



Study on national legislation needed to implement the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters

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1. Objectives of study

This study has been commissioned by the Environment Division of the United Nations Economic Commission for Europe (UNECE) in order to facilitate a better understanding of legal issues relating to the ratification and entry into force of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. This instrument, hereafter referred to as Civil Liability Protocol (CLP) or simply “the Protocol”, was adopted in Kiev in May 2003 by the Contracting Parties to the UNECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 1992, hereafter referred to as “Industrial Accidents Convention”) and UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992, hereafter referred to as “Transboundary Watercourses Convention”). It has been signed by 24 States but, to date, has only been ratified by a single signatory (Hungary), while 16 instruments of ratification, acceptance, approval or accession would be required for entry into force. The UNECE therefore seeks to understand the reasons why States seem reluctant to proceed with the ratification of the Protocol. To this end, its provisions need to be examined against the background of other international instruments and provisions of EU law relating to civil liability for damage caused by industrial accidents. According to the terms of reference set out by UNECE, the purpose of this study is:

- *To prepare an inventory of international instruments on civil liability for damage caused by industrial accidents;*
- *To assess what requirements would have to be fulfilled and what national legislation would need to be put in place to implement these instruments;*
- *To identify the conditions and benefits guaranteed by each of these instruments.*

2. Background and context of the Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters

The Civil Liability Protocol was negotiated under the joint auspices of the Meetings of the Parties to the Industrial Accidents Convention and Transboundary Watercourses Convention in the wake of the Baia Mare industrial accident that caused severe transboundary water pollution damage in the Tisza River basin in January-February 2000. After this pollution incident, it appeared that there was a gap in the applicable rules of conventional international law, since no international legal instrument in force at the time of the accident provided specific rules governing liability for environmental harm and damage to persons and property resulting from transboundary water pollution. In order to remedy this situation, the Contracting Parties to the 1992 Helsinki Conventions decided jointly to launch negotiations on a Protocol to complement the existing regulatory regimes governing transboundary water pollution and the transboundary effects of industrial accidents with specific rules on third-party liability and environmental liability designed to ensure that adequate and prompt compensation would be available in the event of future accidental pollution of transboundary waters.

The CLP establishes what it terms a “comprehensive regime for civil liability and for adequate and prompt compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters” (art. 1). It builds on the regulatory regimes established, respectively, by the Industrial Accidents Convention and Transboundary Watercourses Convention, as the definitions and terms contained in those Conventions apply also within the scope of the Protocol, unless expressly provided otherwise. The CLP applies to damage caused by the transboundary effects of an industrial accident on transboundary waters, outside the territory of the State where the industrial accident occurs. The notions of “transboundary effects” and “transboundary waters” are defined, respectively, in the Industrial Accidents Convention and Transboundary Watercourses Convention. The notions of “damage” and “industrial accident” are defined in the Protocol itself.

The basic principle on which the Protocol is based is the strict liability of the operator of a hazardous activity, as defined in the Protocol and its annexes, for the damage caused by an industrial accident having transboundary effects. This strict liability is without prejudice to any fault-based liability of the operator or any other person in accordance with relevant rules of applicable domestic law. In addition to the strict liability provided for under art. 4(1) CLP, the operator shall also have the obligation, in accordance with art. 6(1) CLP, to take all reasonable response measures, as defined in the Protocol and subject to any applicable requirements of domestic law. The operator’s liability for damage includes the cost of such response measures, as well as the cost of any measures of reinstatement of the impaired transboundary waters which have actually been taken or are to be undertaken.

The operator’s liability pursuant to art. 4 CLP is subject to a financial limit laid down in art. 9(1) and annex II of the Protocol. Operators of hazardous activities who may be liable under the provisions of the CLP have an obligation to ensure that their potential liability under art. 4 CLP is covered by adequate financial security up to the limits specified in

annex II CLP. Pursuant to art. 11(3) CLP, any claims arising under the provisions of the Protocol may be asserted directly against the person providing such financial security, unless a Party has notified the Depositary in accordance with art. 11(4) CLP to indicate that it does not provide such a right of direct action. Finally, Parties shall adopt all necessary legislative, regulatory and administrative measures for the implementation of the Protocol, including rules on the competence of their courts, applicable law, financial security, time and financial limits of liability, response measures and rights of recourse.

3. Inventory of other international instruments on civil liability for damage caused by industrial accidents

When the CLP was adopted, it was not the first international instrument in the field of environmental liability nor in that of civil liability for damage caused by industrial accidents or other hazardous activities. In order to put the Protocol in perspective, it is useful to identify the other relevant or comparable instruments relating to liability for environment-related damage caused by industrial accidents and other environmental emergencies. These comprise a number of legislative instruments adopted by the institutions of the European Union (EU) as well as a number of international treaties, some of them in force and others which have been adopted and/or opened for signature but are not currently in force.

Within the scope of application of the Civil Liability Protocol (CLP), the following *EU legislative instruments* are currently in force in EU Member States:

- Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (hereafter referred to as “Environmental Liability Directive” or ELD)
- Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances, as last amended by Regulation (EC) No 1137/2008 (hereafter referred to as “Seveso II Directive”)
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter referred to as “Brussels I Regulation”) (not in force in Denmark)
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereafter referred to as “Rome II Regulation”) (not in force in Denmark)

Overlapping with the scope of application of the CLP, another legally binding *international instrument* exists, negotiated under the auspices of the Council of Europe, which has not entered into force for reasons similar to the non-entry into force of the CLP:

- Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (21 June 1993; not in force)

A range of other *international instruments* relating to liability for environment-related damage caused by environmental emergencies exist, some of which are in force in some, though not all Member States of UNECE. They mostly relate to activities/situations which have been excluded from the scope of the 1992 Helsinki Industrial Accidents Convention, which does not apply to a range of accidents or emergencies which are specified in its art. 2(2). An overview of the relevant international instruments is provided in Table 1.

Table 1. - Binding international legal instruments concerning liability for environment-related damage caused by hazardous activities

Nuclear accidents or radiological emergencies

- Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960)
- Convention on the Liability of Operators of Nuclear Ships (1962)
- Vienna Convention on Civil Liability for Nuclear Damage (1963)
- Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (1971)

Land-based transport accidents

- Convention on Civil Liability for Damage Cause during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (1989; not in force)

Accidental release of genetically modified organisms

- Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (2010; not in force)

Spills of oil or other harmful substances at sea

- International Convention on Civil Liability for Oil Pollution Damage (1969)
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992)
- International Convention on Civil Liability for Bunker Oil Pollution Damage (2001)
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) (1996)

Accidents caused by other activities in the marine environment, including seabed exploration or exploitation

- Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (1977; not in force)
- Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (1994)

Transboundary movements of hazardous wastes

- Basel Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and their Disposal (adopted by the 5th Conference of the Parties to the Basel Convention, Basel, 6-10 December 1999; not in force)

Environmental emergencies in the Antarctic Treaty Area

- Annex VI on Liability Arising from Environmental Emergencies to the Madrid Protocol on Environmental Protection to the Antarctic Treaty (adopted by the 28th Antarctic Treaty Consultative Meeting, Stockholm, 6-17 June 2005; not in force)

Since the activities/situations to which these instruments relate fall outside the scope of application of the CLP, they will not be specifically examined in this study.¹ However, the experience of Parties to these instruments in terms of the adoption of national implementing legislation may in some cases be of interest in the context of the analysis of the requirements for the implementation and entry into force of the CLP.

To complete the overview of relevant or comparable international instruments relating to liability for environment-related damage caused by environmental emergencies, the following *non-binding international instruments* must also be mentioned:

- Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (International Law Commission, 2006)
- UNEP Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment (Bali, 26 February 2010)

Since these are *soft law instruments*, they do not affect the legal orders in which the CLP is to be inserted. Moreover, they are *universal in scope*, having been elaborated by two global UN bodies, and therefore reflect the lowest common denominator of the normative expectations of the international community. They are considerably less detailed and operational than the above-mentioned international treaties. Nevertheless, they may be referred to where relevant in the discussion of legal and policy issues affecting the entry into force of the CLP.

¹ The Basel Protocol might potentially have some substantive overlap with the subject matter of the CLP, in so far as the latter may apply to certain facilities where hazardous waste is stored or otherwise managed following transboundary movement of such waste. The Annex on Liability to the Madrid Protocol obviously falls wholly outside the substantive and territorial ambit of the CLP and will therefore not be considered.

4. Assessment of national legislation required and other requirements to be fulfilled to implement the Protocol and other relevant instruments

Art. 8(1) CLP requires the Parties to adopt all legislative, regulatory and administrative measures necessary to implement the Protocol.

Many provisions of the Protocol, on their face, seem to be self-executing. Depending on the national legal system, the legislative act authorizing ratification of the Protocol may therefore be legally sufficient to give legal effect to such provisions in the internal law of a Party, without the need for further implementing legislation. In other countries, national constitutional requirements or considerations of legislative policy relating to the need for legal certainty and transparency may call for the adoption of implementing measures (whether legislative or regulatory) even to give effect to certain provisions of international treaties which, *prima facie*, appear to be self-executing. While legal circumstances and requirements might therefore vary from country to country, an analysis of the provisions of the Protocol suggests that the following legislative and/or regulatory measures are required for its implementation:

- Rules providing for strict liability for operators (art. 4)
- Rules on fault-based liability (art. 5)
- Rules regarding the limitation of the liability of operators (financial limits and time limits) (arts. 9-10; Annex II, part I)
- Rules concerning response measures and measures of reinstatement (art. 6)
- Rules regarding the provision of compulsory financial security by operators (art. 11; Annex II, part II)
- Rules regarding direct claims against providers of financial security (art. 12), unless the Party has opted out of this obligation by notifying the Depositary pursuant to art. 12(4)
- Rules to ensure that national courts possess the necessary competence to entertain claims in accordance with the CLP (art. 13)
- Rules to enable arbitration where this is agreed to between parties to a dispute arising within the scope of the Protocol (art. 14)
- Rules regarding applicable law (art. 16(2))
- Rules regarding the recognition and enforcement of judgments and arbitral awards within the scope of the Protocol (art. 18)
- Rules concerning the primacy of other international agreements in force, (arts. 19 & 20)
- Rules to ensure that the non-discrimination provisions of the Protocol are complied with (art. 8(3))
- Rules concerning access to information and access to justice (art. 8(5))

In addition, the following administrative measures would be required for full and effective implementation of the Protocol:

- Measures to inform the secretariat of national implementing measures adopted (art. 8(2))
- Measures to promote international cooperation (art. 8(4))

- Measures to provide for a system of self-insurance for State-owned operators, if the Party wishes to avail itself of this option (art. 11(1))

Each of the above-mentioned required rules or measures will be analysed successively, highlighting potential legal and other difficulties that may be encountered, and obstacles that may have to be overcome by Parties in adopting such rules or measures. In doing so, special attention will be paid to the legal situation of EU Member States that would wish to become Parties to the CLP, bearing in mind the provisions of EU law by which they are already bound and which overlap in scope with those of the Protocol.

From the outset, it must be stressed that, although the required rules or measures cover a wide range of issues, many of them are closely interrelated and would normally be the subject of one and the same legislative and/or regulatory act. The number of issues to be covered does not therefore imply the need for a large number of separate implementing measures that would have to be taken prior to ratification.

Rules providing for strict liability for operators

Summary of the Protocol requirements

Art. 4(1) CLP provides that “the operator shall be liable for the damage caused by an industrial accident”. Though, on its face, this paragraph is worded as a self-executing provision, as are the subsequent paragraphs of the same article which spell out a set of grounds for exoneration of liability as well as circumstances in which the liability of the operator may be reduced or shared with other persons, the implementation of the strict liability regime which the CLP aims to establish requires legislative measures to be taken in the internal law of the Parties for reasons of transparency and legal certainty, as explained below.

Interpretation and implementation of the Protocol requirements

The three key notions on which the rule set out in art. 4(1) is based – “operator”, “damage” and “industrial accident” – are defined in other provisions of the Protocol or the 1992 Helsinki Industrial Accidents Convention. The respective definitions often refer back to other concepts which are themselves defined in yet other provisions of the Protocol or either of its parent Conventions. In some cases, the definitions laid down in those international instruments leave some room for interpretation by the Parties. In order to provide the legal certainty which is an important requirement for any liability regime it falls upon Parties to exercise the discretion which international law affords them in adopting the legislative and administrative measures required for the implementation of the Protocol. In this context, consistency with existing implementing provisions of the Conventions and, for EU Member States, relevant EU legislative instruments will be an important consideration.

For instance, the notion of “operator” is defined in art. 1(e) of the Industrial Accidents Convention as “any natural or legal person, including public authorities, in charge of an activity, e.g. supervising, planning to carry out or carrying out an activity”, in art. 3(3) of

the Seveso II Directive as “any individual or corporate body who operates or holds an establishment or installation or, if provided for by national legislation, has been given decisive economic power in the technical operation thereof”, and in art. 2(6) of the ELD 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”. The first definition is insufficiently precise for the purpose of establishing a strict liability rule, since it suggests that different persons, including public authorities, can be considered as being “in charge of” a hazardous activity at different stages of its planning and operation. But even the most specific and recent of the three definitions, that used in the ELD, remains ambiguous because the identification of the operator for liability purposes may vary from one EU Member State to another depending on whether or not its internal law provides that a person other than the permit holder or person legally in control of the operation but who wields “decisive economic power” over the operation can be held liable.

Rules on fault-based liability

Summary of the Protocol requirements

Art. 5 CLP essentially provides that any person (whether operator or not) shall be liable for damage within the scope of the Protocol “in accordance with the relevant rules of applicable domestic law” when such damage has either been caused by or contributed to by that person’s wrongful act or omission, whether intentional, reckless or negligent. Contrary to strict liability under art. 4 CLP, fault-based liability under art. 5 is not subject to any financial limits, as art. 9(3) makes clear.

Interpretation and implementation of the Protocol requirements

Though the rule in art. 5 seems to be little more than a simple reference to general rules of liability in tort as they exist in all countries, Parties will have to ensure that those general rules actually provide for liability for all forms of damage within the scope of the Protocol, as defined in art. 2(2)(d) CLP. If no fault-based liability were to exist in a country’s domestic law for any category of damage listed in that provision, the Party concerned would fail to meet its obligations under art. 5 CLP.

Rules regarding the limitation of the liability of operators (financial limits and time limits)

Summary of the Protocol requirements

These rules are a corollary of the basic rule of strict liability to be established pursuant to art. 4(1) CLP and would logically be laid down in the same national legislative act. The rules relating to financial limits and time limits as set out, respectively, in articles 9 and 10 CLP are self-contained and not subject to discretionary interpretation by the Parties. However, the rule on financial limits in art. 9(1) refers back to part one of annex II, which in turn contains references to the categories of hazardous substances and activities laid down in annex I.

Interpretation and implementation of the Protocol requirements

Part one of annex I identifies three categories of hazard which serve to define the notion of “hazardous substance”: “very toxic”, “toxic” and “dangerous for the environment”. Annex I further contains “indicative criteria” which “may” be used by Parties when classifying substances into these categories “in the absence of other appropriate criteria, such as the European Union classification criteria for substances and preparations”. This implies that EU Member States are bound, in applying the CLP, to apply the same classification criteria as are laid down in EU law for other regulatory purposes than the establishment of liability regimes. These criteria are currently to be found in the CLP Regulation,² which is based on the UN Globally Harmonised System. Parties which are not Member States of the EU are in principle free, as a matter of international law, to apply their own definitions of the relevant categories, since the criteria set out in annex I CLP are merely indicative. For purposes of legal certainty, these categories should in any event clearly be defined in national law. Though non-EU Parties enjoy a wider discretion, they may nevertheless find it appropriate, for the sake of approximation of their laws with those of the EU and in order to ensure a level playing field for operators subject to their jurisdiction, to apply the EU classification rules for hazardous substances, all the more so since these are now based on a globally harmonized system developed under the auspices of the UN.

Rules concerning response measures and measures of reinstatement

Summary of the Protocol requirements

The damage for which the operator (or the other persons referred to in art. 5) shall be liable includes the cost of response measures and measures of reinstatement as defined in art. 2(2)(d)(iv) and (v), (g) and (h) CLP. The latter two provisions specify that “domestic law may indicate who will be entitled to take such measures”. Art. 6(1) further imposes an obligation on the operator to take “all reasonable response measures” in the event of an industrial accident “subject to any requirements of applicable domestic law and other relevant provisions of the Conventions”.

Interpretation and implementation of the Protocol requirements

The “other relevant provisions” referred to can be found both in the Industrial Accidents Convention and Transboundary Watercourses Convention. The former imposes a general obligation on its Parties to apply “response measures, including restoration measures” (art. 3(1) in fine) and requires them to “take appropriate legislative, regulatory, administrative and financial measures for the (...) response to industrial accidents” (art. 3(4)). Parties’ obligations with respect to emergency preparedness include “the preparation and implementation of on-site contingency plans, *including suitable measures for response and other measures to prevent and minimize transboundary effects*” (art. 8(2)). Further provisions concerning such contingency plans are set out in Annex VII to the Convention. Art. 11 of the Convention further specifies the obligations of Parties in this respect by imposing on them an obligation to “ensure that, in the event of an industrial accident (...) *adequate response measures* are taken, as soon as possible and using the most efficient

² Regulation (EC) No. 1272/2008 on classification, labelling and packaging of dangerous substances and mixtures.

practices, to contain and minimize effects”. Where such effects are of a transboundary nature, the Parties concerned have an obligation to cooperate and coordinate their response measures. The Industrial Accidents Convention contains no further detail regarding the “restoration measures” it refers to as a sub-category of the general notion of “response measures”. It may, however, be presumed that “restoration measures” within the meaning of the Convention are the same as “measures of reinstatement” as defined in the CLP.

The relevant provisions of the International Watercourses Convention can be found mainly in its art. 3 which spells out the general obligations of the Parties for the prevention, control and reduction of “transboundary impact”. These obligations include the adoption and implementation of legal, administrative, economic, financial and technical measures designed to ensure, *inter alia*, that “the risk of accidental pollution is minimized” (art. 3(1)(1)). Moreover, under art. 3(3), each Party is to “define, where appropriate, water-quality objectives and adopt water-quality criteria for the purpose of preventing, controlling and reducing transboundary impact” in accordance with “general guidance” given in annex III to the Convention. These water-quality objectives and criteria may be relevant for the purpose of determining what measures of reinstatement of “impaired transboundary waters” shall be taken following an industrial accident within the scope of the CLP, in order to restore them “to the conditions that would have existed had the industrial accident not occurred”, in accordance with art. 2(2)(g) CLP. Another Convention provision that may be relevant is art. 15 providing for mutual assistance between riparian Parties of transboundary watercourses in the event of “critical situations”. Procedures for such assistance are to be established pursuant to art. 15(2) addressing, *inter alia*, the “arrangements for holding harmless, indemnifying and/or compensating the assisting Party and/or its personnel,” and the “methods of reimbursing assistance services”. Any such procedures agreed between riparian Parties may be relevant for the application of the CLP provisions on response measures and measures of reinstatement.

The wording of art. 2(2)(g) and (h) and art. 6(1) CLP seems to suggest that it is entirely optional for Parties to adopt provisions of domestic law concerning response measures and measures of reinstatement. However, it is difficult to see how the strict liability regime of the CLP can effectively be applied in the internal law of a Party that does not legislate to specify who is entitled to take response measures if the operator fails to comply with his obligation to do so under art. 6(1), what constitutes “reasonable response measures” within the meaning of the same provision, and who is entitled to determine what measures of reinstatement are to be taken and to actually undertake those measures at the operator’s expense in accordance with art. 2(2)(iv) CLP.

In the absence of clear requirements laid down in the domestic law of each Party, public authorities will inevitably face serious legal difficulties when seeking to enforce the strict liability regime of the Protocol, as the operator could rely on the lack of clear domestic provisions as an excuse to avoid liability for the costs of response measures and measures of reinstatement taken by public authorities. In developing the necessary legislative and regulatory provisions at the domestic level, Parties would be well advised to build upon the implementing provisions they have already adopted pursuant to the Industrial Accidents and Transboundary Watercourses Conventions, which do not fully regulate the matter but contain a number of useful building blocks. Parties which are Member States of the EU will note that the ELD lays down detailed requirements in the field of what it calls

“remedial measures”, a concept which covers both “response measures” and “measures of reinstatement” within the meaning of the CLP. Furthermore, the Seveso II Directive also contains rather detailed provisions on response measures to be implemented by operators and public authorities in the event of an industrial accident. The provisions of national law adopted by EU Member States for the transposition of this Directive would also be relevant for the application of the CLP.

Rules regarding the provision of compulsory financial security by operators

Summary of the Protocol requirements

The provisions of the CLP on financial security are probably the most controversial aspect of the Protocol. Art. 11(1) requires the operator to ensure that his liability under art. 4 CLP “is and shall remain covered by financial security such as insurance, bonds or other financial guarantees including financial mechanisms providing compensation in the event of insolvency”, for an amount not less than the minimum limits laid down in part two of annex II of the Protocol. It is to be noted here that the wording of art. 11(1) leaves Parties a wide range of discretion in deciding the *nature* of the financial security to be provided by operators of hazardous activities subject to their jurisdiction. Indeed, the various forms of financial security listed in that provision are merely examples. The Protocol does not require operators to carry liability insurance. Other financial guarantees including bonds and other “financial mechanisms providing compensation in the event of insolvency” are acceptable as well, provided that the operator’s potential liability under art. 4 is effectively covered by a financial guarantee which ensures the protection of the public interest and that of any persons who may suffer damage as defined in art. 2(2)(d) CLP against the risk of insolvency of the operator.

Interpretation and implementation of the Protocol requirements

Art. 11(1) CLP is a key provision of the strict liability regime established by the Protocol and, like the strict liability rule of art. 4(1) itself, its implementation requires the Parties to adopt legislative and/or regulatory measures at the domestic level.

The purpose of the rule set out in art. 11(1) CLP is not to institute a risk spreading mechanism to protect operators and their creditors against the potential financial consequences of strict liability under the Protocol. Operators may, of course, opt for insurance, but the choice is entirely theirs. They may also have recourse to other, less onerous and perhaps more easily available means of providing the required financial guarantee, such as bonds or the establishment of private financial mechanisms such as guarantee funds that will provide compensation to injured persons – including public authorities where these have advanced the costs of response or reinstatement measures – whenever the liable operator’s assets turn out to be insufficient to cover his liability. National implementing legislation should leave operators the choice of means, provided that the result intended by the Protocol, in accordance with the polluter pays principle referred to in its preamble – “to ensure that adequate and prompt compensation is available” – is guaranteed. As to State-owned operators, this requirement can be satisfied, according to the final sentence of art. 11(1) CLP, by a “declaration of self-insurance”.

Rules regarding direct claims against providers of financial security

Summary of the Protocol requirements

A further requirement of the CLP with respect to financial security, as laid down in its art. 11(3), is that Parties should take measures to ensure that “any claim under the Protocol may be asserted directly against any person providing financial cover under paragraph 1” of art. 11. This obligation applies to all Parties which have not availed themselves of the possibility to opt out of this rule by a written notification to the depositary at the time of signature, ratification, approval or accession to the Protocol pursuant to art. 11(4).

Interpretation and implementation of the Protocol requirements

Unless they have made a notification under art. 11(4), Parties will have to include in their domestic legislation rules enabling persons entitled to compensation under the Protocol to assert their claims directly against whoever provides financial security to the operator pursuant to art. 11(1), up to the limit of liability established under art. 9(1). These rules will also have to contain a number of provisions designed to protect the interests of such insurers or other providers of financial security against the operator liable under art. 4, as specified in art. 11(3), 2nd to 4th sentence.

Rules to ensure that national courts possess the necessary competence to entertain claims in accordance with the Protocol (including rules on lis pendens)

Summary of the Protocol requirements

The Protocol lays down a number of procedural rules with respect to the enforcement of claims for compensation. First of all, it designates the courts which are competent to entertain such claims (art. 13(1)) and requires Parties to take the necessary measures to ensure that its courts possess the necessary competence (art. 13(2)). On a related issue, Art. 15 provides for rules to avoid conflicts of jurisdiction between courts in different Parties with respect to cases falling within the scope of the Protocol and to consolidate proceedings in related actions.

Interpretation and implementation of the Protocol requirements

Such rules are a standard feature of international instruments instituting strict liability regimes for certain hazardous activities, such as those mentioned in Table 1. They are necessary to protect the interests of injured persons, to ensure the effective availability of compensation and to avoid conflicts of jurisdiction and conflicting judicial decisions. In designing their implementing legislation, Parties may wish to refer to the legislation they have adopted in the past with a view to implementing similar rules in other international instruments.

Rules to enable arbitration where this is agreed to between parties to a dispute arising within the scope of the Protocol

Summary of the Protocol requirements

In addition to the standard provisions concerning competent courts, the CLP also contains a provision allowing for the settlement of claims by means of arbitration instead of

proceedings before the competent national courts, but only if all parties to the dispute (claimants as well as persons liable) agree to have their dispute settled by arbitration. Parties to the Protocol shall ensure that their national legislation allows for recourse to arbitration under those circumstances and specify that such arbitration will be final and binding and is to be handled in accordance with the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment established by the Permanent Court of Arbitration.³

Interpretation and implementation of the Protocol requirements

General legislative provisions on arbitration as a means of settling disputes between private Parties exist in most countries. Implementing legislation for the CLP would have to build upon such existing legislation. A simple reference to the general legislation may be sufficient. It should however be noted that, in some Parties, national public law will prevent public authorities from agreeing to this mode of dispute settlement. In this event, recourse to arbitration would only effectively be available for disputes between private persons arising under the Protocol.

Rules regarding applicable law

Summary of the Protocol requirements

Another procedural matter to be governed by the domestic law of the Parties is the choice of law. The basic rule laid down in art. 16(1) CLP is that all matters of substance or procedure which are not specifically regulated in the Protocol itself shall be governed by the law of the competent court. However, in the interest of the persons who have suffered damage within the scope of the Protocol, art. 16(2) provides that those persons may request their claims to be settled in accordance with the law of the Party on whose territory the industrial accident has occurred “as if the damage had been suffered in that Party”. So the default rule is the application of the law of the competent court, subject to the right of injured persons to opt for the application of the law of the Party to the CLP that is to be regarded as the “Party of origin” under the Industrial Accidents Convention (art. 1(g)), whenever the victim deems that law to be more favourable to his or her interests.

Interpretation and implementation of the Protocol requirements

General legislative provisions on choice of law exist in all countries. They are normally part of a country’s legislation on private international law or its code of civil procedure. In order to give effect to art. 16(2) CLP a derogation from the general rule may have to be provided for, if the existing choice of law rules in a Party do not provide the possibility for injured parties to opt for the most favourable law.

³ These rules can be accessed at http://www.pca-cpa.org/showfile.asp?fil_id=589

Rules regarding the mutual recognition and enforcement of judgments and arbitral awards within the scope of the Protocol

Summary of the Protocol requirements

In order to complete the set of procedural rules designed to ensure effectiveness of the rights to compensation established under the Protocol, art. 18 CLP sets out provisions concerning the mutual recognition and enforcement of judgments and arbitral awards.

Interpretation and implementation of the Protocol requirements

Such rules are a natural corollary of the rules on the competence of courts laid down in art. 13 CLP and should also be part of any national legislation Parties adopt for the purpose of implementing the Protocol.

Rules concerning the primacy of other international agreements in force

Summary of the Protocol requirements

Articles 19 and 20 CLP deal with the relationship between the Protocol and other rules of conventional international law and EU law that may be in force in Parties in the area of liability and compensation for damage caused by industrial accidents, including procedural aspects. Only art. 20 explicitly refers to EU law and it relates exclusively to procedural aspects, namely rules on jurisdiction, recognition and enforcement of judgments, providing, in essence, that the relevant rules of EU law shall prevail over those of the Protocol in cases involving EU Member States. Art. 19, which concerns substantive law, provides for the primacy of the provisions of any “bilateral, multilateral or regional agreement apply[ing] to liability and compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters” which is “in force for the Parties concerned and had been opened for signature when the Protocol was opened for signature”.

Interpretation and implementation of the Protocol requirements

Since EU legislative instruments are not, technically, international agreements subject to signature, it is unclear whether art. 19 CLP is to be read as referring also to the relevant provisions of any such instruments. However, in practice, this question is moot, since the intention of the drafters of the CLP was clearly to provide for the primacy of pre-existing rules only, and to exclude the possibility for Parties to derogate from the provisions of the Protocol by concluding other bilateral, multilateral or regional agreements covering the same subject matter after its opening for signature on 21 May 2003. While there were EU Directives concerning both industrial accidents and transboundary waters in force at that time, none of their provisions directly concerns liability and compensation for damage and so the issue of a potential conflict between EU rules and the substantive provisions of the Protocol does not arise from any pre-existing rules. It could however, theoretically arise for Parties that are EU Member States as a result of provisions of the ELD which substantially overlap with those of the CLP, and which were adopted over one year after its opening for signature. This question will further be examined in the final part of this study, in which it will be shown that there is no legal obstacle as a matter of either EU or international law that would prevent EU Member States from becoming Parties to the CLP and giving effect to its provisions in their internal law, while at the same time being bound to implement the

provisions of the ELD. However, doing so may require some careful legislative work in order to avoid creating legal uncertainty for any persons concerned. Conversely, no special legislative measures would be required to avoid conflicts arising between the rules of EU law referred to in art. 20 CLP and those of the CLP itself, since any such conflicts are settled by the provisions of art. 20 CLP and by the general principle of the supremacy of EU law in the domestic legal order of EU Member States.

One other issue that needs to be flagged in the context of art. 19 CLP is the legal situation that may arise should the Lugano Convention enter into force at some time in the future, before or after the entry into force of the CLP. This Convention has been signed by several Member States of the UNECE (Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, Netherlands, Portugal), all of which, with two exceptions (Iceland and Liechtenstein), are presently also EU Member States. Though, to date, none of the signatories have ratified the Lugano Convention,⁴ it should be noted that only three ratifications are required for that instrument to enter into force. In this event, pursuant to art. 19 CLP, the provisions of the Lugano Convention would prevail over those of the CLP in the relations between those States which are Parties to both the Convention and the Protocol, and the Parties concerned would have to make provision for this in their internal legislation.

Rules to ensure that the non-discrimination provisions of the Protocol are complied with

Summary of the Protocol requirements

Art. 8(3) CLP requires Parties to apply the provisions of the Protocol and of any internal measures they adopt with a view to its implementation “without discrimination based on nationality, domicile or residence”.

Interpretation and implementation of the Protocol requirements

In preparing national implementing measures Parties shall have special regard to this requirement. Complying with it does not, in principle, require specific legislative measures, but careful drafting of all the implementing measures that will be taken pursuant to art. 8(1) CLP.

Rules concerning access to information and access to justice

Summary of the Protocol requirements

Art. 8(5) CLP contains a rather vaguely worded obligation for Parties to “provide for access to information (...) in order to promote the objective of the Protocol”, which, as set out in its art. 1, is to provide “adequate and prompt compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters”. The obligation set out in art. 8(5) is to be complied with “[w]ithout prejudice to existing international

⁴ An up to date list of signatures and ratifications can be found at <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=150&CM=7&DF=17/10/2011&CL=ENG>

obligations” and “with due regard to the legitimate interest of the person holding the information”.

Interpretation and implementation of the Protocol requirements

In the UNECE region, the existing international obligations referred to can be presumed to include in particular those arising from the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus on 25 June 1998 (hereafter referred to as the Aarhus Convention), five years before the opening for signature of the CLP. The provisions of the Aarhus Convention had already entered into force for a significant number of UNECE Member States in May 2003. Their scope overlaps with that of the CLP since the effects of industrial accidents involving hazardous substances on transboundary waters unquestionably fall within the scope of that Convention’s definition of “environmental information”, while many installations in which hazardous activities as defined in the CLP take place would be regarded as activities “which may have a significant effect on the environment” for the purpose of the application of the public participation requirements of art. 6 of the Aarhus Convention. As a result, the provisions of art. 9 of the Convention on access to justice may also often apply to activities and situations within the scope of the CLP.

Apart from the general requirements of the Aarhus Convention, it is also worth recalling that instrument’s specific provisions requiring its Parties to ensure that “[i]n the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, *all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay* to members of the public who may be affected.”⁵ This specific obligation would seem to apply in situations which may give rise to liability under the CLP. The Parties to the Aarhus Convention have deemed that in such situations of imminent threat the public interest in dissemination of environmental information prevails over any “legitimate interest of the person holding the information”, to quote the terms of art. 8(5) CLP.

The provisions of the Aarhus Convention are, however, not the only “existing international obligations” of UNECE Member States in the field of access to environmental information and access to justice. It should also be recalled that both the Industrial Accidents Convention and Transboundary Watercourses Convention contain provisions in this field, albeit often less detailed ones than the Aarhus Convention. Art. 9(1) of the Industrial Accidents Convention requires Parties to “ensure that adequate information is given to the public in the areas capable of being affected by an industrial accident arising out of a hazardous activity”, while art. 9(3) imposes a specific obligation on Parties to “provide natural or legal persons who are being or are capable of being adversely affected by the transboundary effects of an industrial accident in the territory of a Party, with access to, and treatment in the relevant administrative and judicial proceedings, including the possibilities of starting a legal action and appealing a decision affecting their rights, equivalent to those available to persons within their own jurisdiction”. Such access shall be

⁵ Aarhus Convention, art. 5(1)(c) (emphasis added).

provided by Parties “in accordance with their legal systems and, if desired, on a reciprocal basis.” These provisions of the Industrial Accidents Convention are in fact more specific than those of the CLP itself in terms of non-discrimination and usefully complement the provisions of art. 8(5) of the Protocol. Art. 16 of the Transboundary Watercourses Convention, for its part, contains rather generally worded provisions requiring Parties to make available to the public “information on the conditions of transboundary waters, measures taken or planned to be taken to prevent, control and reduce transboundary impact, and the effectiveness of those measures”.

In view of these pre-existing provisions of other UNECE environmental conventions, it is difficult to identify the added value, if any, of the provisions of art. 8(5) and any additional obligations arising from the latter provisions that would require Parties to the CLP which are also Parties to these other international agreements to take specific implementing measures in addition to those they have already taken to give effect to the Aarhus Convention, the Industrial Accidents Convention and the Transboundary Watercourses Convention. However, prospective Parties to the CLP who are not Parties to the Aarhus Convention may have to seriously consider the need for legislative and/or regulatory measures in this area.

Administrative measures (informing the secretariat of implementing measures adopted, promoting international cooperation and providing for a system of self-insurance for State-owned operators)

The Protocol contains a small number of provisions which seem capable of being complied with by Parties through administrative measures only, without any compelling need for legislative or regulatory measures. The obligation to inform the secretariat of any implementing measures taken “in order to promote transparency” is one of them. So is the obligation to “provide for close cooperation” with other Parties to promote the implementation of the CLP. Finally, the “declaration of self-insurance” referred to in art. 11(1) CLP would also seem to fall into this category, although it will depend on the internal law of each Party whether such a declaration could be made without a clear legislative or regulatory framework specifying how State-owned operators shall meet any financial obligations which may arise under the Protocol.

5. Identification of the conditions and benefits guaranteed by the Protocol and other relevant instruments

The benefits arising for Parties, their public authorities and victims of industrial accidents within their territory from ratification and entry into force of the CLP have to be identified by comparing the legal position of victims and public authorities in riparian States under the CLP with their legal position under EU law and other relevant instruments. As mentioned above in part 2 of this study, there are a range of other international instruments that could be considered relevant in theory. However, for practical purposes, the only one that is currently relevant because it already has legal effects in the legal order of many Member States of the UNECE who are potential Parties to the CLP, is the ELD. Other EU legislative instruments, such as the Seveso II Directive, the Brussels I Regulation and the Rome II Regulation are also relevant but for limited, specific aspects only.

Therefore, the analysis of benefits and possible drawbacks that would arise from the entry into force of the CLP will focus primarily on a comparison of the CLP regime with the ELD regime (for EU Member States) and with the lack of any international legal framework covering liability and compensation for damage to transboundary waters caused by industrial accidents (for non-member States of the EU). Where relevant, some references will also occasionally be made to the provisions of other international instruments, such as the Lugano Convention and other instruments mentioned in Table 1.

Scope of application of the ELD liability regime compared to that of the CLP

The ELD was adopted on 21 April 2004 (a few days before the 5th enlargement of the EU became effective on 1 May 2004) and has to be complied with by all EU Member States since 30 April 2007 (four months after the date of accession of Romania and Bulgaria to the EU under the 6th enlargement).

The stated purpose of the ELD is to establish a framework of what it calls “environmental liability”, based on the polluter pays principle – which is one of the basic principles of EU environmental law set out in art. 191(2) TFEU – to “prevent and remedy environmental damage”.⁶ The key concept around which the ELD regime revolves is therefore that of “environmental damage”. Moreover, the ELD has a dual purpose: prevention and remediation.

The notion of “environmental damage” as defined in art. 2(1)(a) ELD is not the same as the notion of “damage” defined in art. 2(2)(d) CLP. Under the ELD, “damage” means “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”⁷ and “environmental damage” denotes three forms of such damage only: (a) damage to protected species and natural habitats, (b) water damage, and (c) land damage. Only the first two forms of damage fall within the scope of the CLP and are therefore relevant for the purposes of this study. Damage to protected species and natural habitats is defined in the ELD as “any damage

⁶ ELD, art. 1.

⁷ ELD, art. 2(2).

that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species.”⁸ The significance of effects on species and habitats is to be assessed with reference to their “baseline condition”, which is to be established “taking account of the criteria set out in Annex I” to the ELD.⁹ Water damage, for its part, is defined as “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies”.¹⁰ Damage to persons or property, including loss of income resulting from environmental damage, does not give rise to liability under the ELD. Art. 3(3) of the Directive provides that it “shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage”. In EU Member States such damage and compensation for it remain exclusively regulated by relevant national legislation in force in each Member State and is therefore not subject to any harmonized rules at EU level. As appears from the preceding analysis, the concept of “environmental damage” as laid down in the ELD results in a liability regime which is clearly narrower in scope than that established by the CLP.

The scope of application of the ELD liability regime is determined not only by the definition of “environmental damage” but also by the definition of the activities which may give rise to “environmental liability” within the meaning of the Directive. According to art. 3(1) ELD, the Directive applies primarily to “environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities”. Additionally, it applies to “occupational activities other than those listed in Annex III”, but only to the extent that such activities cause or threaten to cause “damage to protected species and natural habitats” (not where they cause water or land damage) and “the operator has been at fault or negligent”.¹¹ Strict liability therefore applies only to activities listed in Annex III. The potential liability of operators of other occupational activities under the Directive is fault-based only.

Annex III lists all activities regulated under other EU legislative instruments which fall within the scope *ratione materiae* of the ELD. For the purposes of this study, the most relevant entry in Annex III is item 7, worded as follows:

⁸ ELD, art. 2(1)(a). It is to be noted that damage to protected species and natural habitats “does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.” We will assume for the purposes of this study that damage resulting from industrial accidents would not be covered by this exception.

⁹ ELD, art. 2(1)(a).

¹⁰ ELD, art. 2(1)(b).

¹¹ ELD, art. 3(1)(b).

7. Manufacture, use, storage, processing, filling, release into the environment and onsite transport of

(a) dangerous substances as defined in Article 2(2) of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances;

(b) dangerous preparations as defined in Article 2(2) of Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations;

(c) plant protection products as defined in Article 2(1) of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market;

(d) biocidal products as defined in Article 2(1)(a) of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market.

As a result of some changes in EU chemicals legislation that have entered into force since the adoption of the ELD the references in this provision to Directives 67/548/EEC, 1999/45/EC, and 91/414/EEC now have to be read as references to, respectively:

- Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and
- Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC.¹²

Moreover, a Proposal for a new Regulation of the European Parliament and of the Council concerning the placing on the market and use of biocidal products, which would replace Directive 98/8/EC,¹³ is currently under consideration and may well be adopted at the end of this year or beginning of 2012.

In any event, it appears from a superficial analysis of the wording of item 7 of Annex III that most, if not all hazardous activities as defined in art. 2(2)(f) are also activities within the scope of the environmental liability regime of the ELD. It is therefore necessary to examine the similarities and differences between that liability regime and that of the CLP.

¹² According to Article 83 of Regulation (EC) No 1107/2009, Directive 91/414/EEC has been repealed with effect from 14 June 2011, and references in other EU legislative acts to the repealed Directive shall be construed as references to Regulation (EC) No 1107/2009.

¹³ See European Commission, Proposal for a Regulation concerning the placing on the market and use of biocidal products, Doc. COM(2009) 267 final, 12 June 2009.

Similarities and differences between the liability regimes of the ELD and CLP

Contrary to the CLP regime, the ELD regime was not designed specifically for accidental pollution, nor for transboundary pollution either. It applies to actual environmental damage or the imminent threat of such damage, whether accidental in origin or not. It even applies to 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.”¹⁴ Within the EU legal order, no distinction in principle is made between environmental damage occurring within the same Member State as that where the cause of the damage is located and damage of a transboundary nature, where the locus of the damage and its source are situated in different Member States. However, environmental damage originating in a non-member State of the EU, and environmental damage caused outside the territory of the EU by activities taking place within the territory of a Member State, fall outside the scope of the ELD. This is due to the territorial dimension of the definition of the notion of “environmental damage”, which refers to other EU legislative acts whose territorial scope is, in principle, limited to the territory of the Member States, such as Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy.

Art. 15 ELD deals with transboundary environmental damage within the EU; it is the only provision of the Directive that specifically refers to transboundary situations. It requires Member States to cooperate in such situations “with a view to ensuring that preventive action and, *where necessary*, remedial action is taken in respect of any such environmental damage.”¹⁵ The provisions of the ELD are, however, not very specific as to what precisely such cooperation entails, beyond “the appropriate exchange of information”,¹⁶ and which of the Member States is responsible for what. Art. 15(2) stipulates: “Where environmental damage has occurred, the Member State in whose territory the damage originates shall provide sufficient information to the potentially affected Member States.” Conversely, where a Member State finds that environmental damage within its borders has been caused by sources outside its territory, “it *may* report the issue to the Commission and any other Member State concerned; it *may* make *recommendations* for the adoption of preventive or remedial measures and it *may* seek (...) to recover the costs it has incurred in relation to the adoption of preventive or remedial measures.”¹⁷

If the source is located in a non-member State, these provisions clearly do not apply. But even when the source can be traced to the territory of another Member State, it seems that the adoption of preventive or remedial measures and cost recovery are largely discretionary, which does not appear to be fully consistent with the polluter pays principle on which the ELD purports to be based. Also, the Directive does not specify what happens

¹⁴ ELD, art. 4(5)

¹⁵ ELD, art. 15(1) (emphasis added).

¹⁶ Ibid.

¹⁷ ELD, art. 15(3) (emphasis added).

if the competent authorities of the Member State of origin refuse to cooperate. Presumably, the competent authority of the Member State suffering the environmental damage, or any other natural or legal persons affected by it, could avail themselves of the remedies and review procedures set out in articles 12 and 13 ELD, but this is not without difficulty and entails a considerable measure of delay, cost and legal uncertainty, which would seem to be to the advantage of the potentially liable party.

The ELD has detailed provisions on what it terms “remedial action”, which deal in substance with the same subject matter as art. 6 CLP. The relevant provisions of the ELD spell out in much more detail than the CLP the obligations of the operator and of the competent public authorities in the event of accidental environmental damage. Art. 6(1) ELD provides:

“Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) all practicable steps 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 effects on human health or further impairment of services and

(b) the necessary remedial measures, in accordance with Article 7.”

Under the ELD, it is the responsibility of the competent authority designated by each Member State to “take, require the operator to take or give instructions to the operator concerning” the response measures to be implemented, to “require the operator to take the necessary remedial measures” and to “give instructions to the operator to be followed on the necessary remedial measures to be taken”.¹⁸ Where the operator fails to act or to follow the competent authority’s instructions, the latter has the power to “itself take the necessary remedial measures”. This power, described “as a means of last resort” also exists if the operator “cannot be identified or is not required to bear the costs under this Directive”. Except in the latter case (corresponding to circumstances in which the operator is exonerated according to specific provisions of the ELD), the costs for the preventive and remedial actions taken pursuant to the Directive shall be borne by the operator, as laid down in art. 8(1).

It falls on the competent authority to recover the costs it has incurred when taking remedial action under the ELD. However, this authority has some discretion in exercising these powers: indeed, it “may decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified”.¹⁹

Defences to liability under the ELD and CLP

In addition to the discretion granted to national competent authorities under art. 8(2) ELD, EU Member States, in their national legislation implementing the ELD, “may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he

¹⁸ ELD, art. 6(2).

¹⁹ ELD, art. 8(2) *in fine*.

demonstrates that he was not at fault or negligent” and moreover proves that the environmental damage was caused either by (a) an emission or event “expressly authorised by, and fully in accordance with” applicable permit conditions, or (b) “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.”

These two defences are available to the operator only if and to the extent that they are expressly provided for in national law; allowing these defences is optional, not mandatory, for EU Member States in the exercise of the discretion they enjoy in the implementation of the ELD in accordance with the general provisions of the TFEU. Neither of them seems to be particularly relevant for the purposes of the present study because (a) accidental pollution of transboundary waters is, by definition, never expressly authorized by any permit, and (b) “hazardous activities” within the meaning of the CLP are, by definition, activities which are known to entail a significant risk of causing damage to the environment and/or human health and are subject to special risk assessment and management obligations under the Industrial Accidents Convention and the Seveso II Directive precisely because of this risk.

Apart from the two above-mentioned defences, the ELD provides that the operator shall not be required to bear the cost of preventive or remedial actions in certain circumstances which are deemed to be beyond his control, such as wrongful conduct on the part of a third party and compliance with a compulsory order of a public authority. Similar defences are provided for in the CLP.²⁰

Time limits for claims under the ELD and CLP

As to time limits, however, the approach of both instruments is quite different. This can be ascribed to the partly different rationale of their respective liability regimes. While the ELD is exclusively concerned with cost recovery by public authorities, based on an administrative law approach, the CLP is still primarily based on a civil liability model, designed to protect the interests of any injured parties, whether public authorities or private persons. Both instruments also use a different starting date for the calculation of time limits. Under the ELD, the relevant date is the date on which the response or remedial measures taken by the competent authority have been completed, or the date on which the liable operator or third party has been identified, whichever is the later, and the time limit is five years.²¹ Under the CLP, there are two starting dates. The first is that of the industrial accident and the ultimate time limit for bringing any claims against the operator is fifteen years from that date.²² Additionally, there is a rule that requires claims to be brought within three years from a second date, i.e. the date that the claimant knew or ought reasonably to have known both the existence of the damage and the identity of the liable person.²³ Due to the different approach applied in the Directive and the Protocol, conflicts could arise

²⁰ ELD, art. 8(3)(a) & (b). Cf. art. 4(1)(c) & (d) CLP.

²¹ ELD, art. 10.

²² CLP, art. 10(1).

²³ CLP, art. 10(2).

between both instruments in certain specific situations which fall within the scope of both. For example, if an industrial accident in one EU Member State were to cause environmental damage on the territory of another, and the competent public authority in the latter sought to recover from the liable operator the cost of remedial measures it had undertaken, its claim would be time-barred under the CLP as early as three years after the liable person had been identified, whereas it would be admissible under the ELD until five years after that date.

Financial security under the ELD and CLP

The ELD contains no provisions on limitation of liability²⁴ and only very rudimentary provisions on financial security. The latter subject was one of the most controversial during the decision-making process on the Commission's proposal for what became the ELD in the Council and European Parliament.²⁵ During this process, the co-legislators eventually reached a compromise which is reflected in several provisions of the Directive. The main provision is art. 14(1), which provides as follows:

“Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.”

This provision clearly places no obligation of result whatsoever on Member States. They are only to take unspecified measures to “encourage” private economic and financial operators to develop financial security instruments that would be available to interested operators who would wish to use such instruments to cover their potential liability under the ELD. However, the Directive does not actually require operators of activities within its scope to have such coverage, any more than it requires Member States to adopt any legislative or regulatory measures in this field. It leaves Member States full discretion, including the right to adopt any requirements in their national law that they would deem appropriate, all the more so since art. 16(1) ELD expressly provides that the Directive “shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage.” The Member States' right to adopt more stringent national provisions also derives from the legal basis of the ELD, art. 175(1) TEC, now – since the entry into force of the Treaty of Lisbon – art. 191(1) TFEU.

The other relevant provision of the ELD is art. 8(2) which requires the competent authorities in the Member States to “recover, *inter alia*, via security over property or other

²⁴ Other than a provision stipulating that the Directive “shall be without prejudice to the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, including any future amendment to the Convention, or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988, including any future amendment to the Convention.” Since the CLP does not apply to off-site transportation by maritime or inland navigation this provisions is not relevant in the context of this study.

²⁵ See H. Bocken, “Financial Guarantees in the Environmental Liability Directive: Next Time Better”, 15 *European Environmental Law Review* (2006) 13.

appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions”.²⁶ This clause has been interpreted by commentators as actually requiring Member States to include some provisions designed to guarantee cost recovery from insolvent operators in their domestic implementing legislation.²⁷ The purpose of this requirement is different from the “aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive” referred to in art. 16(1). While the intended primary beneficiaries of the guarantees mentioned in the latter provision are the operators themselves, the guarantees referred to in art. 8(2) are intended to safeguard the *public* interest in ensuring that the costs of preventive or remedial action taken pursuant to the Directive is eventually born by the operator and not by the taxpayer, in accordance with the polluter pays principle. This aim is to be achieved by any guarantees deemed “appropriate” by the Member State concerned, including, as one possible option, “security over property”.

While Member States have discretion in choosing the means most appropriate to achieve the objective prescribed by the EU legislator, they do not have the freedom to refrain from providing for any appropriate guarantees in their domestic law. The guarantees provided must in any event be adequate to cover the potential cost of preventive and remedial action that may have to be taken in accordance with the relevant provisions of the ELD. Under the ELD, as opposed to the CLP, this cost is not capped by any provision on limitation of liability. However, it is implicitly limited by the ELD provisions on the determination of remedial measures, which stipulate how competent authorities are to decide what measures are to be taken, and include a reference to a “common framework” set out in Annex II of the Directive. It is also limited by the definition of “costs” in art. 2(16) ELD which requires costs to be “justified by the need to ensure the proper and effective implementation of this Directive” and specifies that such costs include “the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs”. Within this context, the principle of proportionality, which is a general principle of Union law, also applies.

Benefits and drawbacks of the CLP compared to the ELD from the perspective of public authorities

In comparing the benefits and drawbacks of both liability regimes, it has to be recalled that the Protocol, according to its art. 3(2), applies only “to damage suffered in a Party other than the Party where the industrial accident has occurred”, whereas the Directive applies to all environmental damage occurring within the territory of an EU Member State where caused by occupational activities carried out within the territory of the same Member State or another Member State. It does not, however, apply where either the damage itself or its source is located in the territory of a non-member State of the EU. Accordingly, the scope

²⁶ ELD, art. 8(2), first indent (emphasis added).

²⁷ See H. Bocken, “Alternative Financial Guarantees for Environmental Liabilities under the ELD”, 18 *European Energy and Environmental Law Review*(2009) 146.

of the liability regimes of the CLP and ELD only overlaps in the event of transboundary environmental damage to transboundary waters between EU Member States.

The main advantage of the CLP regime from the perspective of public authorities in the affected Member State is that the Protocol provides clear procedures and more legal and financial certainty in terms of the ability of public authorities to recover the costs of response measures and measures of reinstatement from the operator. Indeed, under the CLP the procedures for asserting such claims are clearly defined and the public authority concerned has the certainty that the operator's liability is covered by financial security up to a certain limit. It even has the possibility to bring legal action for cost recovery directly against the provider of financial security, unless the Party under whose jurisdiction the liable operator operates has opted out of this system.

The disadvantage of the CLP regime is that the liability of the operator is strictly limited in accordance with the financial limits calculated pursuant to part two of annex II of the Protocol, whereas no similar limitation of liability applies under the ELD. It should be noted that, even under the CLP, there may be circumstances in which the limitation of liability does not apply, namely whenever it can be established that the operator or any other person has caused or contributed to the damage by wrongful intentional, reckless or negligent acts or omissions.²⁸ Another disadvantage of the CLP regime is that the time limit for bringing claims for compensation against the liable operator are shorter than under the ELD: three years instead of five.

Benefits of the CLP compared to the ELD from the perspective of injured persons (other than public authorities)

Since the ELD does not lay down any rules concerning liability for damage to persons or property, the advantages of the CLP regime for any persons suffering such damage as a consequence of an industrial accident are obvious. The Protocol ensures that any injured person, whether a natural or legal person under private or public law, can claim compensation from the operator for loss of life or personal injury, loss of or damage to property, and loss of income directly attributable to impairment of transboundary waters. These types of damage are expressly excluded from the scope of the ELD, which leaves EU Member States free to determine their own rules on liability for such damage. The legal position of the victim will therefore vary from one Member State to another, with strict liability in some Member States and fault-based liability in others.

Ratification of the CLP would ensure harmonisation of the applicable rules and improve the legal position of the victims. It can only result in an improvement of that position, since art. 17 CLP provides that the Protocol is “without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.” Accordingly, any existing provisions of national law that are more favourable to victims than those of the CLP would continue to apply.

²⁸ CLP, art. 9(3).

Benefits and drawbacks of the CLP compared to the ELD from the perspective of operators

From the perspective of operators of hazardous activities the CLP regime presents both drawbacks and advantages compared to the ELD regime.

The main advantage from an economic perspective is that under the ELD, strict liability exists only for the costs of prevention and remediation measures taken by public authorities in accordance with the applicable rules laid down in the Directive. There is no liability under the ELD for any other damage that would be covered by the CLP. Moreover, the ELD does not impose any direct obligation on operators to cover their potential liability by insurance or any other form of financial security, whereas the CLP has such an obligation, which would have cost implications for operators.

Nevertheless, a strict liability regime such as that instituted by the CLP also has certain advantages for operators. The main benefit would be increased legal certainty and predictability of the economic consequences of any industrial accident. The lack of any rules in the ELD governing liability for damage caused to injured parties other than public authorities taking response measures does not mean that the operator is not potentially exposed to such liability, in addition to his liability towards the competent authority under the ELD. Though the Directive itself does not give private parties any right of compensation, its provisions are without prejudice to any such rights that may exist under the national law of the Member States.²⁹ The applicable rules will vary from Member State to Member State, and in the event of an industrial accident causing damage in many downstream riparian States, the operator may be confronted with a variety of victims whose rights to compensation are determined by different legal systems. Under the CLP, however, while the strict liability of the operator would be more extensive, since it would also extend to private claims, it would at the same time be limited financially and therefore more predictable and manageable economically. Under the ELD, there is no overall limit on liability arising from any individual accident causing environmental impairment and consequent damage to persons and property. Finally, the full extent of the operator's potential exposure to liability as a result of an accident will be known earlier under the CLP regime than under the ELD regime, since time limits for claims under the CLP are shorter than under the ELD.

Liability and compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters under the Lugano Convention

For the sake of completeness, we shall also briefly analyse the rules that would apply to damage within the scope of the CLP if the provisions of the Lugano Convention were in force and applicable to this damage.

The scope of both international instruments clearly overlaps, as all hazardous activities as defined in the CLP would fall under the definition of “dangerous activity” as set out in art. 2(1) of the Lugano Convention. According to its art. 3(a), the Convention applies

²⁹ ELD, art. 3(3).

whenever the incident causing damage to the environment occurs in the territory of a Party, regardless of where the damage is suffered, so transboundary effects are clearly covered. Like the CLP, the Lugano Convention establishes a strict liability regime applying to all operators of dangerous activities. Art. 6(1) establishes the rule of strict liability in the following terms:

“The operator in respect of a dangerous activity mentioned under Article 2, paragraph 1, sub paragraphs a to c shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he was exercising the control of that activity.”

“Damage”, as defined in art. 2(7) of the Convention, includes loss of life or personal injury, loss of or damage to property, loss or damage by impairment of the environment, including loss of profit from such impairment, and the costs of preventive measures and any loss or damage caused by such measures. However, loss or damage by impairment of the environment (other than loss of profit) is limited to the costs of measures of reinstatement actually undertaken or to be undertaken. The definition of “environment” includes water and biotic resources. The definitions of “preventive measures” and “measures of reinstatement” under the Convention are very similar to those of “response measures” and “measures of reinstatement” under the Protocol.

The main difference between the Lugano Convention regime and the CLP regime is that, under the former, there is no limitation of liability. Both the Convention and the CLP provide for financial security to be provided by the operator, but Parties to the Convention have more discretion than Parties to the Protocol in determining the financial security requirements that shall apply to operators. Art. 12 of the Lugano Convention provides:

“Each Party shall ensure that *where appropriate, taking due account of the risks of the activity*, operators conducting a dangerous activity on its territory be required to participate in a financial security scheme or to have and maintain a financial guarantee *up to a certain limit, of such type and terms as specified by internal law*, to cover the liability under this Convention.”

Thus, under the terms of the Convention, the nature and amount of the financial security to be provided is left at the discretion of the Parties and is to be determined by national law, whereas the amount is specified under the Protocol.

Another significant difference between the Lugano Convention and the CLP is that the Convention contains much more detailed provisions on access to information and access to justice than the Protocol. These provisions, however, will not be further discussed in this study, as they are at least in part superseded by the above-mentioned provisions of the Aarhus Convention, Industrial Accidents Convention and Transboundary Waters Convention.

Specific legal issues concerning the relationship between EU law and the provisions of the CLP

Like all other international environmental agreements negotiated under the auspices of the UNECE, the CLP contains a clause allowing regional economic integration organizations (REIOs) to become a contracting Party to it.³⁰ This REIO clause is modeled on similar clauses in the Protocol's parent Conventions. As a Party to both the Industrial Accidents Convention and the Transboundary Waters Convention, the European Community, now European Union, participated in the activities of the open-ended working group for the negotiation of the CLP. However, the European Commission was only formally mandated to negotiate on behalf of the Community in accordance with the relevant provisions of the EC Treaty by a decision of the Council of the EU of 24 February 2003, a few days before the conclusion of the negotiations on the text of the Protocol. On 12 May 2003, the Commission submitted to the Council a proposal for a decision that would have authorized the signature of the Protocol by the European Community at the Kiev ministerial conference. This proposed decision was never adopted by the Council and the Commission formally withdrew its proposal in 2005.

From publicly available working documents of the EU Council, it appears that there were disagreements between the Commission and the Member States concerning the desirability of signing the Protocol and in particular of the Community becoming a signatory and, ultimately, a contracting Party. Negotiations took place within the Council's Committee on Civil Law Matters and it appears that difficulties arose with respect to the legal basis and potential legal consequences of the proposed Council decision on signature for the rights and obligations of EU Member States under international law and EU law, as well as the wording of the declaration of competence which the Commission proposed the EC should make upon signing the Protocol, pursuant to its art. 27(1). Eventually the Council Legal Service was asked on 7 October 2003 to give a legal opinion on these questions, which it did on 3 November 2003.³¹ That opinion has only partly been made public. None of the subsequent Council working documents are accessible to the public, so the formal outcome of the decision-making process initiated by the Commission proposal of 12 May 2003 is not known, but the consequence of whatever decision was taken was that the Community refrained from signing the Protocol and that the Commission later came to the conclusion that it was no longer appropriate for the Union to seek to become a contracting Party.

However, when it decided to propose signature of the CLP in May 2003, the Commission had stressed in its explanatory memorandum that there was no conflict between the provisions of the Protocol and the relevant provisions of EU law in force at the time and that the Protocol would "contribute to the achievement and the implementation of the objectives of the environmental policy of the Community" because it "will strengthen existing measures concerning safety and prevention of damage caused by industrial

³⁰ CLP, art. 27(1).

³¹ EU Council Doc. 14066/03, 3 November 2003 (available in French only; "document partiellement accessible au public").

accidents”.³² In its communication to the Council and the European Parliament announcing the withdrawal of its proposal of May 2003 (together with 67 other legislative proposals), the Commission did not give specific reasons for its decision other than the general argument that the withdrawn proposals had been considered “not to be consistent with the Lisbon objectives or Better Regulation principles”, were making “insufficient progress” or were “no longer topical”.³³ In the meantime, of course, the ELD had been promulgated.

Therefore, one needs to address the question whether any incompatibility has arisen between the provisions of the CLP and primary or secondary EU law since the Protocol was opened for signature in May 2003, as a result of new legislative developments or treaty changes since that date.

No such incompatibility can exist in the area of jurisdiction, recognition and enforcement of judgments since, as has already been pointed out above, art. 20 CLP expressly provides that EU rules on these matters shall be applied instead of the rules laid down, respectively, in articles 13, 15 and 18 of the Protocol. As regards choice of law rules, art. 7 of the Rome II Regulation, which applies in all EU Member States except Denmark³⁴ since 11 January 2009, contains a special provision applicable to “environmental damage”. This is worded as follows:

“The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.”

The applicable law as determined pursuant to art. 4(1) of the same Regulation would be “the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

In substance, these rules are fully compatible with those laid down in the CLP. Pursuant to art. 20(1) CLP, whenever the defendant is domiciled in a Member State of the EU,³⁵ the competent court shall be determined in accordance with the relevant EU rules, i.e. the provisions of the Brussels I Regulation, which would require the defendant to be sued in the courts of the Member State where he or she is domiciled,³⁶ subject however to the possibility, for the claimant, to opt to bring the action in “the courts for the place in which the harmful event occurred”.³⁷ In the event of damage caused by the transboundary effects of an industrial accident, that place would be the place where the accident occurred. Both the rules on jurisdiction and the rules on applicable law under the CLP as well as under EU law are designed to allow injured parties to choose the forum and the law which they deem

³² Doc. COM(2003) 263 final, 12 May 2003, p. 3.

³³ Doc. COM(2005) 462 final, 27 September 2003, p. 3.

³⁴ Rome II Regulation, art. 1(4).

³⁵ Except Denmark, since the Brussels I Regulation does not apply in that Member State according to its art. 1(3).

³⁶ Brussels I Regulation, art. 2(1).

³⁷ *Ibid.*, art. 5(3).

most favourable to their interests. That is exactly the result that would be achieved by applying the provisions of the Protocol and of the relevant EU Regulations.

The final question to be addressed in order to determine whether it would be possible for EU Member States to ratify the CLP without infringing their obligations under EU law is whether there is any substantive incompatibility between the liability rules laid down in the ELD and those set out in the Protocol. This question has already been discussed in several above sections of this study. As has been shown, the respective regimes are complementary rather than contradictory. The CLP would provide better protection for injured Parties other than public authorities, and also, arguably, better protection for the financial interests of public authorities seeking to recover the costs of response and reinstatement measures, because of the mandatory financial security required under art. 11(1).

There are only two potential difficulties: the financial and time limits of liability under the CLP. As regards the former, the problem is that there is no absolute financial limit to the liability of the operator for the costs of remedial measures under the provisions of the ELD. In a Member State that is a Party to the CLP and in the event of an accident falling both within the scope of the Protocol and that of the Directive, i.e. in a transboundary effects situation involving two EU Member States, the liable operator could seek to invoke art. 9(1) CLP to limit his liability should the cost of measures which a competent authority is seeking to recover exceed the amounts calculated according to annex II CLP. In this rather improbable³⁸ eventuality, any court in an EU Member State would have to set aside the CLP provision in accordance with the general principle of supremacy of EU law.

The same would apply if the operator were to rely on art. 10(2) CLP to ask the court before which the claim is brought to declare it inadmissible on the grounds that more than three years have lapsed since the competent authority has been or should have been aware of both the existence of the damage and the identity of the liable operator, whereas the corresponding time limit under art. 10 ELD is five years from the date of completion of the measures or identification of the liable operator, whichever is the later. Any court in an EU Member State would have to disallow such a defence.

Indeed, it results from the settled case-law of the Court of Justice of the European Union that whenever common EU rules have been adopted in a particular field, Member States no longer have the right to undertake international obligations which affect those rules.³⁹ Whether a particular treaty obligation contracted by an EU Member State outside the framework of the Union would be such as to affect common rules of EU secondary law depends on the nature and scope both of the obligation in question and of the relevant EU rules themselves.⁴⁰

³⁸ This eventuality seems improbable because the competent authority will not necessarily have to go to court to seek reimbursement of the cost of remedial measures which are clearly to be borne by the operator under the ELD regime. However, it cannot be excluded that an operator would refuse reimbursement or dispute the amount claimed by the competent authority, in which case that authority will have no other option but to bring legal action against the operator.

³⁹ Case 22/70, *Commission v Council*, [1971] ECR 263.

⁴⁰ Opinion 2/91, *Re ILO Convention No 170*, [1993] ECR I-1061.

As has been shown above, though the scope of the ELD overlaps with that of the CLP, both instruments are not identical in scope. To the extent that they do overlap, the fact that the ELD establishes only minimum rules which legally do not prevent Member States from “maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage”⁴¹ implies that provisions of this nature, resulting from ratification and implementation of the CLP, would not be inconsistent with EU law. The rules of the ELD would only be “affected” within the meaning of the above-mentioned case law by international obligations whose application would entail a lower level of environmental protection than guaranteed by the Directive.

However, the CLP itself contains a rule which could be applied in the very specific circumstances set out above, in the event of transboundary environmental damage on the territory of an EU Member State resulting from an industrial accident occurring in the territory of another Member State, to justify a derogation from the time limits and financial limits which conflict with the environmental liability system established by the ELD. Art. 17 CLP provides that the Protocol “is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law”. In EU Member States, such applicable domestic law includes the rules of national law which have been enacted for the transposition of the ELD. These rules confer on the national competent authority the right to implement measures of reinstatement and to recover the cost of such measures from the liable operator without any financial limit and within a longer time period than allowed by the CLP. Such recoverable costs of “remedial measures” within the meaning of the ELD also constitute “damage” as defined in art. 2(2)(d) CLP. Accordingly, national public authorities could rely on art. 17 CLP to defeat any defense raised in cost recovery proceedings by a liable operator based on the financial or time limits set out in the Protocol. This provision makes it possible to interpret the CLP in a manner which is fully consistent with EU law. Though the Protocol does not allow its Parties to make any reservations when consenting to be bound, EU Member States desiring to become Parties to the CLP could make an interpretative declaration to the effect that, in their relations with other EU Member States, they will, in accordance with art. 17 of the Protocol, apply their existing provisions of domestic law enacted pursuant to the ELD with a view to the prevention and remedying of environmental damage, including provisions guaranteeing the right of public authorities to recover fully the cost of measures of reinstatement actually taken from the liable operator.

⁴¹ ELD, art. 16(1).

5. Conclusions

As appears from the above analysis, the liability regime established by the Civil Liability Protocol entails significant advantages for private persons and, to a lesser extent, public authorities which suffer damage as a result of an industrial accident with transboundary effects on international watercourses. No other international legal instrument currently in force contains specific rules on third-party liability arising from such an occurrence.

In Member States of the European Union, a general EU law regime designed to prevent and remedy environmental damage exists under the Environmental Liability Directive, but the legal guarantees it provides are, in most respects, not as robust as those that would result from ratification and implementation of the CLP. Though not specifically designed to address transboundary harm, the ELD liability regime would apply to certain kinds of environmental damage caused in one EU Member State as a result of accidental emissions from certain types of occupational activities in another Member State under the same conditions as it would apply to environmental damage sustained within the territory of an EU Member State as a consequence of emissions that occurred in the same Member State. But the ELD regime differs fundamentally from the CLP regime in that it expressly excludes any damage to private persons or property and economic loss arising from environmental harm. It is designed to cover only the cost of preventive and remedial measures that become necessary to protect or restore the environment in the event of environmental damage or the risk thereof.

The basic rule of the ELD is that such measures are to be taken by the liable operator at his own expense, in accordance with the instructions given by the competent public authority. Where the operator fails to comply with this duty, the competent authority may itself take the measures it deems necessary and subsequently recover the cost from the operator. The extent of the operator's liability for such costs depends on the application of the provisions of the ELD in the Member State concerned, which involves a considerable measure of administrative discretion on the part of national competent authorities. However, unlike the CLP, the ELD places no upper financial limit on the liability of the operator.

The most fundamental difference between the CLP and ELD liability regimes is in the area of damage to private persons or property. While such damage is not covered by the ELD, which leaves this matter entirely to the national law of EU Member States, the CLP provides that the strict liability of the operator extends to this type of damage, within the overall financial limits laid down by the Protocol. Thus the CLP regime is considerably more advantageous from the perspective of potential private victims.

To conclude our assessment, we will briefly summarize the benefits of bringing the CLP into force and implementing its provisions in four hypothetical situations of transboundary effects on the aquatic environment caused by an industrial accident.

- *A situation with transboundary effects involving two non-member States of the EU.*

If both the country in which the accident occurred and that where the damage was suffered are Parties to the CLP, the liability regime of the Protocol will guarantee compensation for

any damage as defined in art. 2(2)(d) CLP, including damage to persons and property and loss of income, up to the financial limits set out in the Protocol, backed by the requirement of compulsory financial security. The Protocol will facilitate recovery by injured persons through its rules on the competence of courts, choice of law and recognition and enforcement of judgments.

- *A situation with transboundary effects involving two EU Member States*

If both EU Member States concerned are also Parties to the CLP, the third-party liability regime of the Protocol will supplement that of the ELD, without interfering with the full application of the environmental liability regime of the Directive, which will continue to govern the recovery of the cost of preventive and remedial measures incurred by public authorities. The added value of the CLP will be the strengthened protection of victims of transboundary water damage, especially private persons, as a result of the strict liability of the operator extending to damage to persons and property and loss of income, which fall outside the scope of the ELD. The CLP provisions on compulsory financial security will benefit both private victims and public authorities.

- *A situation with transboundary effects in a non-member State of the EU in which the accident occurred in an EU Member State*

If both the EU Member State concerned and the exposed non-member State are Parties to the CLP, the CLP liability regime will apply, with the same implications as set out above for a situation involving two non-member States of the EU. Indeed, the ELD contains no provisions applying to environmental damage occurring outside the territory of EU Member States. This implies that the liable operator will be subject to a different set of liability rules for the damage resulting from the transboundary effects of an accident on waters within the territory of the affected non-member State than for the water damage caused by the same accident within the boundaries of the EU Member State where it occurred. The strict liability under the CLP will extend to damage to persons and property and loss of income, which falls outside the scope of the ELD. However, the operator's liability will be limited and covered by financial security in accordance with the Protocol.

- *A situation with transboundary effects in an EU Member State in which the accident occurred in a non-member State of the EU*

If both the affected EU Member State and the non-member State in whose territory the accident occurred are Parties to the CLP, both the public authorities that implemented response measures and measures of reinstatement in the affected Member State and any other public or private persons who suffered damage as defined in the Protocol will be able to invoke the strict liability of the operator and to recover compensation for damage in accordance with the rules and procedures laid down in the CLP, up to the financial limits laid down in the Protocol. This places them in a legal situation that is considerably more favourable than the situation they would have been in if the CLP had not been ratified by both Parties concerned. Indeed, in the latter case the availability of any recourse would depend largely on the fault-based liability rules and conflict of laws rules in force in the State where the accident occurred (unless that State had enacted national legislation

providing for some form of strict liability of environmental damage independently of the CLP). Depending on the rules on the jurisdiction of courts and choice of law in force in the EU Member State it may also be possible for the victims to initiate legal proceedings against the operator in the courts of that State, but they may face difficulties in enforcing any judgment obtained. In any event public authorities would not be able to rely on the provisions of the ELD, since those obviously do not apply to operators outside the jurisdiction of any EU Member State.