

COMPULSORY FINANCIAL ASSURANCE FOR ENVIRONMENTAL RISK EXPANDS GLOBALLY

A rising bar for environmental protection legislation is meeting a rising bar for financial responsibility – one result is expanding financial assurance mandates for environmental damage. This Environmental Alert explores the developing requirements for compulsory financial assurance for businesses in the EU and touches on additional similar requirements internationally.

The EU Environmental Liability Directive (ELD) applies to all companies involved in any economic activity that operate in the EU, regardless of whether the parent company is located outside of the EU.

The ELD came into force in all EU member states between 2007 and 2009. It is based on the ‘Polluter Pays’ and ‘Precautionary’ principles and introduces new liabilities which increase an operator’s responsibility for preventing and remedying significant environmental damage to biodiversity, land and water. The fundamental aim of the new liability regime is to ensure that those companies whose activities cause environmental damage will be financially liable for remedying that damage. The ELD does not apply retrospectively, however, the various environmental laws in existence prior to its implementation could still apply and be enforced by the regulators.

Significantly, the ELD creates new types of liabilities for operators of certain activities. The polluter has to **prevent damage** and **remedy in kind**, damage caused to biodiversity with the scale and cost of remediation being far more onerous than under previous environmental protection legislation.

The key additional liabilities created to businesses by the ELD include:

- The operator (polluter) has to **report any pollution incident** – it is a criminal offence not to do so.
- **Strict liability** – The ELD implements the ‘polluter pays’ principle with strict liability applying to some operators i.e. fault or negligence is not a prerequisite for enforcement action. Fault based liability applies to all other businesses.

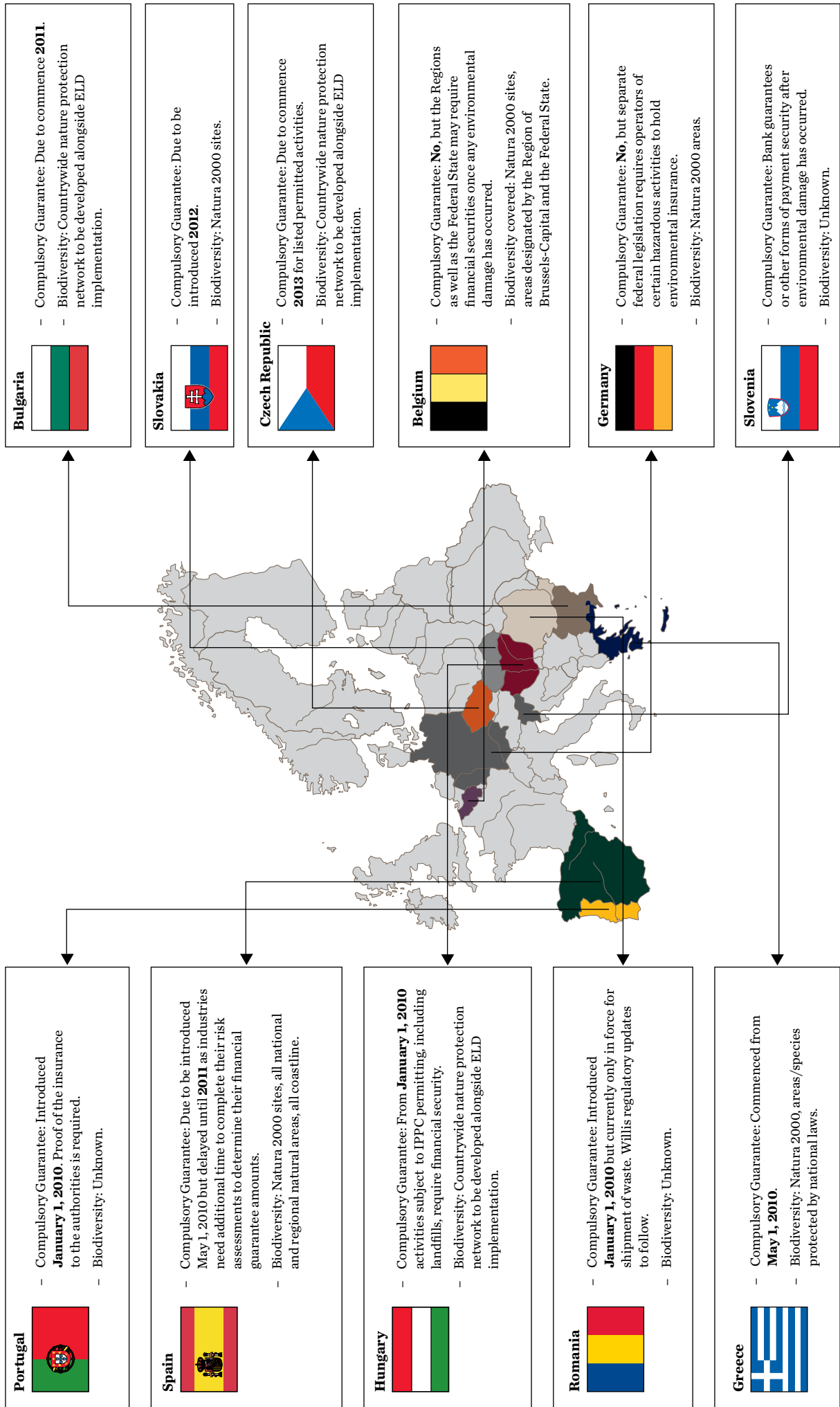
There is **no limit** on financial liability.



- **Increased scope for claims** – significantly, the ELD introduces the possibility of an operator receiving claims instigated by private citizens or non-governmental organisations (NGO’s). NGO’s can ask for judicial reviews if they feel the Directive is not being fully enforced.
- The ELD goes significantly further than existing legislation by imposing new types of liability – specifically more **onerous remediation requirements**. There are three types of remedial measures under the ELD:
 - **Primary Remediation** – returning environmental damage to ‘baseline’ condition.
 - **Complimentary Remediation** – measures to be carried out if baseline conditions cannot be achieved through Primary Remediation e.g. the creation of a new habitat, which may require land purchase.
 - **Compensatory Remediation** – compensation for interim losses until Primary or Complimentary Remediation is completed.
- **Mandatory Financial Security** – The ELD requires Member States to encourage the development of financial assurance mechanisms to ensure that operators have the financial capability to discharge their obligations under the Directive. It is widely acknowledged that general liability insurance products will not respond to the liabilities created under the ELD.

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EU (EEA) MAP - OVERVIEW OF TRANSPOSITION ON COMPULSORY FINANCIAL ASSURANCE UNDER EU ELD



IMPLEMENTATION OF THE ELD

Given the ELD's flexibility, the pace of implementation has understandably varied across the EU. All member States have now enacted legislation to effect the implementation of the ELD.

Existing national laws empowering authorities to pursue polluters in cases of water or soil pollution will remain in place and will continue to apply to cases that fall outside of the ELD or, in some cases, alongside the ELD. A few member states have enacted stricter rules under the ELD than most other member states, e.g. in Sweden, strict liability applies in all cases and liability reverts to a landowner where the polluting company cannot be held liable. Certain European countries that are not part of the EU e.g. Norway have adopted legislation similar to the EU ELD.

To date, mandatory financial provisioning has been left to the discretion of each member state. Currently, eight member states have already introduced this as part of the transposition of the ELD into national law: Bulgaria, Czech Republic, Greece, Hungary, Portugal, Romania, Slovakia and Spain. An EU review of progress on this issue will take place in 2010 and may result in an EU wide compulsory scheme.

An overview of the current mandatory insurance requirements for member states is demonstrated on the map opposite.

THE ROLE OF INSURANCE IN COVERING THE NEW ELD LIABILITIES

The ELD-related liability is a new type of liability and it is clear that it cannot be adequately covered by a standard general third party liability or property insurance as it is not a civil liability and will be a standard exclusion on property policies. Certain general liability insurers have developed new wordings to extend the coverage to include certain ELD liabilities. However there are limitations to this approach and it is widely accepted that the most comprehensive cover in respect of the ELD can be obtained through the specialist environmental market. Environmental insurance provides cover for the prevention and remediation costs as defined under the ELD. Importantly this is not limited to sudden and accidental and offsite clean-up only, but includes gradual pollution and other forms of damage to the environment as well as the on-site risk.

MANDATORY FINANCIAL SECURITY - INTERNATIONAL DEVELOPMENTS

In 2009 China introduced the compulsory 'Green Insurance System' which is expected to apply to all high polluting industries. This will be implemented in phases and is expected to take full effect by 2015.

See International Alert, China Introduces Compulsory Green Insurance.

In 2008 Argentina enacted a law requiring any company that might pose a threat to the environment to provide evidence of insurance or financial assurance to guarantee funding of potential future clean-ups. Failure by companies to comply with the regulations would result in non-renewal of operator permits, rendering those companies unable to operate legally in the country.

See International Alert, Argentina Requires Environmental Insurance.

WILLIS SOLUTIONS

Willis can assist in developing an insurance programme that protects operators against the new ELD-related liabilities and complies with the ELD financial assurance requirements in each member state. Programmes can also be designed to include coverage for a broader range of environmental risk exposures, including liabilities associated with pre-existing conditions or contingent exposures such as business interruption. Many different limit and retention structures are available.

The Willis Environmental Practice has long been a market leader in the management of environmental risks. There is no substitute for experience and our professional team has established an acknowledged reputation for responsiveness, innovation, broking excellence and timely delivery.

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