation on water pollution differs from the ELD (and its transposing legislation) in many respects including the following:

- There is no liability for compensatory or complementary remediation;
- There is no duty to prevent water damage;
- Liability is not limited to an “operator”;
- There is a more restrictive statute of limitations under existing law than the ELD (see this section below);
- The ELD regime applies only if the damage is caused by an activity listed in Annex III of the ELD;
- There are no requirements to notify a competent authority of the pollution or harm; and
- There are no provisions for “interested parties” to submit comments.

Land contamination

The Spanish Government introduced a regime for remediating contaminated land in 1998 when it enacted Law 10/1998 of 21 April on wastes, the main purpose of which was to transpose Council Directive 91/156/EEC on waste. The law came into effect in 2005, when Royal Decree 9/2005 of 14 January was issued. The Decree sets out activities that can potentially damage soil, together with criteria for declaring when land (soil) is contaminated.

The contaminated land regime was modified by Law 22/2011 of 28 July, which came into force on 30 July 2011. Whilst the main purpose of the new Law was transposition of Directive 2008/98/EC on waste, it includes a separate section on contaminated land. The following describes the contaminated land regime, as modified by Law 22/2011.

Each Autonomous Community is obliged to publish an inventory of contaminated land. Criteria and procedures for compiling and maintaining the inventories and declaring land to be contaminated land are set out in Decree 9/2005. The Decree defines contaminated land as soil that has characteristics that have been adversely impacted by the presence of hazardous chemical components from human activities in a concentration that poses an unacceptable risk to human health and the environment. The Decree also sets out criteria and standards for determining when land is contaminated land. These are based on the characteristics of the soil, the use of the land and an assessment of the risk posed by the contaminants. Some Autonomous Communities have also issued criteria and guidance on soil quality criteria and the re-use of decontaminated soil.

The Spanish Government has published a list of over 100 potentially polluting activities. A person who carries out one or more of these activities must have filed a preliminary report on the condition of the land, based on a desktop review with the relevant Autonomous Community by February 2007. Such persons are required to provide complementary and periodic reports on the condition of the land to the Autonomous Community pursuant to procedures, including the frequency of the reports, established by that Community. The owner of land on which one or
more potentially polluting activities has been carried out must disclose the activity(ies) to a potential purchaser of the land. The landowner must also submit a report to the relevant Autonomous Community when it applies for a license or other authorisation to change the use of the land.

When a competent authority becomes aware that land may be contaminated land, either through a request for information or another means, it carries out a risk assessment to determine whether the land meets the relevant criteria for determining it as contaminated land. If the authority considers that the land meets such criteria, it issues an administrative resolution to declare that the land is contaminated land. If the authority issues the resolution, it lists the land in the inventory of contaminated land for that Autonomous Community. Land in the inventories is prioritised by the risks posed by it to human health and the environment. If required by the Autonomous Community, the status of the land as contaminated land must be noted in the Land Registry.

In the early 1990s, the national government began compiling a national inventory of contaminated sites in conjunction with the Autonomous Communities. The Communities were subsequently required to submit their inventories of contaminated land to the Ministry of the Environment and Rural and Marine Affairs by 30 July 2012 and to update the inventories annually after that time. In turn, the Ministry maintains the national inventory.

Once a competent authority has issued a declaration of contaminated land, there is a duty to remediate it. In order to trigger the remediation requirement, the competent authority issues a clean-up order that sets out the measures to be taken in accordance with terms and conditions established by the Autonomous Community. Autonomous Communities in which there has been a long history of industrial use, such as the Basque Country, were the first to establish criteria for evaluating and remediating contaminated land. The standard of remediation is the use of the land when the contamination occurred. Until the contamination is remediated, the competent authority may impose restrictions on developing the land or other measures that are incompatible with its remediation.

When remedial works are completed, the competent authority certifies that the land has been remediated in accordance with criteria set out in Decree 9/2005. If the authority considers that the criteria have not been satisfied, it must require further remedial works to be carried out. When the authority issues the certification that the contaminated land has been remediated and the Autonomous Community agrees, the certification is included in the inventory.

A hierarchy of persons are liable for remediating contaminated land. The person that caused the contamination is primarily liable. If the contamination was caused by more than one person, either at the same time or consecutively, both are primarily liable. A current non-occupying owner(s) of the land is secondarily liable if the polluter cannot be found or cannot pay the remedial costs. The current possessor (occupier) of the land at the time of the contamination has tertiary liability if neither the polluter nor the non-occupying owner can be found or can pay remedial costs. A different system operates for public domain property, with the polluter being

---

135 Under Law 10/1998, prior to its modification by Law 22/2011, the occupier was secondarily liable, with the owner being liable if neither the polluter nor the occupier could remediate the contamination.
primarily liable, the occupier being secondarily liable and a non-occupying owner having tertiary liability. If a person who is not primarily liable remediates contaminated land, that person may seek recovery of its costs from persons who are primarily liable (or secondarily liable in the case of persons with tertiary liability).

The standard of liability is strict. The scope of liability is joint and several, subject to a competent authority allocating liability between multiple persons when feasible to do so. A person that pays to remediate contaminated land has a right of contribution against other liable persons. There are no defences to liability.

Liable persons may enter into voluntary agreements to remediate land that has not been declared to exceed the threshold for contaminated land. If they do so, the competent authority may agree to approve the proposed remediation plan and, subsequently, to certify that the remediation has been carried out according to that plan. The competent authority maintains a register of such remedial actions.

The penalty for the failure to comply with a clean-up order or the breach of a voluntary agreement is a fine, the amount of which is higher if hazardous waste is involved.

Decree 22/2011 authorises competent authorities to require responsible persons to take measures to prevent contamination. Further, it requires the notification of contaminated land to the relevant competent authority.

The legislation on contaminated land differs from the ELD (and its transposing legislation) in many respects including the following:

- The threshold for contaminated land is based on soil quality criteria and not harm to human health;
- Liability is not limited to an “operator” but also includes owners and occupiers of the land;
- The statute of limitations under existing legislation is shorter than the ELD (see this section below);
- The ELD regime applies only if the damage is caused by an activity listed in Annex III of the ELD whereas there are many more potentially polluting activities;
- The national contaminated land legislation is retrospective whilst the ELD regime applies only from 30 April 2007; and
- There are no provisions for “interested parties” to submit comments.

Restoring biodiversity damage

Prior to transposition of the ELD, Spanish legislation specified that a person who caused damage to protected species and natural habitats should remediate the damage.

Other liability systems for remediating environmental damage

Other liability systems for remediating environmental damage in Spain include the following:
• Conditions in an environmental permit under legislation transposing the integrated pollution prevention and control Directive / Industrial Emissions Directive that require the remediation of pollution incidents during the pendency of the permit; with the site to be remediated to a “satisfactory state” at the termination of operations; and

• The legislation on the contained use and direct release of genetically modified organisms (GMOs) authorizes the relevant competent authorities to require a person whose operations may cause environmental damage to carry out preventive measures. In addition, the authorities may require such a person to remediate the damage caused by GMOs and to pay money to compensate for the damage.

The various environmental statutes and secondary legislation 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.

✈ Interface between the existing national liability regimes and the ELD regime

As indicated above, the ELD regime is stand-alone legislation that supplements existing legislation. This means that the existing legislation applies below the thresholds for the ELD legislation. The regime for contaminated land also means that this regime, as well as the ELD regime, could apply to the same land if it has been contaminated by incidents prior to and after 30 April 2007.

There are various differences between the existing environmental legislation and the ELD legislation including the following:

• The administrative liability systems for environmental damage in Spain are largely based on remediating damage that has already occurred rather than prevention although this is beginning to change;

• The existing liability systems are based on requiring the remediation of environmental damage, with compensation based on an estimate of the costs of remediation if remediation is not feasible; in contrast, the compensation option is not permitted for primary liability under the ELD regime;

• The existing legislation tends not to include defences or exceptions, in contrast to the ELD regime; and

• The time limits for bringing proceedings under the existing regimes are shorter than the ELD regime.
3. Integration of the ELD into existing national legislation

Transposing legislation

ELA

Decree 2090/2008, which enacts the partial implementation of the ELA

Ministerial Order ARM/1783/2011 of 22 June, as published in BOE 2011 of 29 June, núm 154, sec.l, p.69142, Priority order and timetable for the publication of ministerial orders that will set mandatory financial guarantees for each group of economic activities

Amendments to existing national environmental law

No amendments were made to existing national environmental law to transpose the ELD.

Authorisation in legislation for other governmental entities to issue rules and regulations

The ELA authorises the Government, after consultation with the Autonomous Communities, to adopt provisions to implement and execute:

- the legal system for financial guarantees;
- criteria to determine the significance of damage to biodiversity (ELD Annex I);
- criteria on the remediation of environmental damage (ELD Annex II); and
- criteria on information that governmental authorities must provide to the Ministry of the Environment and Rural and Marine Affairs with regard to environmental liability (Annex VI).

The Autonomous Communities may adopt more stringent measures regarding the prevention, containment or remediation of environmental damage including the classification of new offences and sanctions, to extend the legislation to other activities, and to extend liability to other persons. None of the Autonomous Communities have issued any transposing legislation.

The Technical Commission on the Prevention and Remediation of Environmental Damage was established as an agency for technical co-operation and collaboration between the General State Government and the Autonomous Communities for the exchange of information and advice on environmental damage prevention and remediation issues. The Technical Commission is authorised, among other things, to issue recommendations and prepare methodology on risk assessment, prevention and remediation of environmental damage and furnish expert opinions, at the request of the competent authorities, on the determination of environmental damage, its remediation and monetary evaluation.

Relationship to other legislation

If a responsible person under the ELA has taken prevention, containment and remediation measures concerning environmental damage under the ELA and defrayed the costs of those measures, it is not necessary for the operator to take actions envisaged under the ELA.

The following acts apply to various procedures in the ELA:
- when imposing sanctions, public administrations shall ensure that the seriousness of an offence is commensurate with the sanction imposed and, in doing so, shall refer to the criteria in Article 131 of Law 30/1992 of 26 November;

- appeals against resolutions (orders) delivered by a competent authority, and any other procedure for which there are no specific procedures in the ELA, are to be made as provided in Title VII of Law 30/1992 of 26 November and other applicable legislation;

- an order requiring an operator to pay costs, and any other act entailing cash payment, shall be executed in accordance with the provisions of Article 10 of the General Budget Act, Law 47/2003 of 26 November; and

- the pecuniary liability of persons who are secondarily liable is to be declared and enforced through executive procedures specified in the laws on taxation and public revenue collection.

The provisions of the ELA apply without prejudice to civil protection legislation for emergency situations; regulations in Articles 24, 26 and 28 of the General Health Act 14/1986 of 25 April; provisions concerning health emergencies in the Public Health (Special Measures) Act Organic Law 3/1986 of 14 April; and regional legislation applicable to civil protection measures and health emergencies.

Guidance and other documentation

Guidance has been issued by some public institutes, together with the governments of Aragon (2008), Navarra (2009), and Andalusia, and some similar institutes. The focus of the documents is to answer questions from companies, in particular small and medium-sized companies.

4. Effective date of national legislation

The ELA entered into force on 23 October 2007; liability under it is retroactive to 30 April 2007.

5. Competent authority(ies)

Article 2 no.22 defines the competent authorities as those which are in charge to implement the provisions, General State Administration, Autonomous Communities and cities of Ceuta and Melilla. These bodies may (within their competence) designate other bodies to implement the legislation.

The General State Administration is competent, where the water and coastal legislation charges it to protect those public goods. Where these public goods are affected by an incident which goes beyond the borders of one Autonomous Community, the General State Administration and the administrations of the Autonomous Communities form a group to take care of the issue, in a spirit of mutual information, cooperation and collaboration. In exceptional cases and when this is required by extraordinary seriousness or urgency, the General State Administration may
promote, coordinate or adopt necessary measures, however in collaboration with the Autonomous Communities and in conformity with their competences (Article 7).

6. **Operators and other liable persons**

ELD: an “operator” is defined 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”

ELA: an “operator” is defined as: “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 the definitions of an operator under the ELD and the ELA are essentially the same, the definition under the ELA 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” (Article 2 no.10).

Operators who are beneficiaries of public schemes supporting foreign Spanish investment in non-EU countries “are obliged to prevent, avoid or repair environmental damage in compliance with international agreements, principles, targets and regulations endorsed by Spain [thus] the damage prevention, containment and remediation measures regulated under this Act may apply, with the same scope and aim”.

If an operator who satisfies the above criteria fails to do so, it must forfeit all public foreign investment aid that gave rise to the environmental damage and shall not be eligible to receive similar aid for two years in addition to any other sanction imposed by Spain.

- **Secondary liability (e.g., parent company)**

Parent companies 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.

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.

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.

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.
Receivers and liquidators of legal persons who failed to take the necessary steps to comply with their duties and obligations may be liable.

- **Death or dissolution of responsible operator**

If a responsible natural or legal operator dies or is dissolved, respectively, its duties, in particular those relating to pecuniary obligations, shall be transferred and become payable in accordance with provisions applicable to tax obligations.

- **Persons other than an operator who may be liable**

See discussion of secondary liability above.

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

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.

### 7. **Annex III legislation**

- **Rebuttable presumption that operator’s activity caused environmental damage**

The ELA establishes a rebuttable presumption that an Annex III activity caused an imminent threat of, or actual, environmental damage “when it is the probable candidate given the intrinsic nature or the course of the incident”.

- **Additional occupational activities subject to strict liability**

Strict liability is extended to non-Annex III activities and establishments within the scope of Royal Decree 1254/1999 of 16 July establishing measures to control risks inherent to serious accidents involving hazardous substances.

- **Spreading of sewage sludge for agricultural purposes**

The spreading of sewage sludge for agricultural purposes is not excluded from Annex III activities.

### 8. **Standard of liability for non-Annex III activities**

Strict liability applies to Annex III and non-Annex III preventive actions and emergency remedial actions (that is, “containment“ or “measures to prevent new damage“; which equates to ELD measures “to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effect on human health or further impairment of services“).

The standard of liability for non-Annex III remedial activities is “fraud, fault or negligence”. This standard equates with gross negligence under English law.
9. **Exceptions**

- Applicable to imminent threat of environmental damage as well as environmental damage

The exceptions apply to an imminent threat of environmental damage as well as environmental damage.

- Differences with exceptions in the ELD

The exceptions in the ELA are the same as in the ELD.

The 10th Additional Provision states that the competent authority may not require the adoption of the reparation or prevention means foreseen in the Act, where the public work in the general interest was carried out in conformity with the (correctly made) environmental impact assessment. The competent authority may neither substitute the operator nor execute the reparation itself. This also means that a private operator who executes work for the public authority, is not liable.

- Diffuse pollution exception

The exception for diffuse pollution is the same as in the ELD except that it is written in the affirmative, that is, “This Act shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse nature where it is possible to establish a causal link between the damage and the activities of individual operators”.

10. **Joint and several or proportionate liability**

Article 11 ELA provides that for several operators who are responsible for the same damage, there is “responsabilidad mancomunada” which is practically the same as joint and several liability.

- Mechanism for contribution between liable operators

The transposing legislation does not include a mechanism for contribution between liable persons.

11. **Limitation period**

The limitation period is 30 years.

12. **Defences**

- Defences to liability or costs?

The defences are defences to costs; that is, the operator must prevent, contain or remediate the environmental damage and then seek to recover its costs (depending on the circumstances) from:

  - an independent third party who is not connected with the operator provided that the operator has carried out sufficient security measures;
a competent public authority that issued an order or compulsory instruction to the operator, and with which the operator is in compliance, including orders issued in performance of any contracts referred to in Public Administration contract law (see also “Definition of operator” above) provided that the order or instruction does not relate to an emission or incident caused by the operator’s activity; and

- the manufacturer, importer or supplier of a product if the environmental damage has been caused by its use and the operator “strictly adhered to the conditions established for the use of the product and the regulations in force at the time of the emission or the event causing the environmental damage”.

The ELA sets out details concerning the application of the second defence (above) to contracts referred to in Public Administration contract law.

The operator may seek recovery of its costs:

- against a third party by filing a motion for recovery under applicable civil law provisions; and

- against a competent public authority by submitting a complaint against the Administration that issued the order, in accordance with applicable administrative law provisions; reimbursement is either through the State Environmental Damage Repair Fund (see below) or through instruments provided for by regulations issued to implement the ELA.

The operator may recover its costs if the permit and state-of-the-art defences apply “according to the terms laid down in regional law”. The Autonomous Communities have not adopted any legislation.

- If defences to liability; suspension (or not) of remediation notice during appeal

Not applicable

- Permit defence

Spain has adopted the permit defence.

The defence applies in the absence of fault, fraud or negligence if the emission or event “which is the direct cause of the environmental damage is the specific, express object of an administrative [Annex III] authorisation” and the operator strictly adhered to the authorisation and the applicable regulation.

NB: the permit defence in the ELA is the same as that in the ELD but specifies the conditions for its application more precisely.

- State-of-the-art defence

Spain has adopted the state-of-the-art defence.
ELD: “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”.

ELA: “an activity, emission or use of a product that, when undertaken or used, was not considered potentially damaging to the environment in accordance with the state of scientific and technical knowledge available at that time”.

NB: the words “potentially damaging to the environment” may, perhaps, indicate that Spain has adopted a narrower defence than that in the ELD which contains the phrase “likely to cause environmental damage”.

13. **Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000)
  
  27.24%

- Extension of biodiversity to nationally protected biodiversity

Liability is extended to:

- species protected by national law;
- species protected by the law of the Autonomous Communities;
- species protected by international treaties to which Spain is a party and which exist in a natural state within Spanish territory on a permanent or seasonal basis, in particular, species listed in the National Catalogue of Endangered Species or any endangered species catalogues compiled by the Autonomous Communities;
- natural habitats protected by national law;
- natural habitats protected by the law of the Autonomous Communities; and
- natural habitats protected by international treaties to which Spain is a party.

Biodiversity damage in the exclusive economic zone

The definition of habitats in ELA (article 2 no.5) mentions “zonas terrestres o acuáticas”. This means that habitats in the EEZ are also covered by the legislation.

Water or water body

Liability applies if there is an imminent threat of, or actual, environmental damage to water covered by the Water Framework Directive 2000/60/EC. That is:

- in respect of surface water and groundwater, the ELA defines water damage as “damage having a significant adverse effect on the ecological, chemical and quantitative state of surface and underground bodies of water and on the ecological potential of
artificial and significantly modified bodies of water”, referring to the definitions in the Water Framework Directive;

- “water” is defined in the ELA as “[a]ll continental surface and underground coastal and transitional waters defined in the consolidated text of the Water Act approved by Legislative Royal Decree 1/2001 of 20 July and all other elements forming part of the public water domain”; and

- the Decree of 23 December 2008 states that damage to water is significant “if the mass a receptor water experiences negative effects”, referring to “a change in the classification”.

In respect of seacoasts and estuaries, damage occurs if an activity produces a “significant adverse effects on their physical integrity and proper conservation and any other effects resulting in difficulty or the impossibility of attaining or maintaining an acceptable level of quality”.

14. Thresholds

Water damage

The threshold for damage to water is any damage which produces significant negative effects on the ecological, chemical or quantitative status of water. This means, for example, that the excessive reduction of water quantity is water damage, even though this would not lead to a change in the classification of the body of surface or ground water.

The threshold for shoreline or tidal inlets is a significant adverse effect on its ecological, chemical or quantitative status or its ecological potential (which is the same as water damage under the ELD).

Biodiversity damage

The threshold for biodiversity damage is the same as biodiversity damage under the ELD

National biodiversity damage

The threshold for national biodiversity damage is the same as the threshold for biodiversity damage to species and natural habitats protected by the Birds and Habitats Directives.

Land damage

ELD: “any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms”.

Decree of 23 December 2008: “Damage caused to land shall be significant if the receptor experiences adverse effects that generate risks to human health or the environment, such that the land can be qualified as contaminated land under the terms established in Royal Decree 9/2005, of 14 January”, which establishes the list of activities that are potentially polluting to the land and the criteria and standards for declaring land as contaminated.

The definition in the ELA is potentially more stringent than the definition in the ELD because it includes risks to the environment as well as human health. However, the reference in the Decree
of 2008 to Decree 9/2005 has the potential of narrowing the threshold by covering only activities that fall within Decree 9/2005.

15. **Standard of remediation**

The ELA definition does not refer to the ideal conservation conditions of the receptor but to the condition that the receptor was in immediately prior to the agent's action. The baseline condition is determined in relation to the damaging agent.

- **Land**

The remediation standard for land is the same as the ELD.

- **Biodiversity**
  - Primary remediation

In addition to the criteria under the ELD, remediation must result in the elimination of any significant risk of adverse effects on human health.

The Decree of 23 December 2008 provides for a remediation project to restore a damaged site which was in an unfavourable conservation condition, was deteriorated or inferior to its ecological potential to be restored to conservation conditions better than the baseline condition, with the additional costs to be met by the competent authority.

- **Complementary and compensatory remediation**

The Decree of 23 December 2008 provides details on the place of remediation if complementary and compensatory remediation should be carried out at an alternative site rather than the damaged site. There must be a geographical link from the alternative site to the damaged site or species, which occurs “when there is an ecological, territorial or landscape connection” to it. The remediation measures “must in all cases lead to an improvement in the services provided by the natural resources in the damaged place”.

- **Water**
  - Primary remediation

The standard of primary remediation of water damage is the same as the ELD.

- **Complementary and compensatory remediation**

The Decree contains detailed criteria on the method for calculating complementary and compensatory remediation measures based, in large part, on the REMEDE study.

16. **Format of determination of environmental damage**

The form of the determination of environmental damage is specified in the Decree of 23 November 2008.

The following is not significant damage:
negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat;

- negative variations due to natural causes or which result from intervention related to the normal management of protected natural reserves of Natura 2000 network sites, as specified in their respective management plans or comparable technical instruments; or

- damage to species or habitats when it has been established that they will recover within a short time and without intervention either to the baseline condition or a condition that leads, solely by virtue to the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

The Decree contains detailed criteria on determining the extent and intensity of environmental damage, including ecosystem services.

17. **Powers and duties of competent authority**

- **Inspections, investigations, studies and analyses**

The competent authority has the power to access public and private property and means of transportation to supervise and carry out any tasks under the transposing legislation and to photograph, copy or take away documents and other objects without payment.

The competent authority may order an operator, user, producer or importer to carry out studies, analyses and measure substances and similar to clarify the cause and effects of pollution found on the damaged site.

- **Information orders**

The competent authority may require the operator, user, producer or importer to provide information regardless of whether there is an imminent threat of, or actual, environmental damage.

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

Competent authorities have the power, but not the duty, to require an operator to carry out preventive measures.

- **Power or duty to require an operator to carry out remedial actions**

Competent authorities have a duty to require an operator to carry out remedial measures.

- **Power or duty of competent authority to carry out preventive measures**

Competent authorities may carry out preventive actions when:

- it is not possible immediately to identify the responsible operator and taking the time to do so could lead to environmental damage;
there are several responsible operators and there is no time or space to apportion liability so as to guarantee the proper execution of the measures;

where studies, knowledge or technical means are required;

when actions must be taken on public or private third-party property making it difficult or inappropriate for the responsible operator to act; or

if warranted due to the seriousness and future repercussions of the damage.

If a competent authority carries out any of the above actions in an emergency situation, it does not need to adhere to the procedures in the ELA concerning determinations of remediation, containment or preventive measures. When the emergency situation ends, the competent authority shall issue an order to establish the cost of the measures against the party or parties responsible for the imminent threat of, or actual, environmental damage and shall seek recovery of its costs from them; the responsible parties are the responsible operator and/or third party. If the cost exceeds the amount that is recoverable, the competent authority may decide not to recover the total amount. In such a case, however, an economic report that warrants the decision not to seek reimbursement of all the costs is necessary.

Power or duty of competent authority to carry out remedial measures

Competent authorities have a duty to require an operator to carry out remedial measures for the same reasons as those stated above for preventive actions.

Form of preventive order

The transposing legislation does not set out the form of an order for preventive actions.

Form of remediation order

An order for remedial actions must contain at least the following:

- a description of the environmental damage or threat that must be eliminated;

- an assessment of the environmental damage or threat;

- when required, a description of the preventive or containment measures that must be adopted and, where appropriate, instructions concerning their proper execution, taking into account the operator’s proposal;

- identity of the party which must implement the measures;

- the deadline for execution;

- the amount and payment required for any measures adopted and executed by the competent authority; and

- identification of the actions, if any, that the public administration must carry out.
Implementation challenges and obstacles of the Environmental Liability Directive

The deadline for issuing an order requiring remediation and notifying the parties is three months with a three-month extension for scientifically and technically complex cases. The parties must be notified of any such extension. This period may be suspended from the date at which an order is issued to the operator to submit his proposal for remedial measures or to correct that proposal.

Appeal against preventive or remediation order

The order may be appealed as provided in Title VII of Law 30/1992 of 26 November and other applicable legislation. That is, an appeal may be made to a higher authority within the Ministry or Agency, with a further right of appeal to an administrative court.

Negotiations for the settlement of a remediation order may be proposed by the competent authority or the operator; the negotiations suspend application of the remediation order for up to two months.

If any other parties are involved, they must submit their views within 15 working days.

A negotiated settlement must guarantee the purposes of the ELA and have regard to the following:

- the content and scope of the measures which must be adopted by the responsible party or parties;
- form of execution;
- stages and priorities and partial and total execution deadlines;
- means of administrative management or control;
- performance guarantees and any other guarantees that help to ensure the effectiveness and feasibility of the measures; and
- measures to be implemented by the competent authority at the expense of the responsible parties.

The negotiated settlement must be included in the resolution / order.

The governmental body authorised to agreement the settlement may reject or amend it for legal reasons; in which case new negotiations may be commenced.

Sanctions for delay in complying with preventive or remediation order

If the competent authority deems it advisable to avoid delays which could jeopardise affected natural resources, it may successively impose up to five periodic penalty payments for the delay of a remediation order, each for a maximum of 10% of the estimated cost of the set of measures being executed.

Formal consultees on contents of preventive and remediation orders

The transposing legislation does not establish formal consultees.

Recovery of implementation and enforcement costs

Recoverable costs are defined as "expenses which are justified by the need to ensure the proper and effective implementation of [the ELA] in the event of environmental damage or the threat of such damage regardless of the amount. They include:
“all expenses relating to the proper execution of preventive measures;

those undertaken to prevent further damage, and remedial measures;

those relating to the assessment of environmental damage and the imminent threat of such damage;

those relating to the establishment of possible options and the selection of the most suitable from among these;

those generated in securing useful data; and

those intended to ensure follow-up and supervision”.

Administrative and legal costs and material and technical expenses relating to the aforementioned activities are assumed to be included in the above costs.

**Deadline for competent authority to seek recovery of costs**

The deadline for a competent authority to seek recovery of its costs is five years. The deadline may be suspended in the event of:

- action taken by the competent authority, with the formal knowledge of the liable party, for the purposes of requiring the liable party to assume any type of liability relating to the same events in accordance with the Act or any other law;
- a criminal investigation for the same events;
- a request by the persons concerned with the formal knowledge of the liable party; or
- any action entailing recognition of liability by the responsible party.

**18. Duties of responsible operators**

**Preventive measures**

An operator has a duty to take preventive measures and to defray their costs regardless of the amount.

**Remedial actions (emergency actions)**

An operator has a duty to take prevention, containment and remediation measures and to defray their costs regardless of the amount.

**Remedial measures**

The responsible operator must identify several primary remedial alternatives to include at least the following:

- ecological considerations needed for the conservation of the natural resources and their services that have been affected;
- degree of intervention associated with each remedial technique (whether full, partial or based on natural recovery) by reference, among other things, to the sensitivity of the environment, the recovery time horizon and the cost of the remedial measure;
- a prior estimate of the provisional loss of resources or services associated with each remediation alternative; and
- a prior estimate of the costs of each remediation alternative.

If a responsible operator considers that the cost of complementary remediation is disproportionate, it must provide a supporting economic report that shall be disclosed to the public.

The operator must estimate for each primary remedial alternative specified, the loss of natural resources and the services provided by them from the time the primary remedial measures are implemented until the resources or services reach the baseline condition.

Factors to take into account when complementary and compensatory remedial measures are not carried out at the place of environmental damage include at least the following:

- the intensity, extent and time dimension of the environmental damage including, when applicable, the capacity for recovery of the affected receptors;
- the services that the resource provided in its baseline condition in order to guarantee the remediation through the application of complementary and compensatory remedial measures at the new location; and
- the interests of the affected population, especially those of the population affected by the damage and those that would benefit from the remedy.

▶ Remediation project

▶ Contents

The Decree sets out specific items to be included in the remediation project. In particular, it states that if more than one operator contributes to an environmental damage at diverse stages, a single remediation project may be formulated based on their respective percentages of contribution in order to establish the joint liability of the responsible operators. In such a case, the operators must collaborate in defining remedial measures and the execution of those adopted by the competent authority.

▶ Approval

Approval includes, among other things, ensuring that the interests of people at an area to be remediated are considered when the remediation is not carried out on the damaged site.

▶ Execution

A remediation project may be carried out at the same time or in phases; separate approval is required for each stage of the latter.
If a remediation project is interrupted by an extraordinary event beyond the operator’s control, the objectives of the project may be revised.

Any substantial modification of the remediation project must be approved by the competent authority.

If a natural resource or its services is in an unfavourable conservation status, or is deteriorated or inferior to its ecological potential, the baseline condition can be supplemented to restore them, with the additional costs being paid by the competent authority provided that other legislation does not require the operator to carry out such remediation.

▶ Monitoring

The operator must carry out monitoring to determine the progress of the remediation project, any potential problems and possible corrective measures.

Monitoring tasks for phased projects must include verification of completed measures at each stage.

The operator must provide information to the competent authority on the progress of the project, at times to be determined by the authority.

The competent authority shall disclose, at a minimum, the following information to the interested parties and the general public:

- the degree of fulfillment of the recovery goals achieved by the remediation project;
- support for any substantial modifications made to the remediation project;
- adopted corrective measures; and
- the existence or absence of any potential risks to human health and, specifically, the company’s employees.

▶ Final report

The operator must submit the final report of the remediation project to the competent authority. The report must include, at a minimum, the following:

- the operator’s statement of compliance with the order to carry out the remediation;
- results of the monitoring and disclosure programme; and
- any modifications and contingencies that have affected the remediation project including the application of corresponding corrective measures.

The competent authority shall approve or disapprove the final remediation after the authority’s analysis of it, according to the provisions of the regulations of the Autonomous Community.

If the competent authority fails to approve, or does not approve, the final report three months after submission of the full report, the report shall be deemed to have been approved.
The final report and the competent authority’s decision shall be disclosed to interested parties and the public.

Duty to notify / provide information when imminent threat of environmental damage occurs

An operator has a duty immediately to communicate to the competent authority the imminent threat of environmental damage that it has caused or may cause.

If an imminent threat of environmental damage is verified, in addition to implementing preventive measures, the operator shall collect the information specified below when the information is necessary correctly to define the preventive measures.

If environmental damage occurs, in addition to preventing further damage, an operator shall collect information needed to determine the magnitude of the damage to include at least the following:

- maps and geology of the land;
- source of the pollution and the damaging agent;
- baseline condition;
- toxicity thresholds of different substances for the resources that could be affected;
- use of the land;
- goals and possible primary remedial techniques that should be applied; and
- other environmental quality indicators that the operator possesses or which the competent authority requests.

The responsible operator shall carry out the following actions to verify whether environmental damage exists:

- identify the damaging agent and the natural resource and affected services;
- quantify the damage; and
- evaluate the significance of the damage.

The Decree sets out details of specified tasks that the responsible operator must carry out concerning:

- identification of the damaging agent;
- description of the damaging agent;
- identification of the natural resources and affected services;
- quantification of the damage;
- significance of the damage in reference to the affected natural resources;
Implementation challenges and obstacles of the Environmental Liability Directive

- significance of the damage in reference to the type of agent;
- other criteria to determine the significance of the damage; and
- determination of the baseline condition.

Entity to which notification should be provided

Notification should be made to the relevant competent authority.

19. Access to third-party land to comply with the ELD

Access is specifically permitted by order of the competent authority when it is necessary to carry out preventive or remedial actions.

The public administrations may declare that access to third-party land is urgent.

Compensation for damages for access to third-party land shall be in accordance with compensation for temporary occupation provided for in expropriation legislation.

20. Interested parties

Qualification criteria for “sufficient interest”

An interested party is:

- a natural or legal person that meets any of the criteria described in article 31 of Law 31/1992, of 26 November, and any legal person without commercial interests (*sin animo de lucro*) that meets the following criteria:
  - the aims provided in its bylaws expressly include protection of the environment in general or specific element of it;
  - it was legally established at least two years before making the comments and it has been actively engaged in the aims stated in its bylaws; and
  - pursuant to its bylaws, it performs its activities in a territory that is affected by the administrative act or omission;
- a non-governmental organisation that meets the above criteria;
- the owners of the land on which preventive, containment or remedial measures must be implemented; or
- any other persons provided under Autonomous Community legislation.

Method of notifying interested parties of planned remedial measures

The transposing legislation does not mention a method to notify interested parties of planned remedial measures.
Information to be provided to competent authority

Interested parties “may make whatever representations they deem appropriate and submit such information as they consider relevant, which must be taken into consideration by the competent authority to which these are addressed”.

The notification / comments must be in writing and shall specify the following “where possible”:

- the damage or threat of damage to natural resources protect by the Act;
- the act or omission of the alleged liable party;
- the identity of the alleged liable party;
- the date on which the act or omission occurred;
- the location of the damage or threat of damage to natural resources; and
- a description of the causal relationship between the act or omission of the alleged responsible party and the damage or threat of damage.

The competent authority must take the comments into consideration and must meet with the owners of the land on which the preventive, containment or remedial measures are being carried out, as well as the operator and all other concerned persons so they can make representations and submit any additional relevant information.

Challenges to competent authority’s decision

A challenge to the competent authority’s decision is an appeal to a higher authority within the Ministry or Agency, with the right of a further appeal to an administrative court.

Under Article 115 of Law 31/1992, the challenge is decided on its merits, i.e. the substantive and procedural legality of the act or failure to act.

Duty on competent authority to respond to person making the notification

Competent authorities shall deliver an express, reasoned resolution of environmental liability procedures, declaring whether the operator is or is not the subject of environmental liability.

Manifestly groundless or abusive requests may be denied by a reasoned decision by the competent authority.

Inclusion of interested party in any proceedings by the competent authority against an operator

The ELA does not contain a provision that allows an interested party to bring an action directly against an operator.

21. Public access to information regarding environmental damage and related measures

The public may request the above information in the possession of the public administration.
22. **Charges on land / financial security after environmental damage**

The competent authority may require a responsible person to obtain “performance guarantees and any other guarantees that help to ensure the effectiveness and feasibility of [remedial] measures”.

23. **Offences and sanctions**

Breaches of the ELA are solely administrative offences. If a breach could constitute a crime or misdemeanour, the competent authority shall forward evidence of culpability to the competent jurisdiction and await the opinion of the judicial authority before proceeding further. If the judicial authority determines that a crime or misdemeanour has not been committed, the public prosecutor shall inform the competent authority, which may then proceed having due regard to facts deemed proven by the courts.

If a single act or omission constitutes two or more breaches, only the breach with the largest penalty shall be considered.

Proceedings for sanctioning shall not delay an operator’s obligation to adopt prevention, containment or remediation measures.

Breaches of the ELA are classified as “very serious” and “serious”.

Very serious breaches are the failure to:

1. adopt the preventive or containment measures demanded by the competent authority when doing so results in damage that was supposed to be prevented;
2. follow a competent authority’s instructions in implementing preventive and containment measures when doing so results in damage that was supposed to be prevented;
3. adopt remedial measures required by the competent authority when doing so reduces their efficacy;
4. follow a competent authority’s instructions in implementing remedial measures required by the competent authority when doing so reduces the efficacy of the remedial measures;
5. notify the competent authority of an imminent threat of, or actual, environmental damage that has been, or may be, caused by or known to the operator, or an unwarranted delay in providing such information that results in aggravation of the effects or actual occurrence of the damage; and
6. arrange required financial guarantees.

Serious breaches are:

- the failure to do any of items (1) to (5) above in respect of a breach that is not a very serious breach;
the failure to provide information pursuant to a requirement to do so in a timely manner;
the failure to provide assistance required by a competent authority in respect of remedial, preventive or containment measures; and
the omission, resistance to or obstruction of obligations under the Act.

In imposing sanctions, the public administrations shall ensure that the seriousness of the breach is commensurate with sanctions specified under national law.

The statute of limitations for very serious offences is three years; two years for serious infractions; three years for very serious misdemeanours; and two years for serious misdemeanours.

The sanction for a very serious breach is a fine of between €50,001 and €2 million and/or permanent or temporary suspension of the authorisation for at least one and up to two years.

The sanction for a serious breach is a fine of between €10,000 and €50,000 and/or suspension of the authorisation for a maximum of one year.

In addition, if environmental damage is caused, or existing damage is aggravated, by the responsible operator's delay, resistance or obstruction in fulfilling its obligations and this constitutes a breach, the operator is also required to adopt the prevention, containment and remedial measures set out in the ELA regardless of the applicable penalty.

Directors and officers liability for breaching legislation
The ELA does not provide that any person other than an operator may be liable for breaching the ELA.

Publication of penalties
Competent authorities shall publish the penalties imposed for breaches of the Act, together with the identity of the responsible operators, annually.

24. **Registers or data bases of incidents**
Public administrations shall provide a list of environmental damage incidents and instances of liability under the ELA to the Ministry of the Environment to include the following information:

- type of environmental damage, date of occurrence and/or discovery of the damage and date on which actions were initiated under the Act;
- activity classification code of the natural or legal liable person(s);
- any resort to judicial review procedures by liable parties or qualified entities, specifying the type of claimants and outcome of procedures;
outcomes of the remediation process; and
date of conclusion of the procedure.

In addition, the public administrations may include any other information and data that they believe may help to achieve a proper assessment of the implementation of the ELA, for example:

- costs incurred from remediation and prevention measures that are: paid directly by liable parties (if such information is available), recovered ex post facto from liable parties, or unrecovered from liable parties (specifying the reasons for non-recovery);
- results of promotional actions and implementation of the financial security instruments; and
- an assessment of the additional annual administrative costs incurred by the public administration in establishing and operating the measures to implement and enforce the Act.

The Ministry of the Environmental shall publish information sent to the Commission.

The ELA does not provide that information which is sent to the Ministry of the Environment shall be published. However, there are general obligations for the administration to publish environmental information (Articles 6 to 9 of Act 27/2006, of 18 of July on access to information).

The 5th additional provision provides that “data and information” shall be sent to the Ministry. Annex VI to the ELA specifies that this refers to a list of cases of environmental damage and of environmental liability which shall indicate the following: type of damage, date of discovery/damage occurrence and date of remedial action; number of the classification list of the responsible person; legal action taken in the case; result of the repair action; date of finalizing the procedure.

Any other data may be included, for example: costs of prevention or reparation incurred; information on who paid these costs; results of support measures and of cases, where the financial guarantee came in, an estimation of the annual costs for the public administration caused by the monitoring of ELA.

25. **Cross border damage in another Member State**

If an imminent threat of, or actual, environmental damage affects another Member State, the competent authority shall immediately pass information concerning it to the Ministry of the Environment.

The Ministry of the Environment, in collaboration with the competent authority and the Ministry of Foreign Affairs and Cooperation, shall:

- provide the competent authorities of the affected Member States with all relevant information so as to enable them to take appropriate action concerning the event that gives rise to the damage or threat of such damage;
establish mechanisms to collaborate with the competent authorities of the Member States to facilitate the adoption of preventive, containment and remediation measures;

take due note of the recommendations of the competent authorities of the Member States affected and forward these to the affected competent authority; and

take necessary steps to ensure that the responsible operators assume the costs incurred by those competent authorities, subject to reciprocity criteria in international treaties or in the law of those States;

If a Spanish competent authority identifies an imminent threat of, or actual, environmental damage in its territory due to an activity in another Member State, it shall inform the European Commission or any other affected Member State through the Ministry of Foreign Affairs and Cooperation.

The Spanish competent authority may also:

- formulate recommendations for preventive or remedial measures to be adopted, which shall be forwarded to the Member State through the Ministry of Foreign Affairs and Cooperation; and
- initiate proceedings to recover costs incurred by it in adopting preventive or remediation measures under the ELA.

The Ministry of Foreign Affairs and Cooperation shall immediately forward all information provided by other Member States concerning cross border environmental damage to the Ministry of the Environment and affected competent authorities.

26. **Financial security**

Mandatory financial security is being introduced for some environmental damage liabilities.

- **Method of introduction of mandatory financial security**

Mandatory financial security is being introduced 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).

- **Extent of financial security**

The financial security must cover the following:

- preventive actions;
- emergency remedial actions;
implement remedial measures to biodiversity, water and land but limited to primary remediation only; and

- provided in each of the above items that the environmental damage was caused by pollution.

Financial security mechanisms

The following mechanisms may be used to establish financial security:

- insurance policy conforming to Insurance Contract Act, Law 50/1980 of 8 October, provided by an insurance company authorised to operate in Spain;

- guarantee granted by a bank, savings bank, credit union, reciprocal guarantee company or other financial institution authorised to operate in Spain;

- ad hoc fund consisting of financial investments backed by the public sector; and

- a technical reserve in the company’s accounts entitled “Technical reserve for environmental liability pursuant to article 26.c) of Act 26/2007, of 23 October”, for a maximum term of five years.

Persons required to have financial security

Annex III operators in respective of Annex III activities carried out by them.

The financial security mechanism must also cover the subcontractors and professionals who collaborate with the operator in the Annex III activity.

Exemptions

The following persons are exempted from the requirement to have financial security:

- operators of activities liable to cause damage when a verified environmental risk assessment carried out pursuant to the guidelines in UNE Standard 150,008 or equivalent rules indicates that any remedial works will not exceed €300,000;

- operators of activities liable to cause damage when a verified environmental risk assessment carried out pursuant to the guidelines in UNE Standard 150,008 or equivalent rules indicates that any remedial works will be between €300,000 and €2,000,000 and the operator has a EMAS certificate (EU Eco-management and audit scheme) or ISO 14001 (UNE-EN ISO 14001:1996); and

- persons who use plant protection products and biocides for agricultural and forestry purposes provided the products and biocides are defined in article 2(1) of Decree 2163/1994 of 4 November, or article 2 a) of Decree 1054/2002 of 11 October, respectively.
The Technical Commission on Environmental Risk Prevention and Remediation has prepared detailed standard environmental risk models and methodology guidelines for carrying out the above risk assessments.

Certain business sectors or sub-sectors or small and medium enterprises are not required to carry out the above risk assessments when they have a high degree of homogeneity and the Ministry has prepared scale charts to calculate the amount of financial security for such businesses.

The following public bodies are also exempt from the mandatory financial security requirement:

- General State Administration and public bodies linked to or dependent on it;
- local governments and any public law bodies dependent on them; and
- regional bodies and any public law bodies dependent on them.

The Autonomous Communities may determine the applicability of the mandatory financial security requirement to their administration and dependent public bodies. The Autonomous Communities have not determined the applicability of the mandatory financial security requirement to their bodies.

- Required level of financial security

The limit of mandatory financial security is €20 million each and every event and in an annual aggregate.

All claims from the same emission, event or incident are deemed to be one event regardless of whether the claims are made at different times and the number of parties affected.

The financial security mechanism may have a sub-limit for preventive actions and emergency remedial actions, with the minimum amount of the sub-limit being 10 per cent of the limit of indemnity.

- Maximum deductible or self-insured retention

The maximum deductible or self-insured retention is 0.5% of the limit of indemnity.

- Duration of financial security

The financial security mechanism must commence from the time at which an authorisation for an Annex III activity is granted and continue during the pendency.

If a financial security mechanism is exhausted or has been depleted by over 50 per cent, the operator must replenish it within six months of the date on which the amount of the costs to which the mechanism applies has been ascertained or reasonably estimated.

- Entity / fund

The ELA establishes a Fund (environmental damage clearing consortium) within the Insurance Clearing Consortium.

The Fund is funded by contributions from a surcharge on the premiums for insurance policies used to provide evidence of financial security.
Money in the Fund is to be used to cover:

- environmental damage from authorised activities during the period of the insurance policy but which did not materialise, or for which a claim was not brought, during the policy period; and
- the liability of insured operators whose insurers have been declared bankrupt, been dissolved or been declared insolvent, has been subject to an audited settlement procedure or been taken over by the Insurance Clearing Consortium.

The deadline for the Fund to cover a claim is a period that is equal to the number of years during which an insurance policy was in force, beginning at the expiration date of the policy, with a long-stop deadline of 30 years.

27. Establishment of a fund

A Fund has been created with the purpose of paying the costs of preventing or remedying environmental damage when the operator has damaged State-owned natural resources and the operator proves that it followed the compulsory order of a public authority, or the state-of-the-art defence applies.

The Fund is managed by the Ministry of the Environment.

The Fund is funded by the General State Budget.

28. Reports

The Ministry of Environment is directed to submit a biannual report assessing the enforcement of the Act and the need, if considered appropriate, to implement the necessary legislative or administrative measures, in particular, the exception of for mandatory security for persons who have EMAS or ISO 14001 and who may cause damage assessed at between €300,000 and €2 million.

The Ministry of the Environment shall consult with the Autonomous Communities and collect information from them in preparing the report.

The Spanish Government shall submit a report proposing the maintenance or, if appropriate, amendment of the thresholds for financial security by 31 October 2015.

The competent authority must submit a report if an imminent threat of, or actual, environmental damage affects water basins managed by the State or State-owned public property.

29. Information to be made public

The following information must be made public:

- the economic report prepared by an operator to support its contention to the competent authority that the cost of complementary remediation is disproportionate;
Implementation challenges and obstacles of the Environmental Liability Directive

- 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 ELA, on an annual basis to include the acts constituting the breaches and the identity of the responsible operators.

The public may request information in the possession of the public administration regarding environmental damage and preventive, containment or remedial measures taken in relation to it. When a remediation project has been finalised, the competent authority shall disclose to the interested parties and the general public the following information, at least:

- the degree of fulfilment of the recovery goals achieved by the remediation project;
- support for any substantial modifications made to the remediation project;
- the corrective measures that have been adopted and
- the existence or absence of potential risks to human health, and specifically, to that of the company’s employees.

30. **Provisions concerning genetically modified organisms**

“Non-environmental damage to crops from the release of genetically modified organisms shall be remedied in the form of compensation for damages in accordance with civil law”. This damage is caused, for example, by the fact that organic crops which are slightly contaminated by GMOs may no longer be sold (at a price higher than normal) as organic food. Also normal crops which are contaminated by GMOs are sold at a lower price.

If the damage is caused by a GMO, its extent is to be determined pursuant to the provisions of the Act 9/2003, of 25 April (which establishes the legal system for confined use, voluntary release and commercialisation of genetically altered organisms), and the Royal Decree 178/2004, of 30 January.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

When Spain transposed the ELD, it already had legislation to remediate contaminated land and water pollution. It did not have legislation that specifically required a person who caused damage to protected species and natural habitats to prevent or remediate it.

The legislation on the remediation of contaminated land is contained in a section of the waste legislation. A hierarchy of persons are liable for remediating contaminated land. The person or persons that caused the contamination are primarily liable. A current non-occupying owner of the land is secondarily liable if the polluter cannot be found or cannot pay to remediate the
contamination. If the property is public domain property, the person who caused the contamination is primarily liable, the occupier is secondarily liable and a non-occupying owner has tertiary liability. If a person who is not primarily liable remediates the contamination, that person may seek recovery of its costs from persons who are primarily liable (or secondarily liable in the case of persons with tertiary liability). Liability is strict, joint and several, subject to a competent authority allocating liability between multiple persons when feasible to do so. A person that remediates the contamination has a contribution action against other liable persons.

As with some other Member States, Spain also prepares and maintains inventories of historically contaminated land. Land is listed in the inventories subject to risk assessments and various other criteria; land that is listed in the inventories must be remediated. Further, there are requirements to notify the competent authorities of contamination and polluting activities that were carried out on the land when specified events, such as changing the use of the land, applying for a permit, or selling the land occur.

A person who pollutes water is liable for remediating it or, if the damage cannot be remediated to its condition before the pollution or is irreparable, paying a compensatory amount determined by the Spanish Government. Liability is strict and joint and several. The threshold for liability is lower than the threshold for water damage in the ELD.
1. **Existing national environmental legislation**

Environmental law in Sweden is set out in an Environmental Code (1998:808) (Environmental Code or Code) that entered into force on 1 January 1999. The Code, which consolidated 15 previous environmental laws, contains 33 chapters and over 500 sections. In addition to consolidation, the Code changed the structure of environmental authorities and created five regional environmental courts. The fundamental rules set out in the Code are supplemented by detailed Ordinances.

A major advantage of the Environmental Code is the harmonisation of pre-existing national environmental legislation and EU legislation, a process that began nearly 10 years before the introduction of the Code.

In transposing the ELD, the Swedish Government introduced liability for biodiversity damage and extended liability for water damage. It did this by supplementing chapter 10 of the Code. In addition, the Government applied fundamental rules in the Code to many aspects of the ELD regime rather than introducing new rules specific to it.

2. **Existing regimes for preventing and remediating environmental damage**

When Sweden transposed the ELD, it already had a liability system for remediating water pollution and land contamination in chapter 10 of the Environmental Code. The liability system included preventive obligations but these were less prevalent than remediation obligations. There was no specific legislation that required a person who causes an imminent threat of, or actual, damage to biodiversity to prevent or remediate it.

- Water pollution
  
  See Land contamination below.

- Land contamination

There is a single regime in Sweden for remediating water pollution and land contamination which also includes buildings and structures. The focus of the regime is, however, land contamination.

Under the regime, operators (defined as “[p]ersons who pursue or have pursued an activity or taken a measure that is a contributory cause of the pollution”) are liable for the remediation (called “after-treatment”)\(^{136}\) of “polluted areas”. The term “polluted areas” was formerly defined as “land and water areas, buildings and structures that are so polluted that they may cause damage or detriment to human health or the environment”. The existing legislation has

---

\(^{136}\) Section 1 of Chapter 10 of the Environmental Code defines the term "after-treatment" as "the investigation, post-treatment and other measures for the remediation of pollution damage or serious environmental damage".
Implementation challenges and obstacles of the Environmental Liability Directive

The transposing legislation for the ELD did not change the definition of an operator. It did, however, change the definition of “polluted areas” to “pollution damage”, which is defined as “damage to the environment which, through pollution of land or water areas, groundwater, a building or structure, may cause damage or detriment to human health or the environment”. This definition is essentially the same as the former definition, with the addition of groundwater.

There are no legally-binding concentration values for contaminants that trigger a requirement to investigate or to remediate contamination. The Swedish Environmental Protection Agency has, however, published generic guideline values.

Liability for remediating pollution damage is not limited to operators. If an operator is unable to carry out or pay for the remediation of pollution damage, the owner of the polluted property is liable for its remediation provided that the landowner knew or should have known of the pollution when it acquired the property and also provided that it acquired the property after 31 December 1998. The requirement for actual or constructive knowledge is, in essence, an innocent purchaser defence in that a person who acquires property can avoid liability for remediating any contamination at the property if the landowner carries out investigations to show that it did not know or should not have known that such contamination existed when it acquired the property.

The innocent purchaser defence applies only when the source of contaminants at the property no longer exists. If, for example, the contents of a landfill or pit on the land continue to seep into groundwater or to migrate, the owner of the land is considered to be an operator even though the owner does not continue the operation of the landfill or pit. For example, the Environmental Court of Appeal concluded that the bankruptcy estate of a haulage contractor was liable for remediating diesel that had leaked from a trolley onto land held by the estate even though the estate did not have an interest in the trolley from which the diesel had leaked. The court concluded that the estate had contributed to the diesel pollution in that the trolley (which the estate had ordered to be removed) had been within its control. The court further concluded that the measures to remediate the pollution (excavating damaged asphalt, removing diesel-contaminated soil and remediating the contaminated land) were reasonable. In another case, the Environmental Court of Appeal concluded that a scrap dealing company was liable for investigating and remediating pollution in a river and adjoining land, owned by a predecessor of the company, on which transformers containing PCBs had been stored. The court reasoned that even though the successor company had not handled the transformers, the pollution was ongoing. The court concluded that the investigations ordered by the competent authority were reasonable because PCBs continued to enter the river from the land. 337

A landowner who is not an operator and who did not have, or should not have had, knowledge of the pollution, may nevertheless have an obligation to pay costs that are equivalent to any

---

increase in value of the land resulting from the remediation. This obligation may apply to persons who acquired contaminated land prior to 1 January 1999 as well as after that date.

If the pollution concerns private residences, buildings or structures, the owner must have had actual (not merely constructive) knowledge. Transactions that are regarded as the acquisitions of property are specified in section 3 of chapter 10 as purchases and contributions to, or share-outs from, a company or an association. The acquisition of a leasehold is not regarded as the acquisition of property.

There is an exception to liability for remediating pollution damage for banks and other lenders that acquire property to protect their security interest in it.

An operator (or other responsible party) is liable for carrying out remediation measures “to prevent or combat subsequent damage or detriment to human health or the environment ... to the extent reasonable”. In determining the extent of liability, account is taken of the following factors: the length of time since the pollution occurred; any obligations on the liable person to prevent future damage provided that the obligations applied at the time of the pollution; and any other relevant circumstances. In respect of an operator (but not another responsible party), a determination of the extent of liability also includes whether the “operator can show that he was only responsible for the pollution to a limited extent”.

Liability is strict. If more than one operator is liable, joint and several liability applies “to the extent that the liability is not limited in respect of the [factors set out in the above paragraph]”. Payments “made by the liable persons shall be shared between them as appears reasonable with regard to the extent to which each of them was responsible for pollution and to other relevant circumstances”.

There is a defence to the application of joint and several liability for “an operator who shows that his or her responsibility for the pollution is so insignificant that it does not by itself justify [remediation]”. If such a de minimis operator meets this burden, it is liable only “to the extent that corresponds to his share of responsibility”. In other words, modified joint and several liability applies. That is, liable operators who are not de minimis, are jointly and severally liable for the costs of remediating pollution with the application of specified equitable factors to allocate liability between them.

Modified joint and several liability also applies to landowners and leaseholders of polluted sites (in the event that they are liable due to an operator being unable to carry out or pay for the remediation of pollution damage). If more than one owner or leaseholder of a polluted site is liable, they are jointly and severally liable to the extent that their liability is not limited due to account having been taken of the length of time since the pollution occurred and any other relevant circumstances.

Liability for the costs of investigating pollution is determined by taking account of the factors set out above. In addition, a landowner who is not liable may be obliged “to bear to the extent reasonable the costs of investigation in consideration of the benefit that he is likely to derive from the investigation, his financial situation and any other relevant circumstances”.

There is no limitation period for liability for remediating pollution damage.
Chapter 10 of the Environmental Code includes a provision that requires the owner or occupier of a property “immediately” to notify the supervisory authority if “any pollution is discovered on the property that may cause damage or detriment to human health or the environment”. The failure to notify is a criminal offence.

If the relevant county administrative board considers that a land or water area is so seriously polluted “that it is necessary, in view of the risks to human health or the environment, to impose restrictions on the use of the land or to prescribe other precautions”, the board declares it to be an “environmental hazard zone”, a designation that is noted in the land register. The board then places restrictions on the use of the area. Such restrictions may include carrying out environmental investigations and notifying the board prior to the transfer of the land to another person. The restrictions are removed when the pollution has been remediated so that the risk to human health or the environment has been removed.

The section of chapter 10 that sets out the provisions for environmental hazard zones states that a county administrative board may issue an injunction to require access for the purposes of remediation in accordance with section 5 of chapter 28 of the Environmental Code. That section requires owners and occupiers of third-party land to grant access to such land in order to carry out investigations and preventive and remedial measures. The owners and occupiers of the third-party land are entitled to compensation for damage and intrusion, with compensation actions being brought before an environmental court.

- Restoring biodiversity damage

As noted above, Sweden did not have specific legislation to require the prevention or remediation of biodiversity damage prior to transposition of the ELD.

- Other liability systems for remediating environmental damage

Other liability systems for remediating environmental damage in Sweden include conditions in an environmental permit under legislation transposing the integrated pollution prevention and control Directive / industrial emissions Directive that require the remediation of pollution incidents during the pendency of the permit; with the site to be remediated to a “satisfactory state” at the termination of operations.

- Interface between the existing national liability regimes and the ELD regime

The interface between the legislation transposing the ELD and existing Swedish environmental legislation is more harmonised than that in most other Member States due to the Swedish Government having transposed the ELD into the Environmental Code. Some aspects of the transposing legislation assist in the harmonisation. For example, the scope of liability, that is, modified joint and several liability, is the same in the transposing legislation and the Code.

The transposition of the ELD has not, however, resulted in a seamless liability system for environmental damage in Sweden. Application of the thresholds for water damage and biodiversity damage may well create similar problems to those in other Member States in that the ELD requires operators to carry out preventive measures and remedial actions to abate the damage and to prevent further damage without delay. Carrying out such preventive measures and remedial actions, however, does not sit easily with the length of time that may be required to determine if the damage that is threatened or has been caused by an operator’s activities
exceeds the thresholds in the ELD. Further, the interaction between the threshold for damage to land that is “pollution damage” (under pre-existing legislation) and the threshold for “serious environmental damage [that] has been caused as a result of soil pollution” (under the ELD-transposing legislation) could be problematic. Still further, the application of a “reasonableness” test to liability for pollution damage (see above) compared to the application of mitigating measures to liability for “serious environmental damage” (see section 12 below) has created two standards of liability and, as a result, uncertainty in cases that could potentially fall within either category.

The following are more stringent provisions in the Swedish transposing legislation for the ELD which are due mainly to its transposition into the Environmental Code:

- The definition of an “operator” is substantially broader than the definition of the ELD and includes, among other things, owners of land on which there is ongoing pollution;
- Liability is not limited to an “operator” but includes secondary liability for owners and occupiers of damaged land (as permitted by the ELD); and
- Strict liability applies to the prevention and remediation of environmental damage whether or not the damage is caused by an activity listed in Annex III of the ELD, with specified persons (that is, farmers, foresters, fishermen, reindeer herders and road keepers) being liable for biodiversity damage only to the extent that they are negligent.

The transposition of the ELD resulted in the following changes to the liability system in Sweden for preventing and remediating environmental damage, some of which strengthened it whilst others weakened it. The transposing legislation introduced:

- The permit defence and the state-of-the-art defence as a mitigating factors;
- Liability for biodiversity damage, which extends to nationally protected biodiversity as well as that protected under the Birds and Habitats Directives;
- Liability for complementary and compensatory remediation to water damage; and
- Liability for primary, complementary and compensatory remediation to biodiversity damage.

3. **Integration of the ELD into existing national legislation**

   Transposing legislation

Sweden transposed the ELD by:
amending the Environmental Code by Amendment of the Environmental Code Act (Lag om ändring av miljöbalken) of 20 June 2007 (SFS 2007/660); and

adopting the Ordinance on serious environmental damage (2007/667) (Environmental Damage Ordinance).

- Amendments to existing national legislation

The transposing legislation also made amendments to other chapters of the Environmental Code, as follows:

- Chapter 2. General rules of consideration, etc.;
- Chapter 9. Environmentally hazardous activities and health protection;
- Chapter 16. General provisions concerning the consideration of cases and matters; and
- Chapter 26. Supervision.

Further, the following Ordinances made amendments to existing Ordinances under national environmental law:

- Ordinance amending Ordinance (1998:900) on supervision under the Environmental Code (2007/673); and

- Authorisation in legislation for governmental entities to issue rules and regulations

Chapter 10 of the Environmental Code provides that the Government or the authority designated by it may issue regulations on:

- “the circumstances which are to be given special consideration when assessing what constitutes serious environmental damage,
- the preventive measures to be taken in the event of serious environmental damage,
- exceptions to the provisions regarding serious environmental damage ..., and
- investigations regarding areas of environmental risk and temporary restrictions and other conditions ... in connection with the examination of such cases”.

- Relationship to other legislation

The Administrative Procedure Act (1986:223) also applies to the ELD regime.

- Guidance and other documentation

The Government has not published guidance on the ELD regime.
4. **Effective date of national ELD legislation**

1 August 2007

5. **Competent authority(ies)**

Section 10 of the Environmental Code refers to a competent authority as a “supervisory authority”.

Municipalities or regional authorities (county administrative boards) are normally competent authorities, with guidance from the Swedish Environmental Protection Agency.

Ordinance (2007:673) states that the competent authorities are as follows:

- Municipal board for “[o]ther environmentally hazardous activities not listed separately in the Annex to Ordinance (1998:899) concerning environmentally hazardous activities and the protection of public health” (B4);
- County administrative board for “[p]ollution damage under Chapter 10, Section 1(1) of the Environmental Code, where the damage originates from an ongoing environmentally hazardous activity listed under A or B in the Annex to Ordinance (1998:899) concerning environmentally hazardous activities and the protection of public health or from similar activities which stopped after 30 June 1969 and where supervision at the time the activity ceased had not been delegated under Section 44a of the Environmental Protection Act (1969:387) or Section 10 of [the Ordinance amending Ordinance (1998:900) on supervision under the Environmental Code]” (B5);
- Municipal board for “[p]ollution damage under Chapter 10, Section 1(1) of the Environmental Code other than that specified in B5” (B5a); and
- “Municipal board or State authority which is responsible for Section 4 and [Annex B of the Ordinance amending Ordinance (1998:900) on supervision under the Environmental Code] for operative supervision of the activity or measure from which the damage originates” for “[o]ther damage to the environment under Chapter 10, Section 1 of the Environmental Code, where the damage originates from an environmentally hazardous activity listed under A or B in the Annex to Ordinance (1998:899) concerning environmentally hazardous activities and the protection of public health, or other activities or measures” (B6).

The Ordinance lists “[w]ater activities, with the exception of those classed as environmentally hazardous activities”. The Agency for Marine and Water Management is the authority for matters concerning water.
6. **Operators and any other liable persons**

The transposing legislation defines the word “operator” 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”.

The above definition of an operator is particularly broad because it includes owners of land on which there is ongoing pollution from landfills, oil tanks, barrels, etc. Such landowners are liable for removing the waste or other polluting substances, investigating the pollution, carrying out preventive measures and remediating pollution that has occurred during their ownership of the land. This is the most common situation in which a landowner is liable under chapter 10. In addition, landowners become liable for investigating, preventing and remediating pollution if they develop, dig or otherwise exploit land that has been contaminated by historic pollution.

- Secondary liability (e.g., parent company)

The transposing legislation does not provide for secondary liability. There have been proposals to extend liability under chapter 10 of the Environmental Code but no such amendments have been made.

- Death or dissolution of responsible operator

The transposing legislation does not mention the death or dissolution of a responsible operator.

- Persons other than an operator who may be liable

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 existing requirements for pollution damage under chapter 10 of the Environmental Code to serious environmental damage (as discussed in section 2 above).

7. **Annex III legislation**

- Rebuttable presumption that operator’s activity caused environmental damage

The transposing legislation does not establish a rebuttable presumption that the operator’s activity caused environmental damage.
Sweden imposes strict liability for non-Annex III activities. However, according to section 23 of Ordinance 2007, farmers, foresters, fishermen, reindeer herders and road keepers are liable for biodiversity damage only to the extent that they are negligent in carrying out their operations. There could potentially be an issue due to this negligence threshold. For example, if a farmer causes biodiversity damage by the use of pesticides, this is an activity under Annex III (see ELD, Annex III(7)(c)).

Sweden has not exempted the spreading of sewage sludge for agricultural purposes from Annex III.

8. **Standard of liability for non-Annex III activities**

The standard of liability for non-Annex III activities is strict liability. This appears to be a consequence of the ELD regime having been transposed into the Environmental Code, which already provided for strict liability for pollution damage.

9. **Exceptions**

   - Application to imminent threat of environmental damage as well as environmental damage

The exceptions apply to environmental damage.

   - Differences with exceptions in the ELD

Section 10 of the Environmental Code states that the ELD regime does "not apply to damage caused by pollution which":

- "is covered by Chapter 10 of the High Seas Act (1994:1009),
- is covered by the Act (2005:253) on compensation from the international oil damage funds,
- is caused by armed conflict, hostility, civil war, an insurrection or an exceptional and unavoidable natural occurrence against which no protection could be given, or
- is caused by an activity or measure whose sole purpose was to prevent a natural disaster”.

The above exceptions differ from those in the ELD as follows:

- they do not include the nuclear conventions;
- there is no specified exception for "activities the main purpose of which is to serve national defence or international security", but see immediately below in this section of the summary; and
- they do not include the diffuse pollution exception.
The exception for Chapter 10 of the High Seas Act reflects article 4(2) of the ELD, that is, the exception for the Conventions in Annex IV of the ELD. Section 10 of the Environmental Code further provides that if environmental damage is covered by limited liability under chapter 9 of the High Seas Act, the provisions of the transposing legislation do not apply where they are in conflict with it.

Ordinance (2007:673) states that there is an exception to the activities set out in it for “defence activities under C”. Section 22 of Ordinance 2007/667 further states that requirements for after-treatment for activities or measures that are needed in view of the armed forces’ operational capacity having contributed to serious environmental damage are set out in Chapter 10, Section 5, paragraph 1 of the Environmental Code insofar as it is deemed reasonable to do so.

In other words, the scope of the exception for national defence purposes / activities is for an operator’s liability to arise only to a reasonable extent.

Diffuse pollution exception

The Swedish transposing legislation does not mention the diffuse pollution exception.

10. **Joint and several or proportionate liability**

Sweden has adopted joint and several liability.

Ordinance 2007/667 states that, in determining the extent of liability, the following factors should be taken 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.

As discussed in section 2 above, the above factors already existed in the Environmental Code.

Chapter 10 of the Environmental Code reiterates the above factors to be taken into account by a competent authority in determining the extent of liability of an operator. That is, section 6 of chapter 10 provides that:

“If several operators are liable ..., they shall accept joint and several liability to the extent that the liability is not limited in accordance with [provisions including such factors]. An operator who shows that his or her contribution to the pollution is so insignificant that it does not by itself justify after-treatment shall, however, only be liable to the extent that corresponds to his or her share of responsibility.

The payment made by the persons jointly liable shall be shared between them as appears reasonable with regard to the extent to which each of them was responsible for the pollution and to other relevant circumstances”.

Mechanism for contribution between liable operators
An operator who has paid to remediate environmental damage may bring a contribution action against another liable operator.

11. **Limitation period**

Chapter 10 of the Environmental Code states that the Limitation Act (1981:130) does not apply. The dis-application is for national provisions only.

The 30-year limitation period for the legislation transposing the ELD is reflected in the transition rule for Law 2007:660.

12. **Defences**

   ▶ Defences to liability or costs?

   The transposing legislation does not mention the defences in respect of:

   - 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 (see Code, chapter 10, section 5).

   As indicated below, Sweden has not adopted the permit or the state-of-the-art defences but uses them as mitigating factors (see Code, chapter 10, section 5).

   The mitigating factors apply to liability not costs. That is, as explained directly below, an order is suspended until any appeal process is completed and the order (which is referred to as an injunction) has "legal effect". The recipient of the order is not required to comply with the order before it has legal effect and then seek to recover costs incurred in doing so.

   ▶ If defences to liability; suspension (or not) of remediation notice during appeal

   Under the Code, an order does not take effect until it is finally decided, at which time it has "legal effect". Orders are, thus, suspended until the appeal process (if any) has been completed.

   ▶ Permit defence

   Sweden has not adopted the permit defence as a defence but 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 serious environmental damage under the ELD regime; they do not apply to pollution damage under chapter 10 of the Code, to which a reasonability test applies.

   ▶ State-of-the-art defence

   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.

As noted above, the mitigating factors apply only to serious environmental damage under the ELD regime; they do not apply to pollution damage under chapter 10 of the Code, to which a reasonability test applies.

13. **Scope of environmental damage**

The transposing legislation refers to “environmental damage” under the ELD as “serious environmental damage”, which is defined by chapter 10 of the Environmental Code as:

“damage to the environment that is so serious that
1. as a result of land pollution it constitutes a significant risk to human health;
2. by affecting a water area or groundwater it has a significant negative impact on the quality of the aquatic environment;
3. it causes widespread damage to or impedes the conservation of an animal or plant species or the habitat of such a species, if the damage concerns
   a. an area of unspoiled nature listed in Chapter 7, Section 27, paragraph 1, points 1 or 2,
   b. an animal’s breeding grounds or resting place which is protected under rules issued pursuant to Chapter 8, Section 1, or
   c. a species which is protected under rules issued pursuant to Chapter 8, Sections 1 or 2”.

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000) 13.77%

- Extension of biodiversity to nationally protected biodiversity

Sweden has extended biodiversity damage to nationally protected biodiversity.

- Biodiversity damage in the exclusive economic zone

The transposing legislation does not specify that the ELD regime applies to biodiversity in Sweden’s exclusive economic zone. However, two Natura 2000 sites, established under the Habitats Directive, are located partially in that zone and partially in Sweden’s territorial waters.

- Waters or water body

The Environmental Damage Ordinance refers to “a water area” in respect of surface water and a “body of groundwater”. It also refers in various places to “a water area [and] groundwater”. It is unclear whether environmental damage must be to a body of surface water or groundwater or to all waters under the Water Framework Directive.
14. **Thresholds**

- **Water damage**

The threshold in the transposing legislation appears to be the same as the ELD.

- **Biodiversity damage**

The transposing legislation refers to factors including “the rarity of the species or habitat and their natural distribution in the vicinity of the damaged area, Swedish territory and the part of the territories of the Member States of the European Union covered by the EC Treaty” in assessing the conservation status of a protected species or natural habitat.

- **National biodiversity damage**

The threshold in the transposing legislation appears to be the same as the ELD.

- **Land damage**

In respect of “serious environmental damage [that] has been caused as a result of soil pollution”, the transposing legislation states that remedial measures shall be decided on the basis of “1. the risk posed by the polluted soil to human health, taking account of a) the properties and function of the soil, b) the type of pollutant, preparation, polluting organism or micro-organism, its concentration and the danger posed, and c) the risk that the pollution may spread, 2. current land use, and 3. future land use which a) under the rules or decisions currently in force was planned when the damage occurred, or b) may be expected in view of the character of and expected developments in the area in question, where there are no rules or decisions regarding future land use in force at the time”.

15. **Standard of remediation**

- **Land**

See section 14, “Land damage” above.

Chapter 10 of the Environmental Code states that an operator must “ensure that the polluted soil no longer poses any significant danger to human health”. This standard of remediation appears to equate to the standard in the ELD, which refers to a “significant risk of human health being adversely affected”.

- **Biodiversity**
  - **Primary remediation**

In assessing the effect of damage on the conservation status of a protected species or natural habitat, the significance of the species or habitat for public outdoor recreation shall be considered as well as the damaged natural resource and the services it provides to other natural resources.

- **Complementary and compensatory remediation**

The transposing legislation states that if it is not possible for compensation measures to be taken at the site where the damage occurs, it shall, if possible, “be taken at a site linked in terms of the
function of natural resources and their significance for general outdoor recreation to the damaged site”.

Section 5 of chapter 10 of the Environmental Code refers to an operator being liable “to compensate lost environmental value pending restoration of the site” and “to compensate for lost environmental value in another way if restoration is not possible”.

The transposing legislation refers to the use of an equivalence assessment method in carrying out complementary and compensatory measures. If this is not possible, a method involving the financial valuation of natural resources and functions, or a different valuation method shall be used.

Water
- Primary remediation

The standard of primary remediation of water damage appears to be the same as the ELD.

- Complementary and compensatory remediation

See Biodiversity, Complementary and compensation remediation, above.

16. **Format of determination of environmental damage**

The transposing legislation does not specify any particular format for a determination of environmental damage.

17. **Powers and duties of competent authority(ies)**

In addition to consulting and providing liable operators with the right to comment prior to issuing an order to carry out remedial measures, the competent authority shall also consult with, and provide the right to comment to, owners and other persons with special rights to the relevant property, “known creditors with mortgages on the properties concerned as well as state and municipal authorities which have significant interests in the matter”. The competent authority shall notify them by publishing a notice in a local newspaper or “another appropriate manner”.

- Inspections, investigations, studies and analyses

The competent authority shall, among other things, hold meetings and site visits, when necessary to investigate.

The Environmental Code provides that there may be a “prohibition against transferring the property in question or other property until the investigation is completed”.

- Information orders

The competent authority may issue orders to require an operator to provide information or documents.

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

Competent authorities have a duty to require operators to carry out preventive measures.
Power or duty to require an operator to carry out remedial actions

Competent authorities have a duty to require an operator to carry out remedial actions.

Power or duty of competent authority to carry out preventive measures

A competent authority has the power to carry out preventive measures if the operator does not do so.

Power or duty of competent authority to carry out remedial measures

A competent authority has the power to carry out remedial measures if the operator does not do so.

Form of preventive order

The transposing legislation does not specify any particular format for an order to carry out preventive actions.

Form of remediation order

The transposing legislation states that an order should state the property, or parts of it, that are affected by after-treatment measures.

Appeal against preventive or remediation order

The appeal provisions in the Environmental Code apply. They provide for appeals to be made to the Environmental Court of Appeal, with the potential for a subsequent appeal to the Supreme Court.

In this respect, Sweden has administrative courts in addition to courts for civil and criminal cases. The scope of matters handled by the administrative courts includes hearing appeals of administrative decisions. The Environmental Court of Appeal is an administrative court that is a division of the Administrative Court of Appeal in Stockholm. ¹³⁸

Sanctions for failure to comply with preventive or remediation order

The administrative sanction charges under the Environmental Code apply; criminal law does not apply. That is, it is not a criminal offence to fail to comply with an administrative order. Instead, 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.

Formal consultees on contents of preventive and remediation orders

The transposing legislation does not provide for formal consultees.

Recovery of implementation and enforcement costs

Ordinance (2007:668) provides that liable persons shall pay the following costs, as applicable, unless the costs of the authority’s work are covered by a fee payable under chapter 2 of the Ordinance:

¹³⁸ See Jan Darpö, Current Survey Sweden; the New Environmental Code; available at www.jandarpo.se/upload/EL-Env%20Code[1].doc
costs incurred by a State authority for supervision in respect of persons who are liable for remediating serious environmental damage (applicable to Environmental Code, chapter 10, section 2); and

- costs incurred by a State authority for supervision in respect of persons who are liable for remediating pollution damage (applicable to Environmental Code, chapter 10, sections 2 or 3).

Ordinance (2007:668) further provides that persons who are “required to investigate an area of environmental risk under Chapter 10, Section 16 of the Environmental Code shall bear the costs incurred by the county administrative board in declaring an area of land or water an area of environmental risk under Chapter 10, Section 15 of the Environmental Code”.

In respect of investigations into environmental risk, the costs also include the cost of publication of notices relating to the matter, file-keeping, experts contracted by the competent authority, meeting rooms. The authority may request advance payments for the above. Costs also include those incurred by an environmental court, if applicable.

The above fees “shall, following a special decision by the State authority, total SEK 800 for each full hour of processing time”, that is, “the total time spent by each official in the authority on preparations, presentations and decision-making in the matter” but not included travel time that exceeds two hours on one journey. If the supervision time results from a complaint that proves to be unfounded, the above fees are not payable.

- Deadline for competent authority to seek recovery of costs

The transposing legislation does not specify a deadline for the competent authority to seek recovery of costs.

18. **Duties of responsible operators**

- Preventive measures

An operator shall take preventive measures “as soon as there is cause to assume that an activity or measure may cause damage or detriment to human health or the environment”.

- Remedial actions (emergency actions)

An operator has a duty to take remedial actions “as soon as there is cause to assume that an activity or measure may cause damage or detriment to human health or the environment”.

- Remedial measures

The duty of an operator to carry out remedial measures is the same as the ELD.

- Duty to notify / provide information when environmental damage occurs

“If serious environmental damage is discovered, the operator shall immediately inform the supervisory authority thereof and notify the measures which have been taken by the operator and those still to be taken as well as further measures which may be needed for the after-treatment of the area”.


The competent authority shall examine whether the above measures “are appropriate and sufficient”. It “shall then order the operator to take [preventive or remedial measures]”.

- **Duty to notify / provide information when imminent threat of environmental damage occurs**

An operator has a duty to notify the supervisory authority immediately if “an activity or measure poses an imminent danger of serious environmental damage”.

If the measures taken by the operator as a result of the imminent danger do not avert it, the operator has a duty to notify the supervisory authority “as quickly as possible”. The notification must include the measures that have been taken by the operator, measures still to be taken, and further measures that may be needed to avert the danger.

The competent authority shall examine whether the above measures “are appropriate and sufficient”. It “shall then order the operator to take [preventive or remedial measures]”.

- **Entity to which notification should be provided**

The name of the entity is not specified in the transposing legislation.

19. **Access to third-party land to comply with the ELD**

The transposing legislation does not mention access by responsible operators to carry out measures on third-party land.

Specific legislative provisions are, however, not necessary. 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.

20. **Interested parties**

- **Qualification criteria for “sufficient interest”**

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”.

The current criteria (above) is less stringent than the criteria which 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.39

---

39 See *Djurgården-Lilla Värtans Miljöskyddsföring v Stockholms kommun genom dess marknämnd* (CJEU, Case No C-263/08, 2009).
Method of notifying interested parties of planned remedial measures

The competent authority shall publish a notice in local newspapers or notify interested and other parties, such as mortgagors, “in another appropriate manner”. It shall also notify the date and place of meetings and site visits, when they take place. The notice shall state the place where documents relating to the matter may be accessed, as well as the deadline for comments.

Further, an order to carry out “after-treatment measures” shall be notified “as soon as possible to the person responsible for after-treatment, the owner and persons with special rights to the properties concerned as well as known creditors with mortgages on the properties concerned”. In addition, the “notice regarding the decision taken shall be published as soon as possible in local newspapers. A copy of the [order] shall be sent to the state and municipal authorities having significant interests in the matter”.

Information to be provided to competent authority

The information provided to the competent authority should identify the actions taken by the operator, information about the type, extent and cause of the damage, the identity of the areas that are or may be affected by the damage, additional actions which should be taken and any other relevant information.

Challenges to competent authority’s decision

A challenge to a competent authority’s decision is by way of appeal. The right to appeal does not apply to a decision that concerns the armed forces, the National Fortifications Administration, the Swedish Defence Material Administration or the National Defence Radio Establishment.

Duty on competent authority to respond to person making comments

The transposing legislation does not mention any exceptions to a competent authority’s duty to respond to the person making comments / observations.

Inclusion of interested party in any proceedings by the competent authority against an operator

The transposing legislation does not authorise an interested party to be included in any proceedings by the competent authority against an operator.

21. Public access to information regarding environmental damage and related measures

The transposing legislation does not specify measures for public access to information regarding environmental damage, related preventive, containment or remedial measures.

There is, however, no need for specific legislation because the Freedom of the Press Act, which is part of the Swedish Constitution, provides free access to all official documents.
22. **Charges on land / financial security after environmental damage**

The Environmental Code provides for financial security after environmental damage only in respect of quarries. There are no provisions that require financial security after serious environmental damage under the ELD regime.

That is, a person who intends to carry out an activity for which a permit for a quarry under the Environmental Code is required, to “furnish a security for the costs of after-treatment and any other restoration measures that may be necessary as a result”. The security is to be assessed by the permitting authority which shall accept it “if it is shown to be adequate for its purpose”. Swedish law further provides that the” security may be lodged at a later date in accordance with a plan which, at all times, meets the current need for the security”. There is an exemption from the above requirement for the State, municipalities, county councils and associations of municipalities.

The Environmental Code provides that there may be a “prohibition against transferring the property in question or other property until the investigation is completed” (see section 17 above).

23. **Offences and sanctions**

As discussed in section 17 above, administrative fees (*astreinte*), which are provided for by chapter 30 of the Environmental Code and which are not specific to the ELD regime, apply to operators who fail to comply with environmental law. Liability is strict. The charge which is levied by supervisory authorities, ranges from SEK 1,000 to SEK 1,000,000.

- Directors and officers liability for breaching legislation

The transposing legislation does not mention directors’ and officers’ liability for breaching the transposing legislation.

- Publication of penalties

The transposing legislation does not mention the publication of penalties.

24. **Registers or data bases of incidents**

The transposing legislation does not specify whether a register or data base of ELD incidents shall be established.

25. **Cross border damage in another Member State**

Ordinance 2007/667 states that if there is “serious environmental damage which may affect human health or the environment in another country of the European Union, the supervisory authority shall inform the relevant authority in the other country”.

26. **Financial security**

Sweden has not adopted mandatory financial security for the ELD regime.
A former programme, known as the Swedish Environmental Damage Insurance programme, which was set up under the 1986 Environmental Damage Act, was abolished in 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.\textsuperscript{140}

27. Establishment of a fund

Sweden has not established a fund for the ELD regime.

28. Reports

Ordinance 2007/667 states that the Swedish Environmental Protection Agency shall submit the report for Sweden to the European Commission, as required by the ELD.

29. Information to be made public

The competent authority shall notify interested parties and other parties, such as mortgagors, of planned remedial measures by publishing a notice in local newspapers or “in another appropriate manner”.

30. Provisions concerning genetically modified organisms

The transposing legislation does not specify any provisions relating to GMOs except for GMOs being an Annex III activity.

31. Key features and differences in legislation transposing the ELD and existing legislation

When Sweden transposed the ELD, it already had legislation that imposed liability for remediating water pollution and land contamination. The liability system included obligations to prevent damage but these were less prevalent than obligations to remediate it. There was no specific legislation that required a person who causes biodiversity damage to prevent or remediate it.

The legislation for remediating water pollution and land contamination is set out in a single regime that also includes damage to buildings and structures. Persons who “pursue or pursued an activity or [have carried out] a measure that is a contributory cause of the pollution” are liable for the remediation (called “after-treatment”) of land, water, buildings or structures that may cause

damage or detriment to human health or the environment ("polluted areas"). The legislation transposing the ELD added groundwater and changed the term to "pollution damage").

The legislation is retrospective to 30 June 1969 as well as prospective. If an operator is unable to carry out or pay for the remediation, the owner of the polluted property is liable provided that the landowner knew or should have known of the pollution when it acquired the property after 31 December 1998 and also provided that the source of the 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 to operate the landfill or pit. If the pollution concerns private residences, buildings or structures, the owner must have had actual, not merely constructive, knowledge.

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 the 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.

In addition, an operator (or other responsible party) is liable for carrying out measures to prevent or abate further damage or detriment to human health or the environment to a reasonable extent. Liability is strict. Liability is also joint and several subject to the length of time since the pollution occurred; any obligations on the liable person to prevent future damage, provided such obligations existed at the time of the damage; and other relevant circumstances. There is a de minimis defence to liability. Modified joint and several liability also applies to the secondary liability of owners and lessees of polluted sites.

Whilst the interface between the legislation transposing the ELD and existing legislation is more harmonised than that in most Member States due to the legislation transposing the ELD having been incorporated into the Swedish Environmental Code, the following two factors are different in the transposing legislation and the existing legislation. First, the threshold for damage to land under the existing legislation differs from "serious environmental damage", the threshold in the legislation transposing the ELD. Second, the standard for liability depends upon the application of the "reasonableness" test for liability to "pollution damage" and the application of mitigating measures to liability for "serious environmental damage".
Implementation challenges and obstacles of the Environmental Liability Directive
1. **Existing national environmental legislation**

The UK has a wide variety of environmental liability legislation. Modern environmental liability legislation originated in the mid-19th Century, with legislation that established liability for polluted water and waste on land. That legislation has gradually evolved and become more wide-ranging in a piecemeal fashion that has focused to a large extent on different environmental media and different regulatory situations. Current legislation is set out in numerous statutes, regulations and statutory guidance. There are major overlaps in the different liability systems as well as substantial differences, and similarities, between them.

The web of environmental liability legislation in the UK has become even more complex with the devolution of powers to adopt environmental legislation to Scotland and, to a lesser extent, Wales. Environmental legislation in Northern Ireland and Gibraltar has substantially differed from that in England, Wales and Scotland for many years.

In transposing the ELD, the various Governments in the UK and Gibraltar decided to adopt stand-alone legislation to supplement existing legislation rather than amending existing environmental legislation. As a result, there are five separate stand-alone Regulations to transpose the ELD in the UK and Gibraltar. Many of the provisions of these Regulations are similar but, as described in this summary, there are significant differences between them, both procedural and substantive as well as the number of competent authorities designated to implement and enforce it in the various jurisdictions. The introduction of the Regulations to transpose the ELD has also increased the number of overlapping provisions between existing environmental liability systems in the UK as well as having increased the differences between them.

2. **Existing regimes for preventing and remediating environmental damage**

When the various jurisdictions in the UK transposed the ELD, liability systems for preventing and remediating water pollution and land contamination already existed. Further, a regime for remediating contamination from historic as well as future pollution incidents had been introduced in England, Wales and Scotland in 2000/2001. Still further, liability systems for remediating and restoring biodiversity damage existed, although these were, and still are, substantially more limited than the ELD and do not include complementary and compensatory damage. Further, none of the regimes covers environmental damage from genetically modified organisms (GMOs).

The remainder of this section describes the main existing liability systems and their relationship with the various Regulations that transposed the ELD, commenting in particular on standards, specificity, precedence/subsidiarity, the interaction and interface between the various Regulations and existing environmental legislation, and application of the thresholds for “significant environmental damage” under the ELD for biodiversity damage and water damage. The description of the legislation focuses on existing legislation in England and Wales rather than
detailing all the nuances between the varying legislation in the UK and Gibraltar, which tend to follow the same general concepts.

Water pollution

Current legislation in England and Wales that establishes liability for remediating water pollution is set out in sections 161-161ZC of the Water Resources Act 1991. The legislation provides that a person who causes or knowingly permits “any poisonous, noxious or polluting matter or any waste matter [to be or to have] been present in, or [to be] likely to enter, any controlled waters [that is, surface, ground and coastal waters]” or to harm or to be likely to harm such waters “by any event, process or other source of potential harm” is liable for:

- removing or disposing of the matter;
- remedying or mitigating any pollution [or harm] caused by its presence in the waters; or
- restoring (so far as it is reasonably practicable to do so) the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before the matter became present in the waters”.

The Environment Agency is the sole competent authority for the above legislation in England; Natural Resources Wales is the sole competent authority in Wales. ¹⁴¹

The legislation differs from the ELD (and its transposing legislation) in many respects including the following:

- The threshold for damage to water is significantly lower than the threshold in the ELD;
- Liability is not limited to damage to water bodies (see section 13, “Water or water body” below);
- Fauna and flora are required to be restored only “as far as it is reasonably practicable to do so”;
- The mitigation of pollution and harm is permitted in some instances in contrast to the ELD, which provides that a competent authority must require an operator who damages water to return the water to its baseline condition and to “achieve the same level of natural resource or services as would have existed” prior to the damage;
- There is no liability for compensatory or complementary remediation;
- There is no duty immediately to prevent environmental damage or to prevent further damage or immediately to carry out remedial actions;

¹⁴¹ Natural Resources Wales is composed of the Environment Agency Wales, Countryside Commission for Wales, and the Forestry Commission. The functions of these authorities were transferred to Natural Resources Wales on 1 April 2013, at which time they ceased to exist.
Liability is not limited to an "operator";
There are limited defences to liability;
The permit defence and the state-of-the-art defence do not apply;
There are no exceptions to liability;
There is no statute of limitations;
The ELD regime applies only if the damage is caused by an activity listed in Annex III of the ELD;
There are no requirements to notify a competent authority of the pollution or harm;
There are no provisions for "interested parties" to submit comments; and
The procedures by which a competent authority can require a responsible person to remediate the pollution are relatively flexible.

Contaminated land

Part 2A of the Environmental Protection Act 1990 establishes liability for remediating "contaminated land" on a person who caused or knowingly permitted the contamination. If the competent authority (generally a local authority or, for a sub-set of contaminated land called "special sites", the Environment Agency in England or Natural Resources Wales) cannot find such a person (called a Class A person) after a reasonable inquiry, the owner or occupier of the contaminated land (called a Class B person) is liable. Liability under Part 2A is retrospective as well as prospective; there is no limitation to such liability. The scope of liability is modified joint and several liability – which consists of a complicated mix of joint and several and proportionate liability.

The Part 2A regime is highly complex. Statutory guidance accompanying Part 2A includes tests that exclude specified persons from liability plus apportionment and attribution criteria, which are designed to allocate liability between appropriate persons and groups of such persons who remain after the exclusion tests have been applied. The exclusion tests permit, among other things, a person who has caused or knowingly permitted contamination statutorily to transfer its liability to a person who purchases the freehold or a lease of over 21 years of the contaminated land with knowledge of that contamination. The regime also includes hardship criteria that an enforcing authority may apply in order to relieve a liable person from having to bear remediation costs.

The threshold for land to be "contaminated land" is complex and is based on a contaminant posing significant harm or significant possibility of significant harm, by way of a "pathway", to specified receptors, that is, human health, specified ecological areas including sites of special scientific interest (SSSIs) (which include Natura 2000 sites), property in the form of buildings, crops, pets rights in wild animals and fish, and surface, ground and coastal waters. The standard for remediation is suitability for current use not requiring planning permission, thus permitting commercial and industrial land to be remediated to a lower standard than residential land. The
The implementation challenges and obstacles of the Environmental Liability Directive regime includes complex consultation and other procedures which, in some cases, extend the beginning of remediation of contaminated land for many years.

The legislation differs from the ELD (and its transposing legislation) in many respects including the following:

- Liability is focused on contaminated land, although it includes the remediation of some but not all water pollution;
- The focus is on remediation and not prevention due to the regime’s focus on contamination from historic pollution incidents;
- The modified joint and several liability system differs substantially from that under the ELD due to the existence of exclusion tests and apportionment, attribution and hardship criteria;
- Although liability exists for damage to SSSIs and other protected sites, there is no requirement to restore biodiversity at such sites – liability is limited to removing the contaminant(s) causing the significant harm or a significant possibility of such harm;
- Liability is not limited to an “operator” but includes owners and occupiers of contaminated land who are liable due to their status as such owners or occupiers;
- Liability is retrospective as well as prospective, with a focus on remediating contamination from historic pollution;
- A liable person who satisfies one or more exclusion tests is excluded from liability under the regime provided that at least one other liable person remains to remedy the contamination;
- There is no statute of limitations;
- There are no requirements to notify a competent authority of the contamination;
- The permit defence and the state-of-the-art defence do not apply;
- A competent authority cannot recover its costs of investigating contaminated land from a liable person;
- The ELD regime applies only if the damage is caused by an activity listed in Annex III of the ELD; the application of Part 2A is not limited to contamination caused by specified activities;
- There are no provisions for “interested parties” to submit comments; and
- The procedures that a competent authority must follow in enforcing the regime are more complex than those in the ELD.
Remediating biodiversity damage

Natural England and Natural Resources Wales have the power to serve a restoration order on a person who has damaged or destroyed natural resources in a SSSI in England and Wales, respectively. There are two types of restoration orders, both of which require the person on whom it is served to have been convicted for causing the damage or destruction.

Under the Wildlife and Countryside Act 1981, a person who is convicted of destroying or damaging flora, fauna or the geological or physiographical features of a SSSI may be ordered by the court to restore the SSSI to its condition prior to the damage. On application, the court may discharge or vary the order if it concludes that a change in circumstances has made compliance with it impracticable or unnecessary.

Under the Conservation of Habitats and Species Regulations 2010/490, Natural England or Natural Resources Wales may make a special nature conservation order on a person who damages or destroys natural resources within a Natura 2000 site. The competent authority may also serve a stop notice if “the flora, fauna, or geological or physiographic features” of the site that have led to its designation as a Natura 2000 site are likely to be damaged or destroyed. If the recipient of a stop notice breaches it, the competent authority may serve a restoration notice as well as bringing a prosecution for further offences. As with a restoration order for a SSSI, a court may discharge or vary it if it concludes that a change in circumstances has made compliance impracticable or unnecessary.

The legislation differs from the ELD (and its transposing legislation) in many respects including the following:

- Liability is focused on SSSIs and Natura 2000 sites, not other natural resources;
- There is no liability for compensatory or complementary remediation;
- The competent authority cannot serve a restoration order unless the potential recipient has been convicted of damaging or destroying natural resources in a SSSI or Natura 2000 site;
- Liability is not limited to an “operator”;
- There is no statute of limitations;
- There are no requirements to notify a competent authority of the damage or destruction;
- The permit defence and the state-of-the-art defence do not apply – the only defence (which is for failure to comply with a notice) is a “reasonable excuse”;
- There are no exceptions to liability; and
- There are no provisions for “interested parties” to submit comments.
Other liability systems for remediating environmental damage

Other liability systems for remediating environmental damage in England and Wales include the following:

- Conditions in an environmental permit under legislation transposing the integrated pollution prevention and control Directive / industrial emissions Directive that require the remediation of pollution incidents during the pendency of the permit; with the site to be remediated to a “satisfactory state” at the termination of operations;
- Waste removal notices under the Environmental Protection Act 1990;
- Remedial measures in connection the abstraction and impoundment of water under the Water Resources Act 1993;
- Remedial measures under the Control of Major Accident Hazards Regulations 1999 (which transposed the Seveso Directive);
- Remedial measures under the statutory nuisance regime; and
- Remedial measures under the Marine and Coastal Access Act 2009.

Interface between the existing national liability regimes and the ELD regime

In its regulatory impact assessment accompanying the introduction of the Regulations transposing the ELD into the national law of England, Wales and Northern Ireland, the UK Government stated that it expected the ELD regime to cover less than one per cent of the 30,000 incidents of environmental damage each year in those jurisdictions,\(^1\) that is, less than 300 cases. The Scottish Government estimated that there would be an average of three cases of biodiversity damage each year in Scotland, three cases of water damage each year, and an additional five cases of land damage each year.\(^2\)

Since the ELD regime came into force in the UK, there has been one incident of water damage, two incidents of damage to nationally protected biodiversity, four incidents involving imminent damage to biodiversity, 10 incidents of land damage, and two incidents involving an imminent threat of land damage. The significance (or not) of the thresholds for environmental damage may have influenced the number of cases of each type of damage (see section 14 below). That is, the threshold for water damage is higher than that in some Member States (requiring damage to a water body); the threshold for damage to a nationally protected area is an adverse effect on the integrity of such an area (which is potentially easier to identify than the threshold for biodiversity damage of a significant adverse effect on the conservation status of a protected species or habitat); the threshold for an imminent threat of biodiversity damage is more flexible than the threshold for actual biodiversity damage (because it is exceeded if there is the “sufficient

---

\(^1\) Defra and Welsh Assembly Government, Impact Assessment of the Environmental Damage Regulations (England) and the Environmental Damage Regulations (Wales) 2008 (16 December 2008).

likelihood that environmental damage will occur in the near future"); and the threshold for land damage is particularly low, being triggered in at least one incident by the members of a family having developed headaches, nausea and sore throats as a result of a spill of hydrocarbons outside their home.

There is a substantial potential for different liability regimes to apply to a single incident of environmental damage. For example, if an operator's activities cause further pollution of a body of groundwater, the ELD regime could apply to the remediation of the new pollution, with the Water Resources Act 1991, Part 2A, or both applying to the remediation of pollution prior to the effective date for the ELD as well as pollution that does not exceed the ELD threshold. The existence of a threshold in the ELD also increases the likelihood that more than one liability regime will apply to many other instances of environmental damage, that is, existing national legislation below the threshold and the ELD regime for damage that exceeds the threshold.

The Guidance to the Regulations for England and Wales states that competent authorities may apply existing national legislation, instead of the ELD regime, for preventive and remedial measures. Whilst the Guidance states that the Regulations “would generally take precedence over other regimes” in respect of the “duty for authorities to require remediation where they establish that there is ‘environmental damage’ and a liable operator”, it states that they need not be applied when the outcome required by them has been “fully achieved ... including through other legislation which can be applied more rapidly”. It is difficult to see how other legislation could fully achieve the same outcome because no legislation in the UK other than the ELD regime establishes liability for complementary or compensatory remediation. There is obviously also a potential for a competent authority that has applied existing legislation to environmental damage below the ELD threshold to continue to apply it to environmental damage that exceeds that threshold, particularly due to the difficulty in identifying the significance threshold for the ELD for biodiversity and water damage.

Further, the costs that a competent authority could seek to be reimbursed are likely to be lower than those under the ELD because the definition of “costs” in the ELD is broader than costs that may be recovered under other national environmental liability regimes.

3. Integration of the ELD into existing national legislation

Transposing legislation

The ELD was transposed into the law of England, Wales, Scotland, Northern Ireland and Gibraltar by the following regulations:


- **Wales**: Environmental Damage (Prevention and Remediation Regulations) (Wales) Regulations 2009, SI 2009/995;
- **Scotland**: Environmental Liability (Scotland) Regulations 2009, SSI 2009/266, as 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, as amended by Environmental Liability (Prevention and Remediation) (Amendment) Regulations (Northern Ireland) 2009, SI 2009/361; and Environmental Liability (Prevention and Remediation) (Amendment) Regulations (Northern Ireland) 2011, SI 2011/210; and


- Amendments to existing national legislation

**All UK and Gibraltar**: No amendments have been made to existing national legislation.

- Authorisation in legislation for other governmental entities to issue rules and regulations

  - **England**: The Department for Environment, Food and Rural Affairs (Defra) developed Regulations which came into force after having been laid before Parliament.

  - **Wales**: The Welsh Ministers developed Regulations which came into force after having been laid before the Welsh Government.

  - **Northern Ireland**: The Department of the Environment developed Regulations which came into force after having been laid before the Northern Ireland Assembly.

  - **Scotland**: The Scottish Government developed Regulations which came into force after having been laid before the Scottish Parliament.

- **All UK and Gibraltar**: The Regulations indicated above do not authorise other governmental entities to issue rules and regulations.

- Relationship to other legislation

  - **England and Wales**: The transposing legislation incorporates section 108 of the Environment Act 1995, which provides competent authorities with broad powers to inspect and investigate suspected and actual pollution. (Northern Ireland and Scotland have inserted specific provisions similar to section 108 in their transposing legislation.)

- Guidance and other documentation

The various governmental authorities have published the following guidance and other documentation.
England and Wales:

- Defra and Welsh Assembly Government, The Environmental Damage Regulations; Preventing and Remedying Environmental Damage (Updated May 2009), a Quick Guide to the Regulations (Quick Guide);
- Defra and Welsh Assembly Government, The Environmental Damage (Prevention and Remediation) Regulations 2009; Guidance for England and Wales 2nd Update (November 2009 (Guidance);
- Defra and Welsh Assembly Government, Regulatory Impact Assessment (Regulatory Impact Assessment of the Environmental Damage Regulations (England) and the Environmental Damage Regulations (Wales) 2008 (Dec. 16, 2008);
- Note on transposition (undated); and

Northern Ireland:

- Department of the Environment, The Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009 – Guidance;
- Department of the Environment, The Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009, Summary Guidance;
- Explanatory note, The Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009, SR 2009/252; and

Scotland:

- Scottish Government, Environmental Liability (Scotland) Regulations 2009, Draft Guidance (Aug. 2009); 146

---

144 The Welsh Assembly Government is now the Welsh Government.

145 Due to the large degree of similarity between the Guidance for England and Wales and the Summary Guidance for Northern Ireland, this summary uses the term "guidance" to refer to the same or materially similar provisions in both documents.

146 The August 2009 Guidance for Scotland is Draft Guidance because the Scottish Environment Protection Agency exercises it duties and powers under the Regulations, which take precedence over the guidance.
Scottish Government, Environmental Liability (Scotland) Regulations 2009, A Quick Guide (July 2009); and


Gibraltar: no guidance has been published.

4. **Effective date of national legislation**

**England:** March 1, 2009  
**Wales:** May 6, 2009  
**Northern Ireland:** July 24, 2009  
**Scotland:** June 24, 2009  
**Gibraltar:** December 11, 2008

5. **Competent authority(ities)**

**England:**
- **Local authorities:** land plus preventive actions for local authority regulated activities;
- **Environment Agency:** Environment Agency regulated sites; all water including water in SSSIs and in respect of biodiversity, but not marine waters unless Environment Agency authorised activity;
- **Natural England:** land in SSSIs and biodiversity; and
- **Marine Management Organisation:** marine waters but not Environment Agency regulated activities.

**Wales**
- **Local authorities:** land plus preventive actions for local authority regulated activities;
- **Natural Resources Wales:** Natural Resources Wales regulated sites; all SSSIs and all biodiversity, but not marine waters unless a Natural Resources Wales authorised activity; and
- **Welsh Ministers:** marine waters but not Natural Resources Wales regulated activities.

**Northern Ireland:**
- The (Northern Ireland) Department of the Environment is the competent authority.
Scotland:

- Scottish Environment Protection Agency: land damage and water damage;
- Scottish Natural Heritage: biodiversity other than marine biodiversity; and
- Scottish Ministers (Marine Scotland): below high water and out to 12 nautical miles for biodiversity.

Gibraltar:

- The Minister or such other person as the Minister may appoint in the Gazette is the competent authority.

6. **Operators and other liable persons**

**All UK and Gibraltar:** The definition of an operator is essentially the same as in the ELD.

- Secondary liability (e.g., parent company)

**All UK and Gibraltar:** No secondary liability is specified.

- Death or dissolution of responsible operator

**All UK and Gibraltar:** The transposing legislation does not mention the death or dissolution of a responsible operator.

- Person other than an operator who may be liable

**England and Wales:** An operator is the only person who may be liable under the Regulations. The transposing legislation, however, states that “An operator who incurs liability to the [competent] authority under these Regulations (whether in carrying out work or in payment to the [competent] authority) may recover all or some of those costs from any other person who caused the damage”.

**Northern Ireland:** The situation is similar to that for England and Wales, above. The transposing legislation provides that “An operator who incurs costs under these Regulations may recover all or some of those costs from any third party who also caused or contributed to the damage”.

**Scotland:** The transposing legislation provides that an operator may recover its costs from a third party.

**Gibraltar:** The transposing legislation states that the competent authority may “require a third party to take the necessary preventive or remedial measures”.

7. **Annex III legislation**

- Rebuttable presumption that operator’s activity caused environmental damage

**All UK and Gibraltar:** None of the transposing legislation establishes a rebuttable presumption.
368 | Implementation challenges and obstacles of the Environmental Liability Directive

- Additional occupational activities subject to strict liability

**All UK and Gibraltar:** None of the transposing legislation extends strict liability beyond Annex III activities.

- Spreading of sewage sludge for agricultural purposes

**All UK and Gibraltar:** The transposing legislation does not include spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes as an Annex III activity.

8. **Standard of liability for non-Annex III activities**

**England and Wales:** The standard of liability for non-Annex III activities is whether the operator intended to cause environmental damage or was negligent as to whether such damage would be caused.

**Northern Ireland:** The transposing legislation applies when the operator “was at fault or was negligent as to whether such damage would be caused”. This is essentially the same standard of liability as in England and Wales.

**Scotland and Gibraltar:** The standard of liability for non-Annex III activities is fault or negligence.

9. **Exceptions**

- Application to imminent threat of environmental damage as well as environmental damage

**England, Wales, Northern Ireland, Scotland and Gibraltar:** The exceptions apply to an imminent threat of, and actual, environmental damage.147

- Differences with exceptions in the ELD

  - Exception 1

    ELD: “a natural phenomenon of exceptional, inevitable and irresistible character”.

    **England, Wales and Northern Ireland:** “an exceptional natural phenomenon, provided the operator of the activity concerned took all reasonable precautions to protect against damage being caused by such an event”.

    **Scotland and Gibraltar:** the exception is the same as the ELD.

  - Exception 2

    **England, Wales and Northern Ireland:** “damage caused in the course of commercial sea fishing if all legislation relating to that fishing was complied with”.

    **Scotland and Gibraltar:** Scotland and Gibraltar do not include the exception for commercial sea fishing.

147 The exceptions are referred to as exemptions under the Scottish ELD regime and exclusions from liability.
Diffuse pollution exception

**England and Wales:** The transposing legislation states that they “only apply to environmental damage caused by pollution of a diffuse character if it is possible to establish a causal link between the damage and specific activities”.

**Northern Ireland and Gibraltar:** The transposing legislation states that they do not apply to an imminent threat of, or actual, environmental damage caused by “pollution of a diffuse character if it is not possible to establish a causal link between the damage and the activities of individual operators”.

**Scotland:** The transposing legislation is essentially the same as Northern Ireland, that is, “they do not apply to an imminent threat of, or actual, environmental damage caused by “pollution of a diffuse character where it is not possible to establish a causal link between the damage and the activities of individual operators”.

10. **Joint and several or proportionate liability**

**England, Wales and Northern Ireland:** The scope of liability is joint and several liability.

**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. The above scope of liability thus allows a competent authority to apply joint and several liability if it cannot proportion liability between the operators. The guidance confirms this by stating that the competent authority may pursue any of the responsible operators.

**Gibraltar:** The transposing legislation does not specify the scope of liability.

- Mechanism for contribution between liable operators

**All UK:** The guidance states that any operator who pays to remediate environmental damage may seek contribution from other liable operators but does not state the source of the legal mechanism for doing so.

**Gibraltar:** The transposing legislation does not specify any mechanism for contribution between liable operators.

11. **Limitation period**

**All UK and Gibraltar:** The limitation period is 30 years with the exception of 75 years in Scotland for damage from GMOs.

12. **Defences**

- Defences to liability or costs?

**England, Wales, Northern Ireland and Gibraltar:** The defences to remedial measures are defences to liability. The "defences" are not true defences but are set out in each set of Regulations as grounds of appeal. The appeals process is bifurcated into an appeal against a notification of liability to remediate environmental damage, and an appeal against a remediation
notice. The “defences” do not apply to preventive actions and emergency remedial actions, against which there is no appeal.

**Scotland:** The defences to preventive and remedial measures are defences to liability. The defences do not apply to emergency remedial actions (see this section directly below).

- If defences to liability; suspension (or not) of remediation notice during appeal

**England, Wales, Northern Ireland and Gibraltar:** The remediation notice is suspended during an appeal unless the person hearing the appeal directs otherwise. Further, a successful appeal against a notification of liability means that a remedial notice is not issued.

**Scotland:** The remediation notice is suspended unless there is an imminent risk to human health or an imminent threat of environmental damage and the competent authority notified the operator of this opinion when imposing the requirement in question.

- Permit defence

**All UK and Gibraltar:** The permit defence applies if the operator was not at fault or negligent and environmental damage was caused by an emission, event or activity in accordance with specified permits. The permits vary between the different jurisdictions.

**England:** The permit defence applies to:

- an environmental permit for IPPC, waste activities, authorisation concerning groundwater;
- a marine licence;
- an ordinary or emergency drought order to drought permit;
- a water abstraction or impoundment licence;
- an authorisation of, or permission for, a plant protection product; and
- the contained use, direct release and placing on the market of GMOs.

**Wales:** The permit defence applies to:

- an environmental permit for IPPC, waste activities, authorisation concerning groundwater;
- a marine licence;
- an ordinary or emergency drought order to drought permit;
- a water abstraction or impoundment licence; and
- an authorisation of, or permission for, a plant protection product.

**Northern Ireland:** The permit defence applies to national legislation transposing the same EU legislation as England and Wales (above), albeit that the national legislation for Annex III
activities for Northern Ireland differs from that for England and Wales. In essence, the permit defence applies to the same activities as in England and Wales.

**Scotland:** The permit defence applies to all Annex III activities.

**Wales:** The permit defence does not apply to GMOs.

**England, Wales and Northern Ireland:** The permit defence does not apply to individual applications of pesticides because pesticide authorisations do not cover such applications; the guidance notes that the state-of-the-art defence may apply to such applications.

- **State-of-the-art defence**

**All UK and Gibraltar:** All jurisdictions in the UK have adopted the state-of-the-art defence.

- **Other**

**England and Wales:** The following are also defences (that is, grounds for appeal against a notification of liability):

- the operator's activity did not cause environmental damage;
- the enforcing authority acted unreasonably in deciding damage was environmental damage; and
- the environmental damage resulted from compliance with public authority instruction and was not related to an emission or incident caused by operator's own activities.

**Northern Ireland and Gibraltar:** The defences / grounds of appeal are the same as for England and Wales above with the exception that the first ground is “the operator’s activity did not cause or contribute to the damage”.

**Scotland:** The transposing legislation states that the grounds for appeal against notification are questions of law and fact.

**13. Scope of environmental damage**

- Percentage of national land area covered by Birds and Habitats Directives (Natura 2000) 8.55%

The Rock of Gibraltar, covering 200.5 hectares is also protected under the Birds and Habitats Directives.

- Extension of biodiversity to nationally protected biodiversity

**England, Wales and Northern Ireland:** Liability is extended to sites of special scientific interest (SSSIs) protected under domestic legislation (known as areas of special scientific interest in Northern Ireland).

**Scotland:** Liability for damage to protected species and natural habitats has not been extended beyond biodiversity damage in the ELD.

**Gibraltar:** The transposing legislation does not extend biodiversity to nationally protected biodiversity.
Biodiversity damage in the exclusive economic zone

UK: The transposing legislation includes biodiversity in the exclusive economic zone. That is, the transposing legislation applies to biodiversity in the seabed of the continental shelf around the UK, and to waters in the Renewable Energy Zone, which extends to about 200 miles seaward around the UK. Scotland, Northern Ireland and Wales are responsible for enforcing the transposing legislation in the sea and seabed out to 12 miles from their shores.

Water or water body

England, Wales and Northern Ireland: The threshold for environmental damage to surface water is damage to a surface water body that is classified as such under the Water Framework Directive (2000/60/EC) such that:
- a biological quality element listed in Annex V to that Directive,
- the level of a chemical listed in the legislation in Annex IX or a chemical listed in Annex X to that Directive, or
- a physicochemical quality element listed in Annex V to that Directive,

changes sufficiently to lower the status of the water body in accordance with the Water Framework Directive whether or not the water body is actually reclassified as being of lower status.

The threshold for environmental damage to groundwater is damage to a body of groundwater such that (1) its conductivity, level or concentration of pollutants changes sufficiently to lower its status under the Water Framework Directive, or (2) in respect of pollutants, the Groundwater Directive (2006/118/EC) whether or not the body of groundwater is in fact reclassified to the lower status.

Scotland: The transposing legislation essentially tracks the ELD. The guidance, however, states that: “Damage only constitutes water damage for the purposes of the [ELD] if a body of surface water or a body of groundwater is adversely affected”.

Gibraltar: The transposing legislation tracks the ELD.

14. Thresholds

Water damage

See section 13 (Water or water body), above.

England, Wales and Northern Ireland: Damage to water extends out to one nautical mile.

Scotland: The guidance states that “Coastal water bodies cover coastal waters up to 3 miles seaward from the baseline from which Scottish territorial waters are measured”.

Gibraltar: Gibraltar’s territorial waters have not as yet been extended beyond three nautical miles or the median line in the Bay of Gibraltar.
Biodiversity damage

England, Wales and Northern Ireland: The threshold for biodiversity damage tracks the ELD. The appropriate natural range by which to determine whether there has been a significant adverse effect on the conservation status of a species or its natural habitat is generally the UK except for wide ranging species.

Scotland: The threshold for biodiversity damage tracks the ELD. The appropriate natural range by which to determine whether there has been a significant adverse effect on the conservation status of a species or its natural habitat is as above, with the guidance noting that in some cases it will be Scotland for, eg, the slender naiad, which is confined to Scotland.

Gibraltar: The transposing legislation tracks the ELD.

National biodiversity damage

England, Wales and Northern Ireland: Damage must have an adverse effect on the integrity of the site (that is, the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats or the levels of populations of the species affected).

Land damage

England, Wales and Northern Ireland: The threshold for land damage is the same as in the ELD, that is, contamination of land by substances, preparations, organisms or micro-organisms that results in a significant risk of adverse effects on human health.

The guidance specifies, however, that a significant risk of an adverse effect on human health includes:

- death;
- disease;
- serious injury;
- genetic mutation;
- birth defects;
- impairment of the reproductive functions;
- gastrointestinal disturbances (nausea, vomiting, diarrhoea, abdominal pain);
- respiratory tract effects (irritation of the nose, throat and respiratory tract cough, sore throat, dyspnoea);
- cardiovascular effects (hypotension, hypertension);
- central nervous system effects (headache, lethargy, drowsiness, decrease in IQ);
- dermal sensitivity; and
- perturbation of liver or kidney enzymes from the normal range.
Gibraltar: The transposing legislation tracks the ELD.

15. **Standard of remediation**

**England, Wales and Northern Ireland:** The transposing legislation provides that “Primary remediation is any remedial measure which returns the damaged natural resources or impaired services to, or towards, the state that would have existed if the damage had not occurred ...”. The guidance states that primary remediation “does not require return to the state the resources and services were in before the damage took place” but, rather “the state they would have been in ‘had the damage not occurred’”.

  ▶ Land

**England, Wales, Northern Ireland and Gibraltar:** The standard of remediation is the same as the ELD.

**Scotland:** The standard of remediation is “the ‘current use’ of the land [which] is to be ascertained on the basis of the land use Regulations, or other relevant enactments, in force, if any, when the damage occurred”. This is essentially the same as the ELD and the rest of the UK.

  ▶ Biodiversity
    ▶ Primary remediation

**ALL UK:** The guidance provides the following examples of primary remediation: removing and/or treating contaminants to reduce impacts on natural resources; removing or protecting against other pressures on the resources and services; re-stocking or re-introductions of damaged species such as fish; seeding, planting or replanting vegetation; engineering works to provides habitats; removing bottlenecks such as impassable weirs and culverts; providing fish passes; providing conservation staff to manage and maintain sites; developing and implementing strategic management plans; implementing restrictions to access; implementing improvements to access; and providing monitoring.

  ▶ Complementary and compensatory remediation

**All UK:** The guidance provides details on complementary and compensatory remediation, together with examples. It also describes habitats equivalency analysis, resource equivalency analysis and valuation equivalency analysis.

  ▶ Water
    ▶ Primary remediation

**All UK:** See biodiversity above.

  ▶ Complementary and compensatory remediation

**All UK:** See biodiversity above.
16. **Format of determination of environmental damage**

All UK: There is no specific format for a determination of environmental damage. The assessment to be carried out by the competent authority tracks the ELD, with the guidance for the various jurisdictions setting out details provisions for assessment.

17. **Powers and duties of competent authorities**

**England, Wales and Northern Ireland:** Competent authorities are called “enforcing authorities”.

**Scotland:** A competent authority may require a “public body” to carry out preventive or remedial measures if it appears to the competent authority that the measures should be carried out urgently, and the public body is better able to carry them out. The public body must comply with such a request. The competent authority must then meet the costs of the public body. The guidance states that the competent authority may then seek to recover its costs. (There is a wide variety of public bodies in Scotland, including executive agencies and public corporations; see [http://www.scotland.gov.uk/Topics/Government/public-bodies/about](http://www.scotland.gov.uk/Topics/Government/public-bodies/about))

- **Inspections, investigations, studies and analyses**

  **England, Wales and Scotland:** The power granted to competent authorities includes the power to access premises and to carry out investigations, studies and analyses. The Regulations refer to section 108 of the Environment Act 1995, which grants enforcing authorities broad powers, among other things, to board, inspect and stop ships and to board and inspect marine installations in UK territorial waters.\(^{148}\)

  **Northern Ireland:** The power granted to competent authorities includes the power to access premises and to carry out investigations, studies and analyses. The Regulations set out the provisions of section 108 of the Environment Act 1995 (which does not apply in Northern Ireland or Scotland) directly in the Regulations, thus granting the same powers as in England and Wales. The Regulations for Scotland set out supplementary powers for the entry of premises.

- **Information orders**

  **England, Wales and Northern Ireland:** Competent authorities may issue notices that require an operator to provide information that reasonably enables the authority to carry out its functions under the Regulations. In addition, the powers under section 108 of the Environment Act 1995 (and their equivalent for Northern Ireland) include the power to require persons to answer questions orally or in writing; such responses may not be used against them.

  **Scotland:** The competent authority may require an operator to provide information. The failure to provide such information without a reasonable excuse is an offence.

  **Gibraltar:** The competent authority may require a person to provide relevant information and data to enable the authority to carry out its duties and functions under the transposing legislation.

\(^{148}\) Section 108 of the Environment Act 1995, as it applies to Scotland, is slightly different from its application in England and Wales.
Power or duty to require an operator to carry out preventive measures

**All UK and Gibraltar:** Competent authorities have the power but not the duty to require an operator to carry out preventive measures.

**England, Wales and Northern Ireland:** If the competent authority serves a prevention notice, there is no appeal against it.

**Scotland:** The failure of an operator to comply with a prevention notice without a reasonable excuse is an office.

Power or duty to require an operator to carry out remedial actions

**All UK and Gibraltar:** Competent authorities have a duty to require an operator to carry out remedial measures.

Power or duty of competent authority to carry out preventive measures

**All UK and Gibraltar:** Competent authorities have the power but not the duty to carry out preventive measures.

Power or duty of competent authority to carry out remedial measures

**All UK and Gibraltar:** Competent authorities have the power but not the duty to carry out remedial measures.

Form of preventive order

**England, Wales, Northern Ireland and Gibraltar:** There are two types of prevention notices. A notice to prevent environmental damage describes the threat, specifies required measures to prevent the damage, and requires the operator to take the measures or measures that are at least equivalent to them within the time specified in the notice. A notice to prevent further environmental damage describes the damage, requires the operator to provide additional information on any additional damage, specifies the measures that must be taken to prevent further damage, and requires the operator to take those measures, or measures that are at least equivalent to them within the time specified in the notice.

**Scotland:** The operator may appeal a prevention notice.

Form of remediation order

**England, Wales and Northern Ireland:** The notification procedure for remedial actions is bifurcated. If the competent authority makes a determination that environmental damage has occurred, the authority notifies the responsible operator that: the damage is environmental damage, the responsible operator’s activity was a cause of the damage, the responsible operator must submit proposals to remediate the damage, in accordance with the Regulations, by a time specified in the notification, and the operator may appeal the notification. If the operator does not appeal, or if the appeal is unsuccessful, the authority consults on the proposals. The authority must then serve a remediation notice on the responsible operator to specify: the damage; measures that are necessary to remediate the damage, together with reasons; the period for remediation; any additional monitoring or investigative measures to be carried out during the remediation; and the right to appeal the notice. The guidance provides that authorities may include other information in a remediation notice including the objectives of remediation, results
required, methods statement, and required project management and reporting. A competent authority may issue more than one remediation notice, either during remediation or, if remediation has not been achieved, when it is ended.

**Gibraltar:** The transposing legislation also provides for a bifurcated process with a notification of liability and a remediation notice.

**Scotland:** The operator may appeal a remediation notice.

- Appeal against preventive or remediation order
  - Preventive order

**England, Wales, Northern Ireland and Gibraltar:** There is no appeal against a preventive order.

**Scotland:** An operator may appeal to the sheriff on questions of fact and law concerning a preventive order.

- Remediation order

**England, Wales, Northern Ireland and Gibraltar:** A responsible operator may appeal a notification of liability and a remediation notice. The grounds for appealing a notification are: the operator’s activity was not a cause of the environmental damage, the competent authority acted unreasonably in deciding that the damage is environmental damage, the environmental damage resulted from compliance with an instruction from a public authority not related to an emission or incident caused by the operator’s own activities, the permit defence (see above), the state-of-the-art defence (see above), and the environmental damage was the result of an act of a third party and occurred despite the responsible operator having taken all appropriate safety measures. The grounds for appealing a remediation notice are: its contents are unreasonable (the appeal may only be made against the parts of the remediation notice that differ from proposals made by the responsible operator).

**Scotland:** An operator may appeal to the sheriff on questions of fact and law concerning a remediation order.

- Sanctions for delay in complying with preventive or remediation order

**England, Wales, Northern Ireland and Gibraltar:** A delay in complying with a remediation order equates to a failure to comply with a remediation notice. The sanctions set out below apply. (Note, as indicated above, that there is no appeal from a preventive order.)

**Scotland:** It is an offence for a responsible operator not to comply with a request from a competent authority to take necessary remedial measures.

- Formal consultees on contents of preventive and remediation orders

**England, Wales and Northern Ireland:** The guidance states that the competent authority “may consult any other person appearing to be necessary” in respect of the service of a remediation notice.

**Scotland:** The guidance states that the competent authority shall consult interested persons before requiring remediation by the operator, if practicable.
Recovery of implementation and enforcement costs

**England, Wales, Northern Ireland and Gibraltar:** A competent authority may recover “any reasonable costs” incurred by it in taking “reasonable actions”. The costs include reasonable costs incurred in preparing a notification and/or remediation notice, assessment of the damage, establishing the identity of the responsible operator, establishing appropriate remediation, carrying out necessary consultation, and monitoring the remediation during and after the works.

**Scotland:** The transposing legislation provides that the competent authority “shall” recover its costs from the responsible operator.

Deadline for competent authority to seek recovery of costs

**All UK and Gibraltar:** The deadline for a competent authority to seek recovery of its costs is 5 years from completion of the works to which they relate or the identification of the responsible operator, whichever is the later.

### 18. **Duties of responsible operators**

- **Preventive measures**

  **All UK and Gibraltar:** An operator whose activity has caused an imminent threat of environmental damage, or damage that there are reasonable grounds to believe will become environmental damage must immediately take “all practicable steps to prevent the damage”.

  **England, Wales, Northern Ireland and Gibraltar:** It is an offence to fail to carry out preventive actions. There is no defence to such a failure.

  **Scotland:** The failure to carry out preventive actions without a reasonable excuse is an offence. An operator may appeal a prevention notice.

- **Remedial actions (emergency actions)**

  **All UK and Gibraltar:** An operator whose activity has caused environmental damage, or damage that there are reasonable grounds to believe is or will become environmental damage must immediately take remedial actions (emergency actions).

  **England, Wales, Northern Ireland and Gibraltar:** It is an offence to fail to carry out emergency remedial actions. There is no defence to such a failure.

  **Scotland:** The failure to carry out emergency remedial actions without a reasonable excuse is an offence. An operator may appeal a notice to carry out such actions.

- **Remedial measures**

  **All UK and Gibraltar:** The operator has a duty to carry out primary, complementary and/or compensatory remediation, as appropriate. The duty is the same as that in the ELD, with the guidance (when published) providing details.

  **Duty to notify / provide information when imminent threat of environmental damage occurs**

  **England, Wales, Northern Ireland and Gibraltar:** An operator has a duty immediately to notify the competent authority if its activity has caused an imminent threat of environmental damage,
or there are reasonable grounds to believe that the damage will become environmental damage, and measures to eliminate that threat fail.

**Scotland:** An operator has a duty to notify the competent authority of an imminent threat of environmental damage as soon as practicable, if, notwithstanding the taking of preventive measures, the imminent threat remains, or to notify the competent authority immediately if environmental damage has occurred.

- **Duty to notify / provide information when environmental damage occurs**

**England, Wales, Northern Ireland and Gibraltar:** An operator has a duty immediately to notify the competent authority if its activity has caused environmental damage or there are reasonable grounds to believe that the damage caused by those activities is or will become environmental damage.

**Scotland:** The transposing legislation does not specify that the operator must notify the competent authority if there are reasonable grounds to believe damage has occurred or will be damage. The guidance, however, specifies that this trigger applies.

- **Entity to which notification should be provided**

**England and Wales:** The entity that appears to be the relevant competent authority should be notified. The guidance states that if there is uncertainty, any of the authorities may be notified.

**Northern Ireland:** The Northern Ireland Environment Agency should be notified.

**Scotland:** The relevant competent authority should be notified. The guidance states that if there is uncertainty, any of the authorities should be notified.

**Gibraltar:** The competent authority should be notified.

19. **Access to third-party land to comply with the ELD**

**England, Wales and Northern Ireland:** A person who has an interest in land on which any works under the transposing legislation must be carried out must grant consent to the operator or person acting on behalf of the operator to access the land. That person is then entitled to claim compensation within 12 months. The compensation includes any depreciation in the value of the person’s interest in the land and any loss or damage in that interest including any reasonable valuation and legal costs.

**Scotland:** A person who has an interest in land on which any measures under the transposing legislation must be carried out must grant consent to the operator, person acting on behalf of the operator, or the competent authority that requires access. The person with the interest in land is then entitled to claim compensation within 12 months beginning with the date of completion of the measures required to be carried out in respect of which compensation is claimed. That person shall be entitled to compensation for any consequential damage.

**Gibraltar:** The transposing legislation does not mention access to third-party land.
20. **Interested parties**

- Qualification criteria for “sufficient interest”

**England, Wales and Northern Ireland:** A person is deemed to have a “sufficient interest” under the transposing legislation if they are a member of a body or organisation, or the body or organisation itself, has the aims or objectives of promoting environmental health, environmental protection, public health, or activities, including recreational activities, likely to be affected by the damage.

The guidance for England and Wales states that identification of persons with a “sufficient interest” depends on the circumstances; and could include birdwatchers, ramblers, recreational fishermen, residents, persons whose health may be at risk from contaminants, persons responsible for children or elderly persons whose health may be at risk, and “charities that are registered with the Charity Commission whose objects include the conservation of the environment”.

The guidance for Northern Ireland states that identification of persons with a “sufficient interest” again depends on the circumstances; and could include birdwatchers, ramblers, recreational fishermen, farmers’ organisations, residents, and persons who are responsible for or those whose health may be at risk from contaminants, and “[c]harities whose objectives include the conservation of the environment or health-related charities”.

In essence, persons with a “sufficient interest” in England, Wales and Northern Ireland are basically the same except for the potential to include health-related charities in Northern Ireland.

**Scotland:** A “non-governmental organisation promoting environmental protection” is specifically indicated in the transposing legislation as a person who may make comments.

**Gibraltar:** A “non-governmental organisation registered or established under the laws of Gibraltar which promotes environmental protection” is deemed to have a sufficient interest.

- Method of notifying interested parties of planned remedial measures

**All UK and Gibraltar:** The transposing legislation does not specify methods for notifying interested parties of planned remedial measures.

- Information to be provided to competent authority

**England and Wales:** The guidance states that an interested party must provide:

- a statement why that person will be affected by the damage or has a “sufficient interest” in it; and

- sufficient information to enable the competent authority of the location and nature of the incident to include “as a minimum, where possible”:
  - name and contact details of person requesting action;
  - date and time of discovery of imminent threat or possible environmental damage;
- reference or description of the location of the activity giving rise to the imminent threat or possible environmental damage;
- a factual description of the activity giving rise to the imminent threat or possible environmental damage;
- a description of the location where the imminent threat or possible environmental damage is likely to occur, if different from the above location;
- the type of environmental damage caused or that may be caused;
- further details of the potential impact or environmental damage such as substances that are actually or potentially released and nearby species and habitats;
- an indication of the scale of the potential impact or environmental damage; and
- any useful supporting information such as sketch maps or photographs of the imminent threat or potential damage.

**Gibraltar:** The transposing legislation simply refers to a statement that explains the way in which the notifier will be affected by the damage or has a sufficient interest, and “sufficient information to enable the competent authority to identify the location and nature of the incident”.

**Northern Ireland and Scotland:** The guidance requires essentially the same information as for England and Wales.

- **Challenges to competent authority’s decision**

**All UK:** The transposing legislation does not mention article 13(1) of the ELD which 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]”.

**England and Wales:** In a consultation on the proposed legislation, the Government stated that it did ‘not feel that it would be necessary or appropriate to create a different route of challenge [than judicial review]’. Under English law, judicial review is not a review of the merits of a case.

**Gibraltar:** A person who submits comments to the competent authority may appeal against the decision taken by the competent authority to the Supreme Court within 21 days from the date on which the authority serves its decision.

---

\(^{149}\) Defra, Welsh Assembly Government, Environmental Liability Directive; Consultation on the draft regulations and guidance implementing Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage para 107 (February 2008); see also Note on Transposition (‘[n]o specific provision necessary. Judicial Review will be available’).
Duty on competent authority to respond to person making comments

**All UK and Gibraltar:** The competent authority need not 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.

Inclusion of interested party in any proceedings by the competent authority against an operator

**All UK and Gibraltar:** The transposing legislation does not provide for the inclusion of any interested party in any proceedings by the competent authority against an operator.

### 21. Public access to information regarding environmental damage and related measures

**All UK and Gibraltar:** The transposing legislation does not specifically provide for public access to information regarding environmental damage and related prevention, containment or remedial measures.


### 22. Charges on land / financial security after environmental damage

**England, Wales, Northern Ireland and Gibraltar:** A competent authority may impose a charge on an operator’s premises for costs that are recoverable under the Regulations including interest on the costs. An operator may appeal a charge.

**Scotland:** There is no provision for a charge on land.

### 23. Offences and sanctions

**All UK and Gibraltar:** A breach of the transposing legislation is a criminal offence:

- summary conviction, fine not more than £5,000 (€6,222), imprisonment not more than 3 months (*Scotland:* not more than 1 year), or both

- conviction on indictment: unlimited fine, imprisonment not more than 2 years, or both.

Directors and officers liability for breaching legislation

**All UK and Gibraltar:** Directors, officers and managers may be convicted if the company's offence is committed with their consent or connivance or is attributable to their neglect.

**Scotland:** The secretary or other similar officers of a company can be convicted if the company's offence is committed with their consent or connivance or is attributable to their neglect. In addition, the partner of a Scottish partnership may 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.

**Publication of penalties**

**All UK and Gibraltar:** Not specified.

### 24. **Registers or data bases of incidents**

**England, Wales, Northern Ireland and Scotland:** The transposing legislation does not mention registers or data bases of incidents. The incident returns for calendar years 2009-2012 are available on request from [eld@defra.gsi.gov.uk](mailto:eld@defra.gsi.gov.uk)

**Gibraltar:** The transposing legislation does not mention registers or data bases of incidents.

### 25. **Cross border damage in another Member State**

**England, Wales and Northern Ireland:** The transposing legislation does not mention cross border damage in another Member State. The only relevant jurisdiction in the UK is Northern Ireland which has a boundary with Ireland.

A Memorandum of Understanding on partnership working under the Environmental Damage Regulations between various English and Welsh bodies, signed in 2009, states, among other things, that if environmental damage is caused on both sides of the border between England and Wales, the authorities in both jurisdictions will co-operate in assessment damage, deciding remedial measures and agreeing, if possible, a single point of contact with the responsible operator. The MOU also commits to working in partnership with Scottish authorities if environmental damage is caused on both sides of the England/Scotland border.

**Scotland:** If an imminent threat of, or actual, damage from an activity carried out in Scotland affects or is likely to affect another Member State or another part of the UK, the competent authority shall:

- co-operate with the relevant competent authority;
- provide all information required by that competent authority;
- consider taking the necessary preventive or remedial measures; and
- notify the Scottish Ministers.

If a competent authority is aware of an occurrence, imminent threat, or environmental damage outside Scotland, it shall notify Scottish Ministers and the relevant competent authority as soon as possible. If the Scottish Ministers receive such notification, they shall notify the European Commission and the relevant competent authority in the MS, and make recommendations for preventive or remedial measures.

**Gibraltar:** If environmental damage occurs in Gibraltar and affects, or is likely to affect, another Member State, the competent authority must provide the Government with information required by it in order to co-operate with the Member State that is affected or potentially affected. The Government shall forward to the competent authority for necessary action any
information forwarded to it by a Member State that has occurred in that Member State and has, or is likely to have, an effect in Gibraltar. If the competent authority has identified environmental damage in Gibraltar which is not caused in Gibraltar, it may make recommendations for the adoption of preventive or remedial measures and may seek to recover the costs of such measures.

26. **Financial security**

All UK and Gibraltar: There are no requirements for mandatory financial security.

27. **Establishment of a fund**

All UK and Gibraltar: The transposing legislation does not include any provisions to establish a fund.

28. **Reports**

All UK: The guidance mentions preparation of the Member State reports and refers to the incident data returns. The incident returns for calendar years 2009-2012 are available on request from eld@defra.gsi.gov.uk.

29. **Information to be made public**

All UK: There is no requirement to make information about incidents under the transposing legislation public although the incident returns for the UK are available on request (see section 28 above).

Gibraltar: There is no requirement to make information about incidents under the transposing legislation public.

30. **Provisions concerning genetically modified organisms**

Wales and Scotland: Neither the state-of-the-art nor the permit defences apply to GMOs.

Scotland: The limitations period for environmental damage from GMOs is 75 years; this is noted in the Scottish Regulations as an exemption from liability.

31. **Key features and differences in legislation transposing the ELD and existing legislation**

When the UK transposed the ELD, it already had legislation for remediating contaminated land and associated groundwater and for preventing and remediating water pollution. Further, it had legislation to remediate biodiversity but that legislation was much less stringent than the ELD.

The legislation for remediating contaminated land includes liability for remediating associated groundwater and also for remediating surface and coastal water as well as biodiversity protected under the Birds and Habitats Directive and national legislation. The legislation does not include...
liability for the restoration of biodiversity. The main focus of the legislation is the remediation of historically contaminated land. Liability is based on a person that caused or knowingly permitted contamination, with liability for causing contamination being strict. The scope of liability is modified joint and several liability, with a complex system for excluding various liable persons. An owner or occupier of contaminated land is secondarily liable. The threshold for liability is roughly the same as the ELD. Liability is retrospective as well as prospective.

Separate liability for preventing and remediating water pollution, including surface, coastal and ground water pollution, already existed and continues to exist. The threshold for the existing national legislation is much lower than that of the legislation transposing the ELD. Liability is, however, limited to primary remediation; it does not include complementary or compensatory remediation.

Separate legislation imposing liability for preventing and remediating biodiversity damage, including nationally protected biodiversity, already existed and continues to exist. The threshold for the existing national legislation is much lower than that of the legislation transposing the ELD. Liability is, however, limited to primary remediation; it does not include complementary or compensatory remediation. Further, a person is not liable for restoring biodiversity unless that person has been convicted of the criminal offence of damaging or destroying the biodiversity.