

## **Factual summary report of the public consultation in support of the evaluation of the Environmental Liability Directive and its implementation**

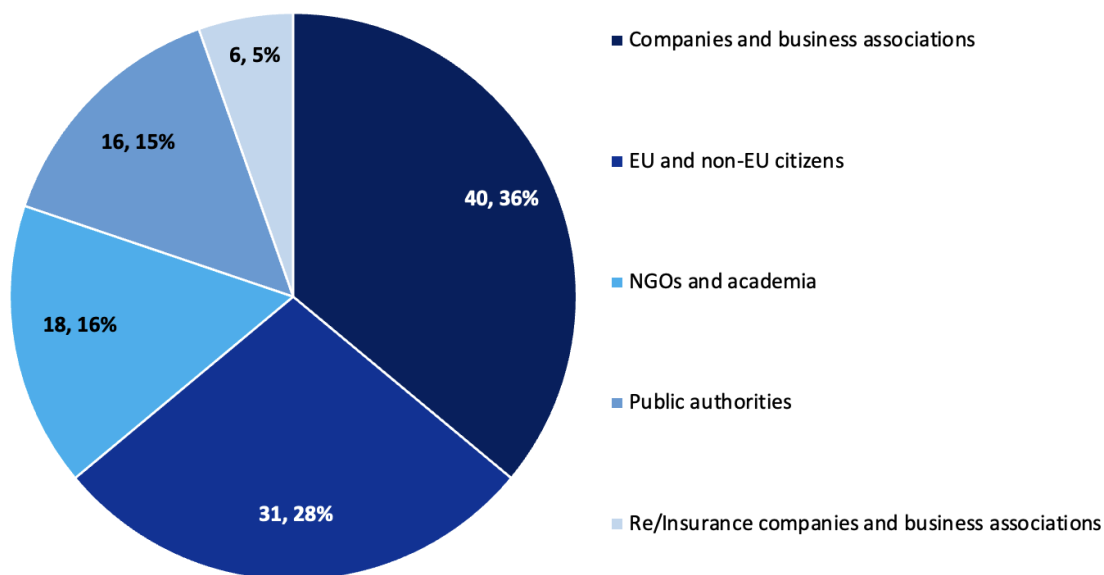
The public consultation ran from 12 May 2022 to 4 August 2022. Participants were able to respond on behalf of an organisation or as individuals and had the opportunity to complement their responses uploading additional documents.

This document provides a breakdown of the responses<sup>1</sup>. An in-depth analysis of the information and views provided in response to this consultation — including by stakeholder category — will be presented in the synopsis report of all consultation activities to be annexed to the evaluation report.

A total of 111 respondents completed the survey. There are no duplicate responses and there is no evidence of campaigns, although four groups of respondents (three groups of two respondents and one group of three respondents) submitted similar or identical responses to open-ended questions. All contributions were therefore considered appropriate and included in the analysis.

Around 40% of respondents (46 out of 111) requested their contribution to remain anonymous while around 60% (65 out of 111) agreed for their responses to be made public. Most responses were received from companies and business associations (36%, 40 out of 111) and EU and non-EU citizens (28%, 31 out of 111). Eighteen responses were also received from representatives of NGOs and academia (16%), 16 from public authorities (14%) and six responses (6%) were on behalf of organisations in the re/insurance industry.

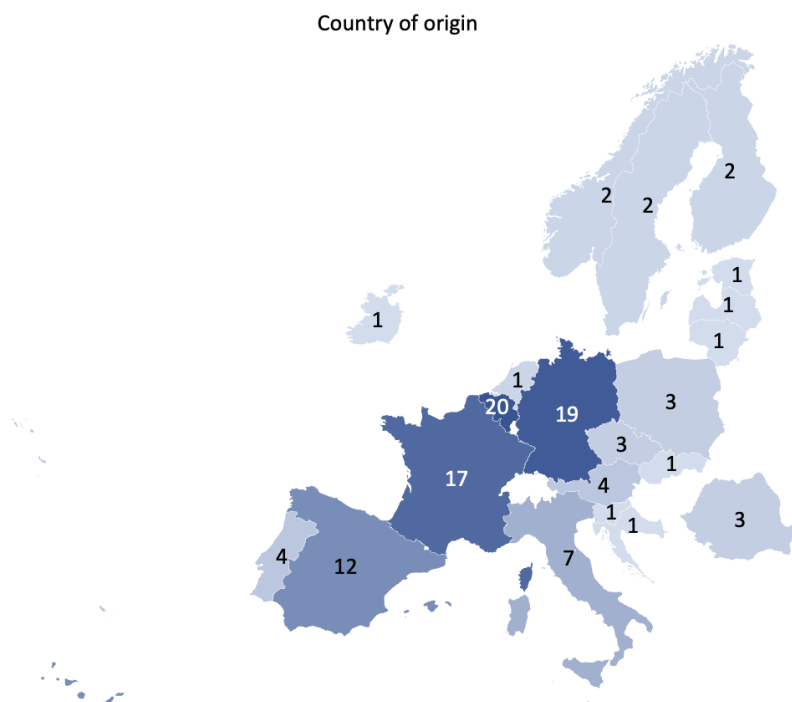
**I am giving my contribution as**



Two-thirds of respondents (68%, 75 out of 111) reported that they had more than five years of experience related to issues that concern damage to the environment. Out of the 18 responses received from businesses, seven were from large companies and eleven from SMEs.

<sup>1</sup> This document should be regarded solely as a summary of the contributions made by stakeholders public consultation in support of the evaluation of the Environmental Liability Directive. It cannot in any circumstances be regarded as the official position of the Commission or its services. Responses to the consultation activities cannot be considered as a representative sample of the views of the EU population.

Most of the responses came from Belgium (18%, 20 out of 111), Germany (17%, 19 out of 111), France (15%, 17 out of 111) and Spain (11%, 12 out of 111). Two responses were received from non-EU countries.



In addition to responding to the questionnaire, 17 respondents uploaded 23 documents: five position papers from business associations (of which four from associations of ELD operators), four position papers from insurance associations, three position papers from NGOs and one position paper from a public authority. Ten documents provide complementary information to the views expressed in responses to the questionnaire. The analysis of these contributions will be presented in the synopsis report of all consultation activities to be annexed to the evaluation report.

### *Overview of contributions*

The questionnaire was structured in two parts. Part I contains mandatory general questions and Part II contains optional technical questions, seeking to gather information on the experience of stakeholders with more expert knowledge of the ELD and its implementation.

#### *Part I – General questions*

In presenting the results of Part I, we analyse all responses including, also the responses by the respondents who chose the response ‘I do not know/No opinion’. The percentage of responses refers to the ratio of responses received to the total number of responses, i.e., 111.

Most respondents agreed (26%, 29 out of 111) or strongly agreed (56%, 62 out of 111) that it is necessary to have a dedicated legislation to implement the **‘polluter pays’ principle**. A similar number of respondents agreed (20%, 22 out of 111) or strongly agreed (62%, 68 out of 111) that it is necessary to have a legislation that requires companies to **prevent environmental damage** in case of an imminent threat and to **remedy the damage** when the prevention measures failed. For these questions, three respondents chose the response ‘I do not know/No opinion’.

When asked about the **benefits delivered by the ELD**:

- 41% (45 out of 111) of the respondents agreed or strongly agreed and 35% (38 out of 111) of the respondents disagreed or strongly disagreed that the Directive assisted in **preventing and**

**remediating damage to biodiversity**, while 10 out of 111 respondents were neutral and 18 out of 111 respondents did not know/had no opinion.

- 43% (47 out of 111) of respondents agreed and strongly agreed and 31% (34 out of 111) respondents disagree or strongly disagreed the ELD assisted in **preventing and remediating damage to land**, while 9 out of 111 respondents were neutral and 21 out of 111 respondents did not know/had no opinion.
- 42% (46 out of 111) of respondents agreed and strongly agreed and 32% (35 out of 111) respondents disagree or strongly disagreed the ELD assisted in **preventing and remediating damage to surface, ground, transitional and coastal waters** in the EU, while 12 out of 111 respondents were neutral and 18 out of 111 respondents did not know/had no opinion.
- 29% (32 out of 111) of respondents agreed and strongly agreed and 33% (30 out of 111) respondents disagree or strongly disagreed that ELD assisted in **preventing and remediating damage to marine waters in the EU**, while 19 out of 111 respondents were neutral and 27 out of 111 respondents did not know/had no opinion.
- 47% (52 out of 111) of respondents agreed and strongly agreed and 31% (34 out of 111) respondents disagree or strongly disagreed that ELD assisted in **application of the ‘polluter pays’ principle**, while 11 out of 111 respondents were neutral and 14 out of 111 respondents did not know/had no opinion.
- 50% (55 out of 111) of respondents agreed and strongly agreed and 27% (30 out of 111) respondents disagree or strongly disagreed that ELD assisted in **ensuring that liable operators carry out preventive and remedial measures as applicable**, while 11 out of 111 respondents were neutral and 15 out of 111 respondents did not know/had no opinion.
- 56% (62 out of 111) of respondents agreed and strongly agreed and 20% (23 out of 111) respondents disagree or strongly disagreed that ELD assisted in **raising awareness of environmental issues**, while 16 out of 111 respondents were neutral and 10 out of 111 respondents did not know/had no opinion.
- 43% (47 out of 111) of respondents agreed and strongly agreed and 28% (31 out of 111) respondents disagree or strongly disagreed that ELD assisted in **preventing contamination of further sites**, while 14 out of 111 respondents were neutral and 19 out of 111 respondents did not know/had no opinion.
- 37% (41 out of 111) of respondents agreed and strongly agreed and 19% (21 out of 111) respondents disagree or strongly disagreed that ELD assisted in **encouraging the availability to operators of financial security instruments at an affordable cost**, while 21 out of 111 respondents were neutral and 28 out of 111 respondents did not know/had no opinion.
- 51% (57 out of 111) of respondents agreed and strongly agreed and 19% (22 out of 111) respondents disagree or strongly disagreed that ELD assisted in **allowing interested persons to request competent authorities to take action in case of environmental damage occurrences**, while 14 out of 111 respondents were neutral and 18 out of 111 respondents did not know/had no opinion.
- 49% (55 out of 111) of respondents agreed and strongly agreed and 17% (19 out of 111) respondents disagree or strongly disagreed that ELD assisted in **allowing interested persons to request competent authorities to take action in case of imminent threat of environmental damage occurrences**, while 18 out of 111 respondents were neutral and 19 out of 111 respondents did not know/had no opinion.

Almost half (49%, 54 out of 111) of respondents thought that the absence of **mandatory financial security for ELD liabilities** at the EU level have limited the effectiveness of the ELD. 17 respondents didn't know the answer or expressed no opinion on this question. Other factors limiting the effectiveness of the ELD mentioned by the respondents were: lack of enforcement, inactivity of authorities, narrow scope of the Directive, lack of awareness of the ELD, and a restrictive definition of environmental damage, including difficulty to understand ‘significant adverse effect’.

Most respondents (71%, 79 out of 111) were aware of the **ELD public participation mechanism** that allows interested persons to request competent authorities to take action in case of an imminent threat of, or actual, environmental damage, and to provide comments and to have access to justice, but very

few among them (9%, 10 out of 111) had direct experience in using it. Out of those, eight had a negative experience due to inefficiencies and lack of capacities or transparency at the competent authorities. Most respondents (64%, 71 out of 111) were also aware of the existence of **information on the ELD and registers of ELD occurrences** at a national level. However, only a small number of respondents (17%, 19 out of 111) had accessed such information or registers, whereas 32% (35 out of 111) of respondents had never tried. 15% of respondents had had difficulty accessing such information or registers and 36% had never heard of them.

## *Part II - Technical questions*

This part of the questionnaire sought information from and the views of stakeholders with an in-depth knowledge of the ELD and/or direct experience with its implementation. The participants were encouraged to reply to the full questionnaire, but they were also given the option to skip the technical questions. The respondents who chose not to reply to the technical questions or did not know the answer/had no opinion are excluded from the statistics, summarising technical questions.

More respondents were in agreement than disagreement that the following predefined factors decreased the **effectiveness of the ELD** (factors listed according to the support received from respondents): insolvency of liable operators in some cases (68%, 54 out of 80, agreed/strongly agreed; 13%, 10 out of 80, disagreed/strongly disagreed); insufficient reporting/lack of publicly accessible records of ELD occurrences/cases (64%, 51 out of 80, agreed/strongly agreed; 25%, 20 out of 80, disagreed/strongly disagreed); difficulties in establishing whether an environmental damage occurrence meets the significance criteria for land, water and/or biodiversity damage (63%, 53 out of 84, agreed/strongly agreed; 30%, 25 out of 84, disagreed/strongly disagreed); impossibility to identify liable operators in some cases (60%, 50 out of 83, agreed/strongly agreed; 20%, 17 out of 83, disagreed/strongly disagreed); lack of awareness about the ELD (57%, 49 out of 86, agreed/strongly agreed; 24%, 21 out of 86, disagreed/strongly disagreed); insufficient access for interested persons to request action/submit comments on an imminent threat of environmental damage under the public participation mechanism of the ELD in some Member States (55%, 39 out of 71, agreed/strongly agreed; 37%, 26 out of 71, disagreed/strongly disagreed); absence of EU legislation on environmental inspections (54%, 44 out of 82, agreed/strongly agreed; 29%, 24 out of 82, disagreed/strongly disagreed); difficulties in deciding whether national ELD legislation, national non-ELD liability legislation, or both apply to an environmental damage occurrence (51%, 39 out of 76, agreed/strongly agreed; 34%, 26 out of 76, disagreed/strongly disagreed); complexity of the ELD (49%, 43 out of 87, agreed/strongly agreed; 22%, 19 out of 87, disagreed/strongly disagreed); limitation of liability for remediating damage to land, to a significant adverse effect on human health (46%, 36 out of 79, agreed/strongly agreed; 35%, 28 out of 79, disagreed/strongly disagreed); application by competent authorities of environmental permitting legislation, including the Industrial Emissions Directive, instead of the ELD (45%, 35 out of 78, agreed/strongly agreed; 33%, 26 out of 78, disagreed/strongly disagreed); and perception of the significance criteria as being high compared to national liability legislation (44%, 32 out of 72, agreed/strongly agreed; 31%, 22 out of 72, disagreed/strongly disagreed). For the remaining proposed factors, there was almost a similar level of agreement and disagreement. This concerns the ‘permit defence’ in the ELD (40%, 34 out of 85, agreed/strongly agreed; 45%, 38 out of 85, disagreed/strongly disagreed), the ‘state-of-the-art defence’ in the ELD (43%, 36 out of 83, agreed/strongly agreed; 41%, 34 out of 83, disagreed/strongly disagreed), and exempting liabilities subject to marine and nuclear conventions, those resulting from armed conflicts, natural disasters, activities serving national defence, international security and preventing natural disasters as well as diffuse pollution (40%, 28 out of 70, agreed/strongly agreed; 39%, 27 out of 70, disagreed/strongly disagreed).

The proportion of those who considered the **level of protection** under the non-ELD legislation as ‘the same’ and as ‘lower’ to the level under the ELD was very similar (43%, 23 out of 54 and 44%, 24 out of 54, respectively). A lower proportion of respondents (13%, 7 out of 54) considered that national non-ELD legislation proposed higher level of protection. In addition, 17 out of 96 respondents were aware of environmental damage cases, which have been dealt under the non-ELD legislation while they could have been also or instead handled under the ELD. In 12 cases, respondents provided the examples or details of such cases.

With regard to **relevance**, the proportion of respondents who agreed that the **ELD scope was still appropriate** was higher than those who disagreed, for the following **aspects of the said scope**: allowing, in Member States which authorise such defences, the use of a ‘permit’ defence (51%, 39 out of 76 agreed/strongly agreed with this statement, while 37 %, 27 out of 76, disagreed/strongly disagreed); and of the ‘state of the art’ defence (49%, 37 out of 76, agreed/strongly agreed; 34%, 26 out of 76, disagreed/strongly disagreed); imposition of fault-based rather than strict liability on non-annex III operators whose activities cause biodiversity damage (49%, 36 out of 74, agreed/strongly agreed; 38%, 28 out of 74, disagreed/strongly disagreed); exempting liabilities subject to marine conventions listed in annex IV to the ELD (44%, 27 out of 62, agreed/strongly agreed; 39%, 24 out of 62, disagreed/strongly disagreed). However, for the following aspects of the ELD scope a higher proportion of respondents disagreed with its being still appropriate: no imposition of liability on non-annex III operators whose activities cause water damage (57%, 42 out of 74, disagreed/strongly disagreed, while only 35 %, 26 out of 74, agreed/strongly agreed) and land damage (57%, 41 out of 72, disagreed; 32%, 23 out of 72, agreed/strongly agreed); limiting liability to operators rather than any person that causes environmental damage (53%, 42 out of 80, disagreed; 34%, 27 out of 80, agreed/strongly agreed); limiting strict liability to annex III operators (50%, 38 out of 76, disagreed/strongly disagreed; 39%, 30 out of 76, agreed/strongly agreed). Also, most respondents disagreed that the scope of activities listed in annex III is adequate (51%, 37 out of 72, disagreed/strongly disagreed; 32%, 23 out of 72, agreed/strongly agreed). Opinions were evenly divided on whether exempting liabilities subject to nuclear conventions listed in annex V to the ELD was still appropriate under the scope of the ELD.

Participants had also an opportunity to provide further **observations concerning the current scope of the ELD**. Some respondents believed the scope of the ELD was too wide and too far-reaching, whereas others thought that the Directive should cover all activities that may cause pollution. Several respondents thought that diffuse pollution from agriculture (e.g., sewage sludge application) should be covered by the ELD. However, some believed that widening the scope of the ELD could diminish the effectiveness of the Directive and impair the insurance market.

Almost two thirds of the respondents having expressed an opinion (65%, 44 out of 68) thought that issues identified in the recent **recommendations from the European Parliament and the European Court of Auditors**, such as a considerable variability between Member States with regard to ELD enforcement, lack of a secondary civil liability regime including parent company and chain liability, corporate board liability, and a financial compensation scheme have hindered the effectiveness of the ELD. 43 respondents didn’t reply to this question or expressed no opinion/didn’t know the answer.

Almost half of respondents having expressed an opinion (45%, 23 out of 51) thought that the ELD improved the **availability of insurance for ELD liabilities** for large and/or multinational companies. 60 respondents didn’t reply to this question or expressed no opinion/didn’t know the answer. A third of respondents (34%, 16 out of 47) thought that the ELD did the same for small and medium-sized enterprises, while more respondents (43%, 20 out of 47) thought that the ELD did not improve the availability. 64 respondents didn’t reply to this question or expressed no opinion/didn’t know the answer.

Participants were asked to select activities that improved the **efficiency of the ELD framework in some Member States**. National guidance on the ELD and awareness-raising programmes about the ELD were selected respectively by 59% (44 out of 75) and 57% (43 out of 75) of respondents. Among other listed activities, a sizeable number of respondents selected: mandatory financial security (40%, 30 out of 75), consultation procedures between ELD and non-ELD competent authorities to determine if an environmental damage occurrence is an ELD occurrence (36%, 27 out of 75) and registers of ELD occurrences (33%, 25 out of 75).

Participants were also asked to rate the **Commission’s actions undertaken since 2016 to improve the efficiency of the ELD**. For all proposed actions, the biggest proportion of expressed opinions qualified the improvement as limited. This was followed by those who considered that there was a substantial improvement, whereas relatively few considered that there was no improvement. Among the different

actions, the recognition of their merits (as substantial or limited improvement) was the biggest for the guidelines (93%, 66 out of 71), followed by training programmes (88%, 51 out of 58), promoting the availability of the insurance (82%, 45 out of 55), and encouraging the compilation and publication of the ELD public registers (79%, 44 out of 56). Between 40 and 56 respondents (depending on the sub-question) didn't reply to the different sub-questions of this question or expressed no opinion/didn't know the answer.

In addition, out of 74 respondents who expressed their opinion on the guidelines on **the term 'environmental damage' used by the ELD**, 19 (26%) agreed that they provided sufficient clarity on the term, while 42 (57%) believed the objective was fulfilled in part.

Overall costs for operators and competent authorities were considered justified/partially justified by 64% of respondents who expressed their opinion (39 out of 61). Between 48 and 57 respondents (depending on the sub-question) didn't reply to the different sub-questions of this question or expressed no opinion. More than a half of respondents who expressed their opinion thought that following specific **ELD costs** were justified/partially justified: costs for remediating environmental damage by liable operators (70%, 44 out of 63); costs for preventing environmental damage by liable operators (68%, 43 out of 63); costs of insurance for ELD liabilities for operators (62%, 38 out of 61); costs for environmental NGOs and others in case of presenting comments, requests for action and participating in court cases (59%, 32 out of 54); administrative costs of competent authorities (58%, 34 out of 59); costs for competent authorities to remedy (58%, 33 out of 57) and to prevent (57%, 33 out of 58) environmental damage.

In comparison, a fifth of respondents who expressed their opinion (20%, 11 out of 54) said that costs for environmental NGOs were not justified, while around 15% of respondents thought that administrative costs for competent authorities (8 out of 59) as well as costs for competent authorities to prevent (8 out of 58) and to remedy (9 out of 57) environmental pollution were not justified.

Only a minority of respondents (15%, 11 out of 72) thought that the ELD was fully **consistent and coherent**, while 39% (28 out of 72) thought it was consistent and coherent to a substantial extent and 36% (26 out of 72) thought the consistency and coherence were limited. Similarly, very few of respondents (13%, 9 out of 68) thought that the ELD was fully coherent with other relevant EU legislation, policies, and international conventions, whereas 43% (29 out of 68) thought it was coherent to a substantial extent.

The majority of respondents thought that the ELD had either a major or some **added value** in all proposed areas: introduction of a minimum standard for preventing and remediating environmental damage (92%, 73 out of 79); creation of a level playing field for all Member States to prevent and remediate environmental damage (89%, 72 out of 81); reinforcing the 'polluter pays' principle (86%, 70 out of 81); introduction of complementary and compensatory remediation for water and biodiversity damage (84%, 62 out of 74); allowing public participation for interested persons (69%, 54 out of 78) and in the growth of an environmental insurance market (77%, 57 out of 74).

Participants were asked about **stakeholder engagement** in the process of improving the implementation of the ELD at a Member State level. For the governmental authorities the extent of engagement was mostly qualified as 'substantial' (60%, 32 out of 53, against 30%, 16 out of 53, qualifying it as 'limited'). The extent of engagement of other stakeholders' categories was most often qualified as 'limited' (for NGOs this opinion was expressed by 50% of respondents, 25 out of 50; for operators - by 46%, 28 out of 61; for trade organisations - by 44%, 19 out of 43.). However, among the three, NGOs were singled out with another 36%, (18 out of 50) considering their engagement as 'substantial'. For 're/insurers and re/insurers brokers' the opinions were equally divided between 'limited' and 'substantial' (42%, 21 out of 50 for each).