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KU LEUVEN

Maastricht University

Faculteit Rechten

master in de rechten

Masterthesis

Balancing Act: Environmental Liability in the Realm of Insolvency Law

Miroslawa Jablonski

Scriptie ingediend tot het behalen van de graad van master in de rechten, afstudeerrichting rechten

PROMOTOR :

Prof. dr. Matthias STORME

dr. Matteo FERMEGLIA

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Abstract

Deze thesis bestaat uit een beschrijvende en vergelijkende analyse van beschikbare wetgeving en mechanismen om het Europese principe "de vervuiler betaalt" te waarborgen tijdens faillissementsprocedures van private rechtspersonen. De analyse omvat zowel Europese als nationale wetgeving en instrumenten. Daarnaast wordt de relatie tussen milieuaansprakelijkheid en faillissementen als gevolg van milieuschade onderzocht. Verschillende vormen van aansprakelijkheid komen aan bod, elk met hun unieke gevolgen. Aansluitend, besteedt deze thesis aandacht aan verschillende mechanismen om het principe "de vervuiler betaalt" uitwerking te kunnen geven tijdens faillissementsprocedures, waaronder financiële zekerheden, verzekeringen en samenwerkingen die zijn ontstaan in de praktijk. Verder wordt er stil gestaan bij de verantwoordelijkheid van rechtspersonen om hun aansprakelijkheid, die tot insolventie zou kunnen leiden, te beperken.

De bestudeerde theorie wordt aangevuld met voorbeelden uit de praktijk om het gedane onderzoek in de juiste maatschappelijke context te plaatsen. Deze voorbeelden, voornamelijk over de financiële gevolgen van milieuschade, tonen de noodzaak van het ontwikkelen van duidelijk mechanismen en afspraken tussen de verschillende betrokken stakeholders.

Vervolgens volgt een kritische blik van de auteur op de bestaande mechanismen en wetgeving. Deze kritische blik wordt aangevuld met suggesties die betrekking hebben op het uitbreiden van bepaalde bestaande initiatieven, wetgevende hervormingen en algemene opmerkingen met betrekking tot het huidige wetgevend landschap. De belangrijke bevindingen onthullen de behoefte aan een meer geïntegreerde en adaptieve benadering van beleidsvorming, waarbij de nadruk wordt gelegd op het harmoniseren van aansprakelijkheidsregimes en het waarborgen van hollistische juridische uitkomsten.

Als laatste wordt er stilgestaan bij de potentiële invloed van nieuwe wetgevende initiatieven op de huidige aanpak. Ook hier wordt er aandacht besteed aan eventuele leemten met betrekking tot het beter integreren van het principe "de vervuiler betaalt" in insolventie procedures en aansprakelijkheidsmechanismen.

Abstract (ENG)

This thesis consists of a descriptive and comparative analysis of available legislation and mechanisms to ensure the enforcement of the European Polluter Pays Principle during insolvency procedures of private economic entities. The analysis includes both European and national legislation and instruments. Additionally, the relationship between environmental liability and bankruptcies resulting from environmental damage is examined. Various forms of liability are discussed, each with their unique consequences. Subsequently, this thesis pays attention to different mechanisms to give effect to the Polluter Pays Principle during insolvency procedures, including financial securities, insurances, and collaborations that have emerged in practice. Furthermore, the responsibility of legal entities to limit their liability, which could lead to insolvency, is considered.

The studied theory is supplemented with practical examples to place the research in the proper societal context. These examples, primarily concerning the financial consequences of environmental damage, to demonstrate the necessity of developing clear mechanisms and agreements between the various stakeholders involved.

Following this, the author provides a critical review on existing mechanisms and legislation. This critical review is supplemented with suggestions concerning the expansion of certain existing initiatives, legislative reforms, and general comments regarding the current legislative landscape. The key findings reveal the need for a more integrated and adaptive approach to policy-making, emphasising the importance of harmonising liability regimes and ensuring hollistic legal outcomes.

Finally, the potential impact of new legislative initiatives on the current approach is considered. Attention is also given to any gaps regarding better integration of the Polluter Pays Principle principle into insolvency procedures and liability mechanisms.

Declaration of originality

I hereby declare that this thesis was entirely my own work and that any additional sources of information have been duly cited.

I declare that any use of AI was based entirely on my own prompts, work and ideas. It was solely used to restructure sentences, synonym generation and translations.

I certify that, to the best of my knowledge, my thesis does not infringe upon anyone's copyright nor violate any proprietary rights and that any ideas, techniques, quotations, or any other material from the work of other people included in my thesis, published or otherwise, are fully acknowledged in accordance with the standard referencing practices.

I declare that this thesis has not been submitted for a higher degree to any other University or Institution.

Acknowledgements

I want to start by expressing my appreciation to my promotors, Professor Mathias E. Storme and Professor Matteo Fermeglia, for their invaluable support, feedback and trust throughout the writing process. Additionally, I extend my gratitude to Mr. Kristof Windey for his insightful feedback sessions and assistance.

My educational journey did not align with my parents' (Vera and Przemek) initial expectations (being a highschool dropout is usually not what parents imagine for their kid), but their unwavering support enabled me to grow and explore on which path I wanted to continue my life. Despite leaving high school, I eventually obtained my degree. After which I persued paralegal studies at PXL. It was there where I fell in love with Law and decided to attend Hasselt University. Me reaching this point in my life would not have been possible without their patience and support, for which I am sincerely grateful. *Kocham was, mamcia i papcia*.

I am thankful to everyone at UHasselt who contributed to my personal and professional growth. The opportunities I received have played a significant role in shaping the person I am today. I will cary the fond memories of my time at UHasselt with me, everywhere I go.

Lastly, I dedicate this thesis to you, Steven. Your untimely departure this academic year left a void, but I cherish your unwavering belief in me. Despite my shortcomings, you always stood by me. Look, I made it. I know you would have been proud, just as I have always been proud of you.

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List of Abbreviations

BD	Bodemdecreet (Soil Decree)
BW	Burgerlijk Wetboek (Civil Code)
DABM	Decreet Algemene Bepalingen inzake Milieubeleid (Decree General Provisions Environmental Regulation)
EP	European Parliament
EU	European Union
EAP	European Action Plan
ECD	Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EIR	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 June 2019
ELD	Directive 2004/35/CE 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
ECHR	European Court of Human Rights
EMAS	Eco-Management and Audit Scheme
Ger.W.	Gerechtelijk Wetboek (Judicial Code)
Hyp.W.	Hypotheekwet (Mortgage Law)
MS	Member States
OBW	Oud Burgerlijk Wetboek (Old Civil Code)
OVB	Orde Vlaamse Balies (Flemish Bar Association)
OVD	Omgevingsvergunningsdrecreet (Environmentalpermitdecree)
OVAM	Openbare Vlaamse Afvalstoffen Maatschappij (Public Waste Angency of Flanders)
PIL	Private International Law
PPP	Polluter Pays Principle
CSDDD	Directive governing Corporate Sustainability Due Diligence
Sv.	Wetboek Strafvordering (Criminal Procedure Code)
Sw	Strafwetboek (Criminal Code)
TUE	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VCRO	Vlaamse Codex Ruimtelijke Ordening (Flemish Zoning and Building Code)
V.T.Sv.	Voorgaande Titel Wetboek van Strafvordering (Introductory Title to the Criminal Procedure Code)
WER	Wetboek Economisch Recht (Economic Code)

Introduction

"*The Earth is what we all have in common.*" — Wendell Berry.

Environmental challenges, corporate social responsibility and environmental responsibility are current buzzwords in legislation, policymaking and debates. The movement for addressing environmental issues is not new. Since the 1970's scholars have been pushing for legislation and regulation to protect the environment from pollution and destruction. The United Nations Conference on the Human Environment in Stockholm from 1971 was the first of its kind. At this Conference, environmental challenges were first acknowledged as a major issue. Legislators heard this call for change and began creating tools, frameworks and regulations. However, as with every shift in policymaking this created new challenges for all parties involved.

Environmental liabilities can be a significant burden for economic entities facing financial difficulties or bankruptcy. Additionally, the allocation of responsibility for the costs of environmental clean-up is a complex issue that involves considerations from various branches of law. The European Union, Belgian and Flemish legislative bodies have developed legal frameworks for addressing environmental liabilities in the context of corporate insolvency proceedings, but obstacles still exist in ensuring that economic entities are held accountable for their environmental obligations. In other words, enforcing the Polluter Pays Principle during corporate bankruptcies is not as easy as it seems. Following this, the issue at hand is figuring out why it is tough to strike a balance between environmental principles, such as the polluter pays principle, and protecting creditors and environmental liability victims during insolvency proceedings. This issue leads to five primary research questions: 1) what current legislation and legal frameworks are provided in both Environmental and Insolvency Law in relation to this issue, 2) do these instruments ensure the enforcement of the Polluter Pays Principle during bankruptcy proceedings, 3) what securities and guarantees exist to mitigate financial consequences of bankruptcies, 4) what liability regime provides the best outcome to minimise insolvency risks, and 5) what reforms can be implemented to improve the effectiveness of the various instruments studied in this work. This particular issue was chosen, because the interplay between environmental and insolvency law is not always on the forefront when issues related to insolvency proceedings or environmental harm are discussed. This absence of priority related to this topic piqued the interest of this author.

To answer the questions above, a comprehensive literature study and comparative review will be conducted with a primary focus on pertinent environmental and insolvency laws. The legislation and frameworks researched will be situated in European, Belgian and Flemish Regional Law. Where necessary, other branches of law will be brought up to further deepen the understanding of the challenges legislators and economic entities face. To enrich this literature study, desk research has been conducted to analyse the Polluter Pays Principle and different liability approaches. Because of the economic nature of the topic at hand, principles and theories from Law and Economics research have been applied; in addition to existing frameworks and theories found in Law doctrine and jurisprudence.

Following the literature study and desk research mentioned above, there will be a qualitative analysis of the available frameworks and legislation. This analysis aims to explore legislative gaps in the existing instruments, related to enforcement of the Polluter Pays Principle during bankruptcy proceedings. In addition, a selection of cases involving corporate bankruptcies with significant environmental liabilities are provided as illustrative examples. The cases are selected based on their relevance to the research questions. The aim of supplementing theoretical frameworks with real-world scenarios is to gain clarity on areas where the Polluter Pays Principle clashes with current legislation. The chosen research methods have been selected as they seemed the most appropriate within the comparative and quantitative nature of this thesis.

The scope of this thesis is limited to environmental liabilities of private economic entities. Meaning, insolvency procedures and environmental liabilities of public economic entities and natural persons are excluded. This exclusion results in a deeper analysis of one branch of Insolvency Law and provides the opportunity for a detailed analysis. However, a broader scope could be interesting for future research.

Since environmental liabilities often result in tort proceedings, various tort principles will be explored. Special attention will be given to the Belgian tort principles. At the moment of writing this thesis, the Belgian tort principles have been revised and updated to better fit current society. Where possible and necessary both the old and new legislation shall be examined. By exploring tort, different forms of liability as a way to enforce the Polluter Pays Principle will be presented. However, with tort comes insolvency risks. The balance between finding a good liability regime while avoiding insolvency risks is therefore an important aspect of this thesis. Cross-border tort proceedings are excluded, as this would make the scope of this thesis to broad and complex. Therefore, Private International Law will not be investigated in this work.

The analysed instruments related to insolvency proceedings encompass European, Belgian and Flemish frameworks and legislation. However, European insolvency legislation will only be discussed briefly; since the most prominent EU insolvency frameworks govern Private International Law and thus fall outside of the scope of this thesis. Additionally, the primary aim of this thesis is exploring the situations where bankruptcy has already occurred and what the consequences of these proceedings are on environmental liabilities. The prevention of insolvency and bankruptcy, for example through restructuring proceedings, is not the main objective of this work and is therefore not examined in great detail.

European Environmental Law and frameworks play a much bigger role within the scope of this thesis because of their influence on national law. Therefore, contrary to European Insolvency Law, they will be broadly examined. The national legislation will be divided between Federal and Regional legislation. Belgian Federal legislation on this topic is limited, since most of the legislative competencies for the environment rest with the Regional governments. As a result, European and Flemish environmental legislation have the most prominent role in this thesis. Legislative initiatives

from the other regional authorities are not discussed, however they might appear in the form of an example or comparison.

This thesis follows a structured outline. First, an analysis of the current legislation is presented. Second, essential definitions and concepts pertinent to this thesis are outlined. Third, attention is directed towards the existing frameworks aimed at enforcing the Polluter Pays Principle and protecting liability victims during corporate bankruptcies. Forth, a critical examination of all accessible schemes and frameworks will be conducted. Finally, a brief overview of legislative changes and their possible influence on the subject of this thesis will be presented.

The expected outcomes of this thesis include a detailed analysis of the legal frameworks for addressing environmental liability in the context of corporate bankruptcies, as well as an assessment of the effectiveness of these frameworks in practice. As mentioned above, the research will identify areas where the current legal frameworks can be improved. The findings of this research will be of interest to policymakers, legal professionals and other stakeholders involved in Environmental and Insolvency Law. As mentioned above, since the scope is somewhat limited, this thesis can be an instresting first step for future research related to this topic.

Balancing Act: Environmental Liability in the realm of Insolvency Law

1. Setting the scene

1. This first chapter contains a brief, yet comprehensive, analysis of the most prominent legislative frameworks and principles with relevance to this thesis. It will explore *ratio legis*, scope and applicability; and provide interesting side notes for legislation of both the European Union (hereafter: EU) and Belgian legal systems. First, it explores the legal texts as they exist at the moment that this thesis is being written. Future legislation will be discussed later in Chapter 4. Second, special attention will be given to key concepts and definitions, related to both Insolvency and Environmental Law. Lastly, liability regimes and tort principles will be explored as they are significant for a deeper understanding of this thesis.

1.1. Legislation

2. The legislation, frameworks and principles will be presented in the following order. This chapter begins with discussing EU legislation, followed by an examination of the Belgian legal frameworks. Where necessary, reference to future changes of law will be mentioned briefly. It is important to note that this chapter will not contain all available frameworks and legislation; a selection of the most influential ones, in relation to the research questions of this thesis, has been made. Since discussing all possible frameworks and legislation would go beyond the scope of this work. If required and applicable, additional legislation beyond the one specified in this chapter will be referenced later in this work, along with relevant context.

1.1.1. Insolvency Law

1.1.1.1. European Union

3. In the early days of the EU, insolvency proceedings were not included in its competencies. As the EU grew over time, the areas of involvement of the EU have expanded due to the revision of the founding Treaty[1]. Since the Lisbon Treaty of 2009, common foreign and security policy, police and judicial cooperation were integrated into the competencies of the EU legislative bodies. This opened the door for EU legislators to work on frameworks for insolvency procedures. Nevertheless, the vast majority of Insolvency Law in the EU still consist of national law of its Member States (hereafter: MS).[2]

[1] EEC Treaty.
[2] Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 december 2022.

4. The EU has developed quite a few instruments related to insolvency. The most significant one is the European Insolvency Regulation[3] (hereafter: EIR). This Regulation deals with jurisdiction, applicable law and assistance within the EU. Another well-known significant instrument regarding insolvency on EU level is the Brussels Ia Regulation.[4] This Regulation governs the enforcement and recognition of ordinary judgements that fall outside of the scope of the EIR.[5] However, both of these instruments fall outside of the scope of this thesis. Since neither cross-border pollution, nor cross-border insolvency proceedings will be discussed. They are mentioned here, to showcase that the EU has taken multiple steps toward creating insolvency legislation.

5. Later in this thesis, time will be spent on why environmental liabilities and insolvency have a complicated 'relationship'. First, as one can imagine a bankrupt debtor will not be able to compensate victims in instances where environmental damages occurred. Second, the existing liability regimes contain an insolvency risk. Meaning that there is a risk that a liability claim could lead to insolvency or bankruptcy of the economic entity (*infra*). Therefore, it is important to prevent the latter, for example, though interventions before the debtor finds themselves in such a position. By emphasizing prevention, the occurrence of insolvency and, consequently, unpaid environmental damages can potentially be averted. Keeping this point of view in mind, it is worth mentioning that the EU ~~recast~~ its Directive on restructuring and insolvency[6] in the year 2023. Two objectives that stand out, are highlighted hereafter. First, this Directive aims to remove differences between national legal systems concerning preventive restructuring, insolvency, discharge of debt and disqualifications. Its goal is to ensure that viable economic entities, that find themselves in financial hardships, have access to frameworks which enable them to continue with their activities. In other words, these frameworks provide a second chance to honest insolvent or over-indebted economic entities.[7] Second, MS are encouraged to provide frameworks and measures in their national law to prevent insolvency proceedings by prioritising restructuring. To ensure effectiveness the procedures should be flexible.[8] By providing minimum standards for the content of a restructuring plan, this Directive enables MS to require additional explanations and/or conditions in restructuring plans (e.g. criteria for creating groups of creditors). This allows MS to adopt frameworks that fit their individual needs.[9]

6. Special mention should be given to Recital 71. It contains a consideration regarding negligent management decisions that negatively impact the value of the debtor's estate.[10] This could potentially lead to creditors receiving protection from management decisions that cause environmental damage, thereby decreasing the value of the bankruptcy estate. For example, soil

[3] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast 09/01/2022).
[4] Regulation (EU) No 1215/2012.
[5] R. VAN GALEN, *An introduction to European Insolvency Law*, Deventer, Kluwer, 2021, 1.
[6] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Hereafter: Directive on restructuring and insolvency).
[7] Recital (1) Directive on restructuring and insolvency.
[8] Recital (29) Directive on restructuring and insolvency.
[9] Recital (42) Directive on restructuring and insolvency.
[10] Recital (71) Directive on restructuring and insolvency.

contamination can lower the value of real estate, posing challenges in selling the property and repaying creditors. Additionally, this Recital urges Member States to hold management accountable for breaching their duty of care. However, the Directive itself does not provide details or frameworks to manage environmental claims or the Polluter Pays Principle (hereafter: PPP) in restructuring proceedings.

1.1.1.2. Belgium

7. Because Belgium is a MS of the EU, national legislation is subjected to influence of EU law and case law of the European courts. Despite this influence, Belgian Insolvency Law is mostly governed by national law. The legislative competencies regarding Insolvency Law lay under the jurisdiction of the Federal legislative bodies. Most aspects related to the insolvency and bankruptcy proceedings can be found in the Economic Code and Judicial Code. Provisions related to insolvency that are specifically designed for a certain sector or situation will often be included in legislation governing those specific sectors or situations.

1.1.1.2.1. BOEK XX - Wetboek Economisch recht (Economic Code)

8. Most frameworks concerning insolvency under Belgian Law can be found in Book XX, of the Economic Code (Wetboek Economisch Recht, hereafter: WER). In Belgium, bankruptcy proceedings are "the last resort" when economic entities find themselves in financial troubles. Before initiating bankruptcy proceedings, economic entities can use of some of the restructuring frameworks offered under Belgian insolvency law, if they meet the necessary conditions. These frameworks include, but are not limited to: temporary measures[11], (out of court) reorganisation/restructuring[12] or mediation with creditors on payment plans[13]. These measures are designed to avoid bankruptcy and aim to restore the financial situation.[14]

9. If the above-mentioned measures were not successful or when bankruptcy is seen as the only viable option, bankruptcy proceedings will be initiated. Article XX.98 WER states that the goal of the bankruptcy proceedings is to place the debtor's assets under the control of a bankruptcy trustee[15] whose main objective is to ensure the assets are optimised[16], for example by selling the company warehouse, and to divide profits from the assets amongst the creditors.

10. Under Belgian law, a debtor is insolvent when they have ceased payment in a lasting manner and their ability to get credit is disrupted.[17] The latter means they, for example, are no longer able to get new investments or loans. As soon as this occurs, the debtor is required by law to file a declaration at the court clerk's office of the Insolvency Court.[18] The initiation of insolvency

[11] Titel III WER.
[12] Titel III and Titel V/1 WER.
[13] Titel III WER.
[14] Titel III WER.
[15] In Dutch: curator.
[16] M.E. STORME, *Insolventierecht in kort bestek*, Gent-Mariakerke, 2023, 587.
[17] Art. XX.99 WER.
[18] Art. XX.102 WER.

proceedings is not solely the prerogative of the debtor; creditors, the public prosecutor's office or a temporary bankruptcy trustee also hold the right to initiate such proceedings under certain conditions.[19]

11. Within the scope of this thesis, it is interesting to note that the bankruptcy trustee has certain obligations when confronted with possible soil contamination regarding to properties in the bankruptcy estate (*infra,* Chapter 2.2).[20] An other interesting note is the fact that the WER does not provide specific frameworks for environmental liability claims in insolvency procedures.

1.1.1.2.2. Gerechtelijk Wetboek (Judicial Code)

12. Additional legislation related to insolvency proceedings can be found in the Belgian Judicial Code (Gerechtelijk Wetboek, hereafter: Ger.W.). It contains provisions on seizures and garnishments. Since this falls outside of this thesis's scope, it will not be discussed.

1.1.1.3. Key definitions for insolvency frameworks

13. Throughout this thesis, several specific terms and concepts will be used. To ensure their meaning is clear within the context of this work, the following section provides clarifications, context, and definitions.

1.1.1.3.1. Bankruptcy and insolvency

14. To prevent confusion, the difference between insolvency and bankruptcy proceedings should be kept in mind. Since these concepts carry distinct interpretations within this thesis. When the term "insolvency proceedings" is used, it includes all (legal) proceedings pertaining to every facet of insolvency. This entails, but is not limited to: temporary measures, restructuring, bankruptcy or mediation with creditors. "Bankruptcy proceedings" strictly encompasses the proceedings where a bankruptcy trustee has been appointed by the Insolvency Court to optimise and allocate the available assets amongst creditors. This difference is important because the rights of creditors might vary from those in bankruptcy proceedings and, for example, restructuring efforts.

1.1.1.3.2. Preferential treatment of creditors

15. During bankruptcy proceedings, some creditors are given preferential treatment because they have a certain status or collateral. As a result, their rights on the assets of the bankruptcy estate come before those of other creditors. The primary rules governing this preferential treatment can be found in: 1) Title XVII for real rights on movables; 2) and Title XVIII for preferential treatment for movables and immovables, Oud Burgerlijk Wetboek (Old Civil Code,

[19] Art. XX.100, lid 1 WER.
[20] Art. 34 and 123, §1 Bodemdecreet.

hereafter: OBW). Title XVIII is also referred to as Hypotheekwet (Mortgage Law, hereafter: Hyp.W.). Examples are the preferential treatment of: the seller of a good for its the price[21], the landlord[22] or the pledgee[23]. Besides these primary rules, other forms of preferential treatment are often included in other legislative texts. For example, the preferential treatment of the pledgee of financial instruments[24]. As a result of this 'scattered' legislation, insolvency practitioners and bankruptcy trustees need to regularly update their knowledge in order to ensure the correct treatment of creditors.

16. Preferential treatment is mentioned, because it influences the outcome of the liquidation for creditors of the economic entity during bankruptcy proceedings. As will become clear later (*infra*, Chapter, 2.1), some financial securities and guarantees enjoy preferential treatment. Meaning, that the financial interests of the holders of these securities and guarantees are somewhat protected.

1.1.2. Environmental Law

17. To discuss the most relevant Environmental Law frameworks, an identical sequence as in the preceding chapter will be maintained, addressing first the European level due to its impact on national law, and subsequently, Belgian national law. Where necessary a distinction between Federal and Regional legislation will be made, because environmental policy discretion in Belgium is divided between the Federal and Regional jurisdiction.

1.1.2.1. European Union

1.1.2.1.1. Environmental Liability Directive

18. Directive 2004/35/CE on environmental liability with regard to prevention and remedying environmental damage (hereafter: ELD) entered in to force in 2007 and has been reviewed in 2019. As can be deducted from the title, it aims to prevent and remedy environmental damages.[25]

19. The ELD does not speak of economic entities, corporations or companies. It uses the expression: operators. This broadens its scope beyond economic entities, to other operators such as natural persons. In light of the exclusion of natural persons from this thesis, the effect of the ELD on natural persons will not be discussed.

20. The definition of operator can be found in article 2(6) ELD:

[21] Art. 27, 1º Hyp.W.
[22] Art. 20, 1º Hyp.W.
[23] Art. 76 Pandwet.
[24] Art. 11 Wet Financiële Zekerheden.
[25] Recital (11) ELD.

"*Any natural or legal, private or public person who operates or controls the occupational activity, or where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity*".

21. The scope of the ELD can be found in article 3:

"*1. This Directive shall apply to:*
(a) 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;
(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

2. This Directive shall apply without prejudice to more stringent Community legislation regulating the operation of any of the activities falling within the scope of this Directive and without prejudice to Community legislation containing rules on conflicts of jurisdiction.

3. Without prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage."

22. The scope of the ELD is further defined by related EU legislation, more specific: the Birds Directive[26], Habitats Directive[27], Water Framework Directive[28], Marine Strategy Framework Directive[29] and Industrial Emissions Directive[30]. As a result of the related legislation, environmental damage that falls within the scope of the ELD is damage to habitats, species, water and soil.[31]. In March 2021 the Commission adopted guidelines[32], based on established caselaw, to further define and clarify the scope of 'environmental damage' in the ELD.

23. Not all environmental damages fall within the scope of the ELD. For example, excluded environmental damages are damages caused by: an armed conflict, a natural phenomenon of

[26] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.
[27] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
[28] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.
[29] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).
[30] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (recast).
[31] Art. 2(1) ELD.
[32] Commission Notice Guidelines providing a common understanding of the term 'environmental damage' as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage 2021/C 118/01.

exceptional, inevitable and irresistible character and nuclear accidents.[33] Besides the exclusions mentioned in article 4 of the ELD, the following matters are excluded as well: personal injuries, damage to private property or economic loss. However, being excluded from the ELD does not affect any rights regarding these types of damages, such as rights of compensation granted under other international agreements regarding civil liability.[34] Meaning, that there are other legal grounds to pursue compensation.[35]

24. The ELD strongly relies on the PPP. Meaning the operator whose activity caused environmental damage or poses the threat of such damage will be held financially accountable. With this approach, the EU hopes to motivate operators to adopt measures and to develop strategies for minimising their environmental risks.[36] To ensure operators are financially secure in the case of environmental damage, the ELD stimulates MS to encourage operators to get insurance and/or provide other forms of financial securities.[37] A broader analyses on these financial securities will be presented later in Chapter 2.1.

25. An interesting side note can be found in the content of Recital 25, that grants non-governmental organisations the right to contribute to the effective implementation of the ELD. By allowing this, competent bodies that monitor environmental risks have an extra set of eyes to look out for threats or already occurred damages.

1.1.2.1.2. Environmental Crime Directive

26. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (hereafter: ECD) stipulates the criminalisation of serious violations of environmental legislation. It allows MS to use criminal sanctions in order to sanction those who have caused harm to the environment and is without prejudice to other systems of liability for environmental damage.[38] It provides minimum rules. In other words, MS have the policy discretion to adopt and/or maintain more stringent measures.[39] The reasoning behind allowing criminal sanctions, is the believe that it will raise compliance due to the fact that criminal penalties demonstrate a social disapproval that cannot be achieved by administrative penalties or compensation mechanisms under civil law.[40]

27. First, it is important to note that the ECD does not mention administrative enforcement.[41] The measures in this Directive relate strictly to criminal law.[42] Some see this is a missed opportunity, since a lot of MS rely heavily on administrative enforcement for environmental law

[33] Art. 4 ELD.
[34] Recital (11) ELD.
[35] Recital (14) ELD.
[36] Recital (2) ELD.
[37] Art. 14 and Recital (27) ELD.
[38] Recital (11) ECD.
[39] Recital (12) ECD.
[40] Recital (3) ECD.
[41] M. FAURE, *Environmental liability of companies*, Brussels, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 92.
[42] Art. 1 ECD.

enforcement. Belgium, for example, is among the countries which rely on administrative legislation for environmental law enforcement.[43] Second, the scope of the ECD is limited to the offences listed by article 3 of this Directive. Some examples are: the discharge of materials into soil which cause death or serious injury to any person or the quality of the soil[44], the killing of specimen of protected wild fauna or flora[45]; or any conduct which causes the significant deterioration of a habitat within a protected site[46]. Third, the ECD only applies to the Directives listed in the ECD's Annexes.[47] This further narrows down the scope. Some examples are: Directive on disposal of waste oils[48], Directive concerning the quality of bathing water[49] and Directive on the conservation of wild birds[50]. Lastly, for the ECD to apply, the economic entities' actions must be unlawful and committed with intent, or at the very least demonstrate serious negligence. Inciting, aiding and abetting the offences outlined in article 3 also falls under the scope of the ECD.[51]

28. It is important to note that during the writing of this thesis, the approach to environmental criminal law enforcement has undergone significant changes. The Council of the European Union and the European Parliament adopted a new Directive on the protection of the environment through criminal law in 2024. The impact of this new Directive on the ECD and its consequences will be discussed later in Chapter 4.2.

29. The ECD plays an important role within the scope of this thesis because it provides the necessary frameworks for criminal environmental liability of economic entities and their managers. It strengthens the enforcement of the PPP.

1.1.2.2. Belgium

30. In Belgium, the jurisdiction for Environmental Law is divided amongst the Federal and Regional governments.[52] The Federal government has limited competencies when it comes to environmental matters. They are responsible for product regulation, protection against radiation and managing radioactive waste.[53] Other environmental matters fall under the jurisdiction of the Regions. The Flemish government has created multiple tools to regulate environmental matters on its territory. To discuss them all in great detail would go beyond the scope of this thesis. However, highlighting some of them is important for a good understanding of the topic at hand. Before discussing the merits of this legislation, it should be noted that the majority has its roots in Administrative Law.

[43] Titel XVI. Toezicht, handhaving en veiligheidsmaatregelen, DABM.
[44] Art. 3(a) ECD.
[45] Art. 3(f) ECD.
[46] Art. 3(h) ECD.
[47] Recital (9) ECD.
[48] Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils.
[49] Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water.
[50] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.
[51] Art. 4 ECD.
[52] Art. 35 Gw.
[53] Art. 6, §1, II, lid 2 BWHI.

31. First, the Decree General Provisions Environmental Regulation (Decreet Algemene Bepalingen Milieubeleid, hereafter: DABM). As can be deducted from its title, this Decree contains the general provisions of Flemish environmental legislation. Each chapter encompasses one aspect of environmental legislation. It should be mentioned that Title XVI DABM contains specific provisions for environmental law enforcement, which are applicable to both Belgian and EU environmental legislation.[54] Furthermore, this Title defines the difference between environmental infringements[55] and environmental crimes[56] under the DABM. Additionally, providing procedures and frameworks for environmental law enforcement, such as: administrative[57] and criminal[58] enforcement, sanctions[59] and competent authorities[60]. Because this Title of the DABM contains criminal sanctions, it is regarded as the implementation of the above mentioned ECD. As for permits specifically, not all are governed by the DABM. Some provisions regarding building permits can be found in the Flemish Building and Zoning Code (Vlaamse Codex Ruimtelijke Ordening, hereafter: VCRO). These provisions mainly concern urban planning and other related permits.

32. Second, the provisions for obtaining a permit to conduct certain activities (e.g. the exploitation of a waste management plant or changing the vegetation of an area) can be found in the Environmental Permit Decree (Omgevingsvergunningsdecreet, hereafter: OVD). The OVD is connected to multiple other legislative frameworks and contains administrative procedures that are related to these before mentioned frameworks.

33. Third, certain activities are classified in Categories which have their own exceptions, emission limits or special procedures that need to be followed (e.g. for obtaining an environmental permit). These activities are believed to pose a risk to the environment.[61] They are divided in three Categories that can be found in the annexes of VLAREM II.

34. Forth, the Soil Decree (Bodem Decreet in Dutch, hereafter: BD) contains the procedural frameworks for soil remediation for different types of soil contamination. This Decree also appoints the person responsible for conducting the soil investigations and remediations. As noted above, it contains special provisions[62] relating to the responsibilities of bankruptcy trustees (*infra,* Chapter 2.2).

35. Lastly, Belgian Criminal Law has made it possible for legal persons to be criminally charged.[63] Meaning that legal persons can be prosecuted for environmental crimes that are recognised by Belgian Law, as encouraged by the ECD and made possible by the DABM (*supra*, nr. 32).

[54] Art. 16.1.1, lid 4 DABM.
[55] Art. 16.1.2, 1º DABM.
[56] Art. 16.1.2, 2º DABM.
[57] Hoofdstuk IV. DABM.
[58] Hoofdstuk VI. DABM.
[59] Art. 16.4.7 DABM.
[60] Hoofdstuk III. DABM.
[61] Bijlage 1 VLAREM II.
[62] Art. 34 j. art. 123 BD.
[63] Art. 5 Sw.

1.1.2.3. Environmental Law principles

36. Next to legislation, the EU developed Environmental Law principles that carry a lot of weight in the creation of new legislation and environmental law enforcement. These principles are applicable to all EU policies, even non-environmental ones. It shows the ambition of the EU to achieve its environmental goals, as it strengthens their approach by not solely relying on environmental policies and legislation.[64]

1.1.2.3.1. Polluter Pays Principle

37. The foundation for the PPP can be found in article 191(2) TFEU. This article holds that:

> "*Union policy on the environment (...) shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay*".

38. Applying the PPP is mandatory for EU legislators when enacting legislation regarding environmental policy areas. For other areas, even though they can have a significant environmental impact (e.g. transportation), EU legislators are not bound by the PPP.[65] Meaning they have the policy discretion to either apply the PPP or not. The latter somewhat clashes with the above-mentioned ambition of the EU regarding environmental law legislation.

39. As briefly mentioned before, the objective of the PPP is holding the economic entity that caused the environmental pollution accountable for the harm it caused. Speaking from an economic standpoint, the PPP internalises negative environmental externalities.[66] When applied correctly, the PPP provides incentives to avoid damages: clean-up costs can be a heavy financial burden, thus by avoiding pollution altogether, paying for the clean-up costs can be avoided. If proper application fails, the costs end up being paid by public funds. Indirectly making the citizens pay for pollution.[67] The implementation of the PPP varies between MS, resulting in incomplete and uneven implementation[68].

1.1.2.3.2. Other Environmental Law principles

40. Besides the PPP, other environmental principles serve as a guide to the EU for situations that are not explicitly mentioned by law. They aim to incorporate environmental considerations

[64] A. ROWELL and J. VAN ZEBEN, *A guide to EU environmental law*, Oakland, University of California Press, 2021, 47–50.
[65] EUROPEAN COURT OF AUDITORS, *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 12, Luxembourg, 2021, ISBN 978-92-847-6308-5, 8.
[66] EUROPEAN COURT OF AUDITORS, *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 12, Luxembourg, 2021, ISBN 978-92-847-6308-5, 6.
[67] Commissioner for Environment, Oceans and Fisheries Virginijus Sinkevičius.
[68] EUROPEAN COURT OF AUDITORS, *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 12, Luxembourg, 2021, ISBN 978-92-847-6308-5, 5.

into non-environmental policies. Because of this influence, they are summarised briefly in this chapter.[69]

41. The Precautionary Principle seeks to minimise harm form *unknown* environmental risks.[70] Contrary to this, the Preventive Principle seeks to minimise harm from *known* environmental problems.[71] The Rectification at the source Principle aims to prevent further harm by addressing the course of the environmental problem.[72] The Integration Principle holds that "*environmental protection measurements should be taken in to account in defining and implementing other Union policies and activities, in particular with a view to promoting sustainable development*".[73] Last but not least, Sustainable Development can be found in multiple relevant articles.[74] It aims to strike a balance between economic, social, and environmental development while promoting the sustainable management of global natural resources.

42. The abovementioned principles will be kept in mind when discussing suggestions to improve legislation and frameworks later in this thesis.

1.2. Guidelines and soft law

43. Guidelines and soft law are useful tools in establishing governance structures for economic entities. However, they are non-binding instruments. This means that not adhering to them has no legal consequences *sensu stricto*. Nevertheless, soft law and guidelines do influence establishing the appropriate level of due care and industry standards for examining if an economic entity is, partially, liable or not. Hence, if economic entities decide to ignore them completely, it could raise their risk of being exposed to environmental liabilities, expensive lawsuits and the possibility of insolvency or bankruptcy because of those liability claims.[75] Examining all available soft law and guidelines related to the topic at hand would exceed the objective of this thesis. Instead, a few examples are briefly presented below to illustrate the importance of these frameworks in shaping legislative structures and corporate governance.

44. A first example can be found in the work of the OECD, an international organisation which aims to build evidence-based policies around topics such as: environmental, economic and social challenges.[76] As to environmental challenges, the Due Diligence Guidance for Responsible Business Conduct contains multiple valuable guiding principles. For example, in this guide the OECD presents the importance of Environmental Impact Assessments (hereafter: EIA) by economic entities. Such assessments aim to limit environmental risks such as: ecosystem degradation, destruction of forest

[69] A. ROWELL and J. VAN ZEBEN, *A guide to EU environmental law*, Oakland, University of California Press, 2021, 47–50.
[70] Art. 191(2) TFEU.
[71] Art. 191(2) TFEU.
[72] Art. 191(2) TFEU.
[73] Art. 11 TFEU.
[74] E.g. art. 3 *juncto* art. 21 TEU.
[75] D. PETROPOULOU IONESCU and M. ELIANTONIO, "Soft Law Behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change." *European Journal of Risk Regulation*, 2023,*14*(2), 292-312.
[76] As found on the "about page" of the OECD: https://www.oecd.org/about/.

and biodiversity, water pollution.[77] Following this Guide assists economic entities with establishing due diligence procedures to limit their environmental liability risks. In relation to insolvency, the OECD developed an Insolvency Indicator.[78] This indicator serves as a summary of available insolvency frameworks that aim to promote entrepreneurship through restructuring efforts for honest failed economic entities or help non-viable economic entities in making a timely and effective exit of the market.[79]

45. A second example can be found in the EU Action Plans (hereafter: EAP). These are non-binding EU instruments that aim to facilitate the development regarding the implementation of EU Law and steps to be taken to reach EU-goals.[80] As for the environment, the current EAP is the 8th EAP. Its goal is to guide environmental policy until 2030. There is currently no EAP that strictly focuses on insolvency. But the EAP on Building a Capital Markets Union does include several goals and recommendations regarding improving insolvency legislation as a means to strengthen the Capital Markets Union.[81]

1.3. (Strict) liability and negligence

46. Some scholars refer to (strict) liability and negligence as 'civil responsibility'.[82] Both are significant in defining the frameworks for the consequences of environmental pollution, since the two of them have a different financial impact. This financial impact, in its turn, could influence the risk for economic entities to find themselves in bankruptcy or insolvency proceedings as a result of environmental law enforcement. Because of this, it is important to spend some time on discussing liability and negligence within this work. This chapter touches upon general conceptions related to liability and negligence, the Belgian tort principles and a special liability mechanism for managers of economic entities.

1.3.1. General insights on liability and negligence

47. Negligence and (strict) liability are terms commonly used in tort proceedings. The reasoning behind mentioning tort in this work, follows from the fact that environmental damages usually occur outside of a contractual relationship and thus fall under tort. A typical example of tort in an environmental lawsuit could be the following situation: a factory is releasing harmful chemicals into a nearby river, resulting in contamination of the water supply. This contamination causes harm to residents downstream who rely on the river for drinking water and fishing. These

[77] OECD, *OECD* Due Diligence Guidance for Responsible Business Conduct, 2018, 39.
[78] https://www.oecd.org/economy/growth/oecd-insolvency-indicator.htm.
[79] C. ANDRÉ and L. DEMMOU, "Enhancing insolvency frameworks to support economic renewal", *OECD Economics Department Working Papers*, 2022, No. 1738, OECD Publishing, Paris, https://doi.org/10.1787/8ef45b50-en.
[80] EUROPEAN COMMISSION, *What is an Action Plan*, onuitg. EU publicatie, https://ec.europa.eu/futurium/en/action-plans/what-action-plan.html.
[81] EUROPEAN COMMISSION, communication from the Commission to the European Parliament, the Council, the Europeand Economic and Social Committee and the Committee of the Region: Action Plan on Building a Capital Markets Union, Brussels, 30 september 2015.
[82] R. COOTER and T. ULEN, *Law and Economics 6th edition,* Berkeley Law, Berkeley, 2016, 188.

residents could, if the necessary legal conditions are met, sue the factory for damages based on negligence and/or liability (depending on the available scheme in their legal system).

48. Tort consists of civil suits, usually between private parties. The usage of the wording "usually between private parties" is deliberate, as more and more tort suits involve government bodies. This phenomenon is sometimes referred to as 'government liability'. [83] A relevant example within the context of this work could be the situation where the government has failed to timely enforce the PPP, which resulted in significant environmental degredation. Not enforcing the PPP within a reasonable timeframe means that the government did not act as a 'normal diligent and prudent authority' and can therefore be liable.[84]

49. It should be noted, that there is a difference between intentional tort and unintentional tort. Intentional tort, so named, because the injurer inflicts the harm on purpose. In most cases intentional torts are crimes as well. Thus, the victim has the choice between a criminal procedure or a civil suit. Unintentional tort typically starts with some kind of accident, the injurer did not cause the harm on purpose.[85] An example for the former could be the intentional negligence by the manager of a factory to replace a broken air-pollution filter, knowing that it will cause harm to the environment and nearby residents. An example of the latter could be an accidental oil spill after a truck accident. In this case, the truckdriver did not spill the oil on purpose, yet harm still occurred.

50. The ELD, has an unique approach on tort and liabilities. Whereas the traditional liability and tort systems of most MS govern damage to property, economic loss or personal injury; the ELD focusses on pure ecological damage, with the PPP as its basis. This damage encompasses the damage to soil, water, protected species and habitats (*supra*, nr. 22). Liability regimes under the ELD are categorised in two regimes. First, strict liability for operators that fall within the scope of Annex III (e.g. waste management) and cause damage to soil, water, protected species and habitats. Second, fault-based liability and negligence for those who do not fall with the scope of Annex III and cause damage to protected species and habitats.[86] However, it should be noted that the number of cases brought before courts where the ELD was applied is relatively low.[87] Additionally, it is held that the ELD adopts a administrative system rather than a pure civil liability approach.[88] Finaly, the ELD can only be enforced by public authorities, meaning private parties cannot bring a claim before a court against a liable operator. Making it a system of public liability.[89]

[83] CORNELIS L. and VAN HOE A., "Overheidsaansprakelijkheid voor een onzorgvuldige wetgever: een wegje maar geen autostrade", Juristenkrant 2023, afl. 464, 3.
[84] Rb. Antwerpen, 15 januari 2021, nr. 21/851.
[85] R. COOTER and T. ULEN, *Law and Economics 6th edition*, Berkeley Law, Berkeley, 2016, 188.
[86] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 14.
[87] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 125.
[88] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 29.
[89] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 29.

1.3.2. Belgian tort principles

51. Under Belgian law the primary rules governing tort can be found in article 1382 – 1386 OBW. The following paragraphs will focus on article 1382 – 1384 OBW. Article 1385 and 1386 OBW will not be discussed, since they are not relevant for the topic this thesis.

52. Currently, the Belgian tort principles are the subject of significant legal reforms. In the future, the primary rules governing tort can be found in Book 6 Burgerlijk Wetboek (Civil Code, hereafter: BW). To safeguard the principle of legal certainty, the BW contains transitional law. Art. 44 of the transitional law statue regarding Book 6 states that for damages that occurred before the new law entered in to force, the OBW will still apply. Future damages, that have not yet manifested before the entering in to force of Book 6 BW, do not fall under this transitional law. Thus, for those damages the new tort principles will apply. For now, the rules from art. 1382 – 1384 OBW still apply and are therefore briefly explained below.

53. Article 1382 OBW contains the principle known by Belgian practitioners and scholars as: "fault – harm – causality", meaning that if a person inflicts harm on someone else due to a fault, they are held liable for this harm and have an obligation to compensate the victim, if there is a causal link between the fault and the harm that occurred. This type of liability is also referred to as: fault-based liability. The fault-element contains two conditions that have to be met in order for article 1382 OBW to apply: 1) objective element; behaviour that breaks the law or the general standard of care, and 2) subjective element; the person that caused the harm has to have the legal capacity to incur liability.[90] This last element caused issues for situations where legal persons are involved, as according to Belgian law legal persons do not have this capacity. To counter this obstacle, the Belgian legal system developed the "organ theory", trough jurisprudence and doctrine. By applying this theory, a legal person can be liable trough the actions of the people that represent the legal person (the organs). For this theory to apply, the fault has to occur when the organ is conducting behaviour withing their assigned competencies (e.g. The CEO, in an effort to cut costs, decides to illegally dump toxic waste into a nearby river, violating environmental laws).[91] The same principles apply for instances where a (legal) person caused harm by being negligent or incautious, as set out in article 1383 OBW.

54. Article 1384 OBW contains a strict liability regime for harm caused by a defect in a good or a third person. In other words, not only is a (legal) person liable for its own behaviour, they are also held accountable for persons that are under their supervision or goods that resort under their care. This means that a victim does not need to prove a fault of the (legal) person, the causal link between the damage caused by a defect in a good and the loss suffered suffices.[92] An example of such an defect good could be a faulty machine that leaked oil in a nearby pond.

[90] I. SAMOY and S. STIJNS, *Verbintenissenrecht*, 1bis, Brugge, die Keure, 2020, 52.
[91] I. SAMOY and S. STIJNS, *Verbintenissenrecht*, 1bis, Brugge, die Keure, 2020, 67.
[92] I. SAMOY and G. JOCQUÉ, *Schadevergoedingsrecht*, Leuven, Acco, 2022, 8.

2. Current approach

55. This chapter is dedicated to available schemes that protect either the PPP, creditor rights or both simultaneously. An identical sequence as in the preceding chapters will be maintained, addressing first the European, and subsequently, Belgian schemes and frameworks. A great deal of the schemes discussed in this chapter fall outside of Environmental and Insolvency Law and rely on voluntary participation of economic entities. Some, however, are mandatory because of the before mentioned laws. First, various kinds of financial securities and guarantees will be discussed. Second, this chapter touches upon the beforementioned obligations of the bankruptcy trustee during bankruptcy proceedings related to soil remediation and the frameworks developed to support this obligation. Third, environmental liability of companies will be examined. Lastly, the monetary efforts, of both the EU and Belgium, to mitigate environmental harm will be briefly addressed by providing some illustrative examples.

2.1 Financial securities and guarantees

56. As highlighted earlier, the ELD advocates for the establishment of financial safeguards to address insolvency concerns.[93] This proactive approach facilitates the application of the PPP should insolvency arise. However, it should be noted that there is no formal duty under the ELD to provide financial guarantees; the ELD merely encourages MS to urge economic intities to use financial securities.[94] Additionaly, the ELD contains a provision[95] that allows competent authorities to recover the funds that were spent on preventive or remedial actions. Still, in practice this may not always suffice as illustrated with the example below.

57. An Italian case from 1995 illustrates the critical need for financial securities when polluters face insolvency issues. Despite that the facts occurred a long time ago, this case remains profoundly relevant. The scenario unfolds with an Italian asbestos producer declaring bankruptcy after ceasing production. Prior to the commencement of the bankruptcy proceedings, the company had initiated environmental clean-up efforts, responding to a request from the Italian Ministry of Environment. However, once the bankruptcy proceedings commenced, the appointed bankruptcy trustee halted all financing for the environmental remediation. Consequently, the burden of financing the clean-up fell upon the government, necessitating the use of taxpayer and EU funds. Despite the completion of the cleanup efforts in 2019, the authorities faced significant challenges in recovering the incurred costs. With the company having gone through bankruptcy, the prospects of recuperating these funds remain dim.[96]

[93] Art. 14(1) ELD.
[94] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 14.
[95] Art. 8(2) ELD.
[96] EUROPEAN COURT OF AUDITORS, *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 12, Luxembourg, 2021, ISBN 978-92-847-6308-5, 32-33.

58. Before exploring various types of financial securities and guarantees, it's worth noting that Insurance Europe[97] conducted a study[98] on EU-level financial securities under the ELD. The study concluded that a 'one size fits all' approach for insurance policies would not be beneficial or feasible and that such an approach could hinder the free development of the insurance market. Furthermore, they stated that mandatory insurance could result in a significant price increase for the premiums in existing insurance schemes and that there would be less available options to choose from for consumers (economic entities). In addition, Insurance Europe advises against an EU-wide fund as this would pose a moral hazard. Some arguments presented by Insurance Europe regarding this moral hazard include:

- It would penalise economic entities who buy adequate insurance with a higher cost, as prices for premiums could increase and contributions to the fund would create an additional financial burden. Whereas those who do not contribute, or do not contribute in an equal manner, would be rewarded when the fund would take over a part or all their liability;
- Unless the fund would set certain investment requirements, economic entities would lose the incentive to take additional measures for risk prevention and risk management. Since the fund would pay out regardless of whether they invested or not. This could increase the risk of environmental disasters;
- Funds come with a costly and difficult administrative burden.

59. In contrast, scholars argue that insolvency concerns should be the main reason for implementing mandatory financial securities and guarantees. Because insolvency leads to underdeterrence and failure to compensate the victim. In other words, insolvency can cause issues for the ELD goals to be met.[99] Additionally, some authors argue that implementing liability regimes without the requirement of providing a mandatory financial security to remedy potential insolvency, theoretically, should not be allowed. Since the lack of these financial remedies can hinder the remediation of potential pollution.[100]

2.1.1. Insurance

60. With the above-mentioned study and concerns in mind, the first analysis in this chapter pertains to both mandatory and voluntary insurance schemes. The reach of the EU is limited for voluntary insurance schemes. As a result, national law of MS plays a crucial role in providing the necessary frameworks for insurance companies to be able to organise environmental liability insurance. The most common insurance policies, related to ELD liabilities, appear under one of these three categories: 1) environmental extensions to general liability insurance, 2)

[97] Insurance Europe is the European insurance and reinsurance federation. Through its 36 member bodies (the national insurance associations) it represents all types and sizes of insurance and reinsurance undertakings.
[98] ISURANCE EUROPE, *Key messages on the EU Environmental Liability Directive*, onuitg. Study, 2022, https://www.insuranceeurope.eu/publications/2690/key-messages-on-the-eu-environmental-liability-directive/download/Key+messages%20on%20the%20EU%20environmental%20liability%20directive.pdf.
[99] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 56.
[100] K. DE SMEDT, "Schaliegaswinning: kan de bestaande Europese regelgeving het herstel van potentiële milieuschade garanderen?", MER, 2016, 187.

environmental extensions to property policies and 3) stand-alone environmental insurance policies.[101]

61. A wide range of stand-alone environmental insurance policies for environmental, including ELD, liabilities are available in Belgium. Besides stand-alone policies, environmental extension to general liabilities exist as well. They cover, for example, the cost for soil pollution remediation from a sudden and accidental event at the insured site. However, insurers often attach strict conditions to these insurances to limit their scope and coverage. One of these often-included limitations in insurance contracts, is the condition that the polluting event must begin and end within a 24-hour timeframe in order to be eligible for coverage. Thus, excluding long-lasting pollution. Environmental extensions to property policies are available to a limited extent, but they often do not provide coverage for ELD liabilities.[102]

62. In line with voluntary insurance schemes, the reach of the EU regarding mandatory insurance is limited as well. General mandatory insurance is not popular among EU MS. If they decide to introduce mandatory insurance policies, they are typically associated with specific sectors. An example can be found in the Czech Republic where operators of landfills are required to either have insurance, a bank guarantee or a dedicated bank account to cover damages to the environment caused by the exploitation of the landfill.[103] Another example can be found in Germany, where waste transporters are required to have environmental liability insurance.[104]

2.1.1.1. Mandatory insurance in Belgium

63. In Belgium, mandatory insurance schemes are imposed on economic entities operating in specific industries and sectors which could have significant environmental impact should an environmental accident occur. The Financial Services and Markets Authority created a list[105] with all mandatory insurance policies in Belgium and the legislation that requires them.

64. For Flanders specifically, activities that have mandatory insurance include the handling and transport of hazardous materials[106], high-risk chemical and mineral activities[107], soil

[101] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 49.
[102] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 190.
[103] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 156.
[104] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 158.
[105] See: https://www.fsma.be/nl/lijst-van-de-verplichte-verzekeringen.
[106] Besluit van de Vlaamse Regering van 12 december 2008 tot uitvoering van titel XVI van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid, *BS* van 10 februari 2009 and Besluit van de Vlaamse Regering van 28 oktober 2016 houdende uitvoering van het Mestdecreet van 22 december 2006 (VLAREME), *BS* van 10 februari 2017.
[107] Besluit van de Vlaamse Regering van 1 juni 1995 houdende algemene en sectoriele bepalingen inzake milieuhygiëne (Vlarem II), *BS* van 31 juli 1995.

remediation[108], waste management[109], maritime operations[110], environmental sampling and/or inspection authorities[111], sustainable resource management[112], involvement of emissions trading[113] and certain professional, commercial and industrial activities both on land and at sea[114]. Discussing all insurance schemes related to these activities would go beyond the objective of this work. However, providing some examples to put this extensive list in to real-world scenarios might be beneficial for a better understanding of the various activities that have a statutory obligation to obtain insurance:

- Transportation KGA-waste. KGA ('Klein Gevaarlijk Afval') translates to Small Hazardous Waste and is a specific type of waste. For example: left over paint, fire works or smoke detectors;
- Exploration and exploitation of the resources of the sea and ocean floor and its subsoil beyond the limits of national jurisdiction by a person who has a contract with the competent authority regarding this matter;

[108] Besluit van de Vlaamse Regering van 14 december 2007 houdende vaststelling van het Vlaams reglement betreffende de bodemsanering en de bodembescherming (Vlarebo), *BS* van 22 april 2008.
[109] KB van 2 juni 1987 houdende reglementering van de uitvoer, de invoer en de doorvoer van afvalstoffen, *BS* van 19 juni 1987 and Verordening (EU) 2024/1157 van het Europees Parlement en de Raad van 11 april 2024 betreffende de overbrenging van afvalstoffen, tot wijziging van de Verordeningen (EU) nr. 1257/2013 en (EU) 2020/1056 en tot intrekking van Verordening (EG) nr. 1013/2006 (J.O. L, 2024/115 du 30 april 2024) and Samenwerkingsakkoord van 4 november 2008 betreffende de preventie en het beheer van verpakkingsafval tussen het Vlaamse Gewest, het Waalse Gewest en het Brussels Hoofdstedelijk Gewest, *BS* van 29 december 2008 and Wet van 11 juli 2023 betreffende het vervoer van waterstof door middel van leidingen, *BS* 5 juli 2023.
[110] Wet van 17 augustus 2013 betreffende de prospectie, de exploratie en de exploitatie van de rijkdommen van de zee- en oceaanbodem en de ondergrond ervan voorbij de grenzen van de nationale rechtmacht, *BS* van 16 september 2013 and Koninklijk besluit van 4 oktober 2013 betreffende de prospectie, de exploratie en de exploitatie van de rijkdommen van de zee- en oceaanbodem en de ondergrond ervan voorbij de grenzen van de nationale rechtsmacht, *BS* van 15 oktober 2013 and Art. 4, 9º KB van 22 juli 2019 tot vaststelling van de procedure tot het bekomen van een gebruiksvergunning voor de zones voor commerciële en industriële activiteiten in de zeegebieden onder de rechtsbevoegdheid van België, *BS* 20 september 2019 and Art. 81, §1, 4º KB van 26 april 2024 betreffende de procedure tot instelling van mariene beschermde gebieden, tot Natura 2000-toelating en Natura 2000-goedkeuring en tot milieuvergunning in de Belgische zeegebieden, *BS* 6 juni 2024 and Wet van 25 mei 2024 betreffende de bescherming van mens en milieu bij de prospectie, exploratie en exploitatie van rijkdommen van de zee- en oceaanbodem en de ondergrond ervan voorbij de grenzen van de nationale rechtsmacht, *BS* 20 juni 2024.
[111] Art. 11 Besluit van de Vlaamse Regering van 23 december 2022 tot uitvoering van de Europese plantengezondheidsregels voor het plantaardige teeltmateriaal, *B.S.* 7 februari 2023 and Gedelegeerde Verordening (EU) 2024/370 van de Commissie van 23 januari 2024 tot aanvulling van Richtlijn (EU) 2020/2184 van het Europees Parlement en de Raad door vaststelling van conformiteitsbeoordelingsprocedures voor producten die in contact komen met voor menselijke consumptie bestemd water en de regels voor de aanwijzing van bij die procedures betrokken conformiteitsbeoordelingsinstanties (J.O. L 2024/370 du 23 april 2024) and Verordening (EU) 2019/1009 van het Europees Parlement en de Raad van 5 juni 2019 tot vaststelling van voorschriften inzake het op de markt aanbieden van EU-bemestingsproducten en tot wijziging van de Verordeningen (EG) nr. 1069/2009 en (EG) nr. 1107/2009 en tot intrekking van Verordening (EG) nr. 2003/2003 (*P.B.* L170/1 van 25 juni 2019) and Art. 13, §8 KB van 21 februari 2024 betreffende de ijkverrichtingen voor opslagtanks, *BS* 27 maart 2024.
[112] Besluit van de Vlaamse Regering van 17 februari 2012 tot vaststelling van het Vlaams reglement betreffende het duurzaam beheer van materiaalkringlopen en afvalstoffen (VLAREMA), *BS* van 23 mei 2012 and Besluit van de Vlaamse Regering van 17 februari 2012 tot vaststelling van het Vlaams reglement betreffende het duurzaam beheer van materiaalkringlopen en afvalstoffen (VLAREMA), *BS* van 23 mei 2012.
[113] Art. 11 Wet van 14 april 2024 betreffende de instelling van een mechanisme voor koolstofgrenscorrectie, *BS* 30 april 2024.
[114] Wet van 12 juli 2009 houdende instemming met het Internationaal Verdrag van 2001 inzake de burgerlijke aansprakelijkheid voor schade door verontreiniging door bunkerolie, en met de Bijlage, gedaan te Londen op 23 maart 2001, *BS* van 30 oktober 2009 and KB van 19 maart 2013 ter verwezenlijking van een duurzaam gebruik van gewasbeschermingsmiddelen en toevoegingsstoffen (Bijlage 1), *BS van* 16 april 2013 and Art. 6 KB van 12 maart 2002 betreffende de nadere regels voor het leggen van elektriciteitskabels die in de territoriale zee of het nationaal grondgebied binnenkomen of die geplaatst of gebruikt worden in het kader van de exploratie van het continentaal plat, de exploitatie van de minerale rijkdommen en andere niet-levende rijkdommen daarvan of van de werkzaamheden van kunstmatige eilanden, installaties of inrichtingen die onder Belgische rechtsmacht vallen, *BS* 9 mei 2002.

- Usage of 'bunker oils' by shipowners of seagoing vessels, these are all mineral oils consisting of hydrocarbons, including lubricating oils, used or intended to be used for the operation or propulsion of the ship, as well as all residues thereof.

65. The activities encompassed in the legislation listed by the Financial Services and Markets Authority are predominantly activities that are conducted by professionals (economic entities), pose a danger to one of the protected categories by the ELD (*supra,* nr. 22) and require some form of permit. Hence, one could conclude that the intent of the EU to encourage MS to require financial security mechanisms for ELD liabilities finds application in Belgian and Flemish through statutory insurance obligations. Furthermore, the legal texts mandating insurance obligations often state that any economic entity intending to engage in a particular activity, or already operating within that activity, must provide the competent authority with proof of insurance. In other words, a mere statement by the economic entity will not suffice to prove that it has complied with this obligation.

66. It should be noted that typically, there is no minimum insured capital requirement specified. This is not necessarily an issue, because the risk that has to be insured varies between different economic entities.

2.1.1.2. Importance of insurance during bankruptcy proceedures

67. Insurance policies generate certain consequences regarding creditor rights in bankruptcy proceedings. To avoid complicating matters, this chapter only discusses instances where the insured and the policy holder are the same legal person (economic entity).

68. First, the insurance policy creates benefits for insurance companies. One of these benefits is a lien on the insured object. This means that in cases where the economic entity in debt with the insurance company, they can use the insured object to obtain compensation for the debt.[115] It is important to note that this specific preferential treatment only applies to insurance policies for things.[116] This system of preferential treatment is of the utmost importance to ensure that an incentive exists for insurance companies to provide insurance to economic entities. Without this system of preferential treatment, high-risk economic entities would not be able to find insurance for their activities, as no economic entity can guarantee that they will never go bankrupt.

69. Second, is the fact that the insurance policy will continue to exist in favour of the bankruptcy estate. Meaning that if an incident occurs that triggers the insurance, the coverage will be allocated to the bankruptcy estate. The bankruptcy trustee can, however, decide to terminate the insurance policy.[117] In instances where the insurance in question is an insurance policy for things, the pay-out from the insurance policy for damages to the things (suffered by the bankrupt

[115] Art. 114 *juncto* art. 247 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[116] P. COLLE, *De nieuwe wet van 4 april 2014 betreffende de verzekeringen; Algemene beginselen van het Belgische verzekeringsrecht*, zesde editie, Antwerpen, Intersentia, 2015, 130.
[117] Art. 87, lid 1 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.

economic entity), will also become part of the bankruptcy estate.[118] However, if the pay-out is higher than the cost to either replace or repair the insured object, the rest of the pay-out is allocated to creditors who have a (general) lien or mortgage.[119] This could potentially lead to some creditors not walking away with empty hands after the finalisation of the bankruptcy proceedings.

70. Third, another reason why insurance is significant, is the fact that the existence of a liability insurance policy enables third-parties (tort victims) to take direct action against the insurance company.[120] Direct action ensures that the victim's rights are not in competition with those of other creditors. In other words, it protects the victim from the bankruptcy of the economic entity.[121] Some even argue that this rule is of public order[122], meaning that not respecting this rule has significant legal consequences, such as nullity of legal acts that go against it. It is important to note that the victim has to take action for these rules to apply. If no claim has been made, according to Belgian law, the damage does not exist.[123] A second note that should be made, is that this direct action only applies to claims that are protected by the Insurance Law from 2014. For claims that are not protected by this law and that originate from an accident, the preferential treatment from Article 20, 9º Hyp.W. still applies. The protection granted by this preferential treatment is similar to the one provided by direct action. However, the insurance company can try to dismiss the claim by relying on exceptions.[124] The third-party effects of these exceptions varies between instances where insurance is mandatory by law or voluntary:

- If the insurance is mandatory: exceptions will not have third-party effect against the victim, irrespectively of whether they existed before or after the damage.[125] This rule, however, does not apply to exceptions related to the existence of the insurance contract or its coverage.[126]
- If the insurance is voluntary: the insurance company can rely on all exceptions available to them, as long as they originate from a fact that occurred before the damage.[127] Consequently, exceptions that manifest after the damage will have no third-party effect against the victim.[128]
- The consequence of exceptions not having third-party effect, is that the insurance company will have to pay damages to the victims of the economic entities. Later, the insurance company can execute recourse against the economic entity, if the insurance contract included such a possibility.[129] To initiate the recourse, the insurance company has to notify

[118] Art. 113 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[119] Art. 112 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[120] Art. 150, lid 1 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[121] Art. 150, lid 2 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[122] P. COLLE, *De nieuwe wet van 4 april 2014 betreffende de verzekeringen; Algemene beginselen van het Belgische verzekeringsrecht*, zesde editie, Antwerpen, Intersentia, 2015, 211.
[123] Art. 141 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[124] P. COLLE, *De nieuwe wet van 4 april 2014 betreffende de verzekeringen; Algemene beginselen van het Belgische verzekeringsrecht*, zesde editie, Antwerpen, Intersentia, 2015, 214.
[125] Art. 151, §1 lid 1 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[126] Art. 151, §1 lid 2 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014 and Cass. 19 oktober 2001, *JLMB,* 708 en *De Verz.* 2002, 346, noot de Rode, H.
[127] Art. 151, §2 lid 1 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[128] Cass. 19 oktober 2001, *TBH* 2002, 213.
[129] Art. 152, lid 1 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.

the economic entity of its intentions to execute this right.[130] However, this recourse might be difficult to execute in the case bankruptcy.

2.1.2. Funds and risk-sharing facilities

71. The second financial guarantee analysed in this chapter are funds. In line with insurance, some are mandatory; whereas others are voluntary. First, it is important to note that a study regarding financial securities for ELD liabilities concluded that it is not feasible at this time to create an EU-wide insolvency risk fund to comply with the PPP.[131] The before mentioned study included many negative remarks from potential stakeholders. Some of these remarks are:

- risk assessment would not be included in a fund;
- establishing a fund could hinder the development of the insurance market;
- economic entities would know that their liabilities are capped; and
- a fund would go against the PPP, since economic entities who have not caused any harm would help pay for the harm caused by more careless economic entities.[132]

72. It is interesting to note that the remarks form this study, which was conducted in 2013, are fairly similar to the ones formulated by Insurance Europe in 2022 (*supra,* nr. 58). One could argue that both regulators and the financial security providers have yet to find a mutual ground to for mandatory financial securities. Consequently, there is no EU-wide fund that complies with the PPP and deals with insolvency risks for cases where financial market securities fail. Furthermore, funds for ELD liabilities are not common in MS. Specific funds for ELD liabilities were only established in two MS: Spain and Portugal. In addition, MS that established public funds, meaning that taxpayer money is being used, tend to do so only for historical soil contamination that was caused before the Eastern European countries became MS of the EU. These funds, however, are not established to deal with insolvency risks or financial market failure. They solely aim to restore pollution and are usually set up for specific industries or commercial sectors.[133] It is important to highlight that using public funding to restore environmental harm does not align with the objective of the PPP.

73. In Belgium, several funds have been established to deal with environmental pollution. However, they do not specify application to situations where insolvency or bankruptcy is in play. Interesting examples can be found in the PROMAZ-fund (*infra*, nr. 123) and the MINA-fonds. The latter is an initiative of the Flemish Region to finance expenses related to environmental concerns

[130] Art. 152, lid 2 Wet betreffende de verzekeringen van 4 april 2014, *BS* 30 april 2014.
[131] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 210.
[132] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 211.
[133] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 210.

sensu lato.[134] It is financed[135] and managed[136] by the Flemish Government. The recourses to finance the operations of this fund are sourced from, but not limited to: environmental taxes, administrative fines and EU-funding.[137] The PPP finds indirect application here through the allocation of some of the revenues from the administrative environmental fines to this fund.

74. A third way to provide financial security can be achieved by risk-sharing facilities. They provide more or less the same level of financial security as a fund. The main difference is that funds do not have members, whereas risk-sharing is membership based. This membership can be limited to specific industries or economic entities. 'Mutuals' are a special form for risk-sharing. These risk-sharing schemes are established by an agreement between parties who wish to be members of such a scheme. The main purpose of a mutual is sharing the risk between the members if a specified incident occurs. In its turn, the mutual can cede the risk to a reinsurer or demand additional payment from its members if the costs exceed the available funds.[138] These risk-sharing schemes are often set up between large economic entities, such as oil tanker businesses.[139] Examples of risk-sharing facilities are:

- Protection and Indemnity Clubs[140]: these Clubs are non-profit mutual insurance association created by shipowners and charterers, in order to protect them from liabilities related to ownership and use of ships. The liabilities covered by these Clubs are those stipulated in the agreement that members need to sign in order to join the Club. In addition to the liabilities, these agreements often contain rules that members must follow in order to be eligible for financial aid. Hence, if a member of such a Club has conformed to the rules and causes environmental damage covered by the agreement, then the Club will cover the damages. A specific example related to environmental damage are pools for vessel-induced oil pollution;
- European Liability Insurance for the Nuclear Industry (ELINI)[141]: this is a Belgian mutual insurance organisation, with international members such as: Brazil, Romania and Sweden. Through the mutual, they offer third-party liability coverage.[142] The main focus is coverage of nuclear liabilities. However this includes environmental harm as well, because should a nuclear incident occur, damages to the environment will be enormous.

[134] Art. 4 Decreet tot oprichting van Fonds voor Preventie en Sanering inzake Leefmilieu en Natuur als Gewestdienst met afzonderlijk beheer, *BS* 23 januari 1991.
[135] Art. 5 Decreet tot oprichting van Fonds voor Preventie en Sanering inzake Leefmilieu en Natuur als Gewestdienst met afzonderlijk beheer, *BS* 23 januari 1991.
[136] Art. 1 Decreet tot oprichting van Fonds voor Preventie en Sanering inzake Leefmilieu en Natuur als Gewestdienst met afzonderlijk beheer, *BS* 23 januari 1991.
[137] Art. 3 Decreet tot oprichting van Fonds voor Preventie en Sanering inzake Leefmilieu en Natuur als Gewestdienst met afzonderlijk beheer, *BS* 23 januari 1991.
[138] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 263- 265.
[139] See International Group of P&I Clubs, 'About us'; https://www.igpandi.org/about.
[140] https://www.igpandi.org/article/about/ & J. LIU and M. FAURE, "Risk-sharing agreements to cover environmental damage: theory and practice", Int. Environ. Agreements 2018, 18, 264-266, https://doi.org/10.1007/s10784-018-9386-0.
[141] https://elini.net/ & J. LIU and M. FAURE, "Risk-sharing agreements to cover environmental damage: theory and practice", Int. Environ. Agreements 2018, 18, 266-269, https://doi.org/10.1007/s10784-018-9386-0.
[142] X., "AM Best Affirms Credit Ratings of European Liability Insurance for the Nuclear Industry", oktober 2023, https://news.ambest.com/newscontent.aspx?refnum=253084&altsrc=23.

2.1.3. Bank guarantees

75. The fourth financial security discussed in this chapter are bank guarantees. This is a commonly imposed financial security in EU MS. When introduced in a MS, bank guarantees typically become compulsory.[143] In line with insurance, bank guarantees can be mandatory for certain sectors or industries. Their compulsory character follows from legislation governing specific sectors or industries. A bank guarantee is a written agreement between the economic entity and the bank, in favour of the competent authority, which ensures environmental protection. It is most commonly used for environmental liabilities that are quantifiable. Typically, the competent authority will determine the hight of the bank guarantee. When the economic entity fails to comply with its obligations, e.g. releasing higher concentrations of chemicals into the water than allowed by its permit, the bank will transfer the necessary funds to the competent authority to satisfy the obligations.[144] An example from Belgium can be found in the requirement by the federal government of a bank guarantee for *ex post* environmental damages (*infra*, nr. 77).

76. If the economic entity goes bankrupt and there is a case of environmental liability, the bank guarantee will not become a part the bankruptcy estate. It will be used to compensate the competent authority. In the unlikely event that the guarantee exceeds the remediation costs of the environmental harm, the remaining money from the bank guarantee will be added to the bankruptcy estate.

2.1.4. Special *ex-post* financial securities under Belgian law

77. Mandatory *ex post* financial security for environmental damages is required by Federal law when an economic entity carries out the remediation measures itself. These include a bank guarantee by a bank established in Belgium or a guarantee that has been declared admissible by the authorities and signed by a Protection and Indemnity Club. Some argue that the reference to the Protection and Indemnity Club, could result in a limited application of this requirement to marine operations because this type of Club is most often used in that context (*supra*, nr. 74).[145]

78. In the Flemish region an enforcement order[146], if endorsed by the competent authority and declared enforceable[147], is accepted as a financial security *ex post*. It is important to note that the enforcement order itself is not a financial security mechanism. It is a merely a means to obtain financial security through:

- a general lien on the movables of the economic entity[148];

[143] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 9.
[144] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 58-59.
[145] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 134.
[146] In Dutch: dwangbevel.
[147] Art. 15.8.13 DABM.
[148] Art. 15.8.14, lid 2 DABM, art. 16.5.2., §3 DABM and art. 161, §1 BD.

- a statutory mortgage[149], which can be placed all immovables of the economic entity, located in the Flemish region;
- or other forms of financial security, which may also be accepted by the Flemish government.[150]

79. First, it can be used for reimbursement for the costs procured by the authority that has taken measures to limit environmental harm or the threat thereof.[151] A second application of this enforcement order, and its consequences, can be found in the provisions related to the collection of administrative fines for situations where the economic entity has neglected to fulfil its obligation to pay.[152] To become enforceable, the enforcement order must be served on the economic entity by bailiff's writ. Then, the economic entity has the opportunity to oppose the enforcement order within thirty days. This opposition by the economic entity suspends the execution of the enforcement order. However, the Flemish government and/or OVAM (for cases related to administrative fines) can ask the judge to lift this suspension.[153]

80. A third application, which was added recently (July 2024), is the reimbursement of OVAM when they exercised their right of *ex officio* execution of soil investigations and remediation efforts.[154] This third application is mentioned separately because the BD grants OVAM similar rights, obtaining a statutory mortgage or general lien. But, the text of the BD does not mention the use of an enforcement order and the procedure to make it enforceable. After researching this difference in the parliamentary documents related to updates of the BD, this author has not found any mention or *ratio legis* related to this difference. It is therefore unclear to this author if the Flemish legislator was simply forgetful or had the intention of applying the procedure explained above by analogy.

81. Because of the general lien, the Flemish government and/or OVAM enjoy preferential treatment in the hierarchy of creditors that have financial securities on the movables of the economic entity. However, they are placed after the creditors listed in article 19 and 20 Hyp.W.[155], which means their general lien is placed at a late stage of the division of assets during the bankruptcy proceedings. In other words, both the Flemish government and OVAM might walk away with empty hands, if the bankruptcy estate does not contain many valuable movable assets or if there are many 'higher ranking' creditors with competing securities. Therefore, this general lien might not be the most effective tool to ensure reimbursement for the costs made and the collection of unpaid administrative fines. Consequently, if the assets from the bankruptcy estate cannot be claimed to reimburse the Flemish government and/or OVAM for their efforts, there is a low application of the PPP because taxpayer money is being used to fund these remediation and/or prevention efforts. The same perspective can be applied to unpaid fines, if the assets from the

[149] Art. 15.8.14, lid 2, art. 16.5.2., §3 DABM and art. 161, §1 BD *juncto* art. 44, lid 1 Hyp.W.
[150] Art. Art. 15.8.14, laatste lid DABM and V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive,* European Commission, Brussels, 2020, 134.
[151] Art. 15.8.12 DABM.
[152] Art. 16.5.2 DABM.
[153] Art. 15.8.12 DABM.
[154] Art. 161 BD.
[155] Art. 15.8.14, lid 3 DABM, art. 16.5.2, §3, lid 2 DABM and art. 161, §2 BD.

bankruptcy estate cannot be claimed to pay the fines, there is no application of the PPP because the polluter cannot pay. To combat this low application of the PPP, manager liability could be used in cases where the environmental damage occurred because of a fault or negligent behaviour of management to get some form of compensation (*infra*, Chapter 2.3).

82. The place of the statutory mortgage in the hierarchy of creditors is determined by the date of registration of the statutory mortgage. In other words, it refers to the date on which the Flemish government or OVAM utilise the opportunity, granted by the endorsed and enforceable enforcement order, to register the statutory mortgage with a notary.[156] As a result, their place in the hierarchy will depend on other existing mortgages and whether they have been registered before them or not. This means that it is entirely possible that a mortgage that was received at a later date, but registered before the statutory mortgage, will enjoy a 'higher ranking' in the hierarchy of creditors. As for enforcement of the PPP, a mortgage is a strong financial security mechanism because of its public character through the obligation of registration and the fact that it encompasses a so-called 'right of resale'. The latter means that the mortgage has third-party effects against all special legal successors.[157] But, this is only in favour of the Flemish government and/or OVAM if the following conditions are met: 1) the immovable is eligible to be sold; and 2) the economic entity has one of the following rights on the immovable: usufruct, long lease, building right.[158] If these conditions are not met, it is not possible to place a mortgage on the immovable. Hence, if the economic entity has been renting the immovable, this enforcing the statutory mortgage against the economic entity will not be possible. An other possible issue is the risk that the immovable, on which the statutory mortgage has been placed, has lost its value. For example, because of soil contamination or negligence with maintenance. Or, there could be many other creditors with mortgages on the immovable with earlier registration dates. This risks have somewhat been mitigated by allowing the placement of a statutory mortgage on all of the immovables in the estate of the economic entity, thus expanding the pool of possible immovables on which a statutory mortgage can be placed.[159] Therefore, it is of the utmost importance that the Flemish government and/or OVAM register their statutory mortgage with a notary as soon as possible. Overall, it is a useful tool to recover funds or unpaid fines and has a higher probability of success than a general lien.

83. It should be mentioned, that funds recovered by this general lien and statutory mortgage can only be used to reimburse the government. They cannot be allocated to remedy physical damage, private property damage or economic loss of persons as a result of the environmental harm.[160] This is a similar approach to the damages eligible for compensation under the ELD (*supra*, nr. 23).

[156] Art. 15.8.14, lid 4 DABM, art. 16.5.2, §3, lid 3 DABM and art. 161, §3 BD. *juncto* art. 81 Hyp.W.
[157] Art. 3.4 BW and art. 96 Hyp.W.
[158] Art. 45 Hyp.W.
[159] Art. 15.8.14, lid 2 DABM, art. 16.5.2, §3, lid 1 DABM and art. 161, §1 BD.
[160] Art. 15.1.5 DABM

2.1.5. Concluding remarks

84. The financial securities and guarantees outlined above provide assurances to creditors, victims of environmental harm, and competent authorities financing cleanup costs in the event of bankruptcy of the economic entity, due to environmental liability or other economic factors. In addition, these financial securities and guarantees play a significant role as well for instances where bankruptcy has not yet occurred. Financial securities, such as insurance, risk-sharing and bank guarantees can be used to remediate environmental damage without compromising the financial viability of the economic entities. Thereby preventing insolvency and/or bankruptcy while simultaneously ensuring compliance with the PPP.

85. In Belgium, a vast amount of activities related to ELD-liabilities and other environmental liabilities have a statutory obligation of obtaining financial securities and guarantees that economic entities must adhere to. Belgium, therefore, followed the recommendation of the EU.

2.2. Soil remediation in bankruptcy proceedings

86. This chapter delves into the responsibilities of the bankruptcy trustee when faced with, possibly, contaminated soil within the bankruptcy estate. However, due to the specific nature of these responsibilities and broad policy discretion of MS regarding soil remediation, this chapter will not go beyond discussing the available frameworks under Belgian law. More specifically, the obligations of the bankruptcy trustee are defined by Flemish frameworks, as the BD falls under the jurisdiction of the Flemish region (*supra*, nr. 30). The before mentioned obligations slightly differ between indications of soil contamination that exceeds or is at risk of exceeding the allowed contamination limits (new soil contamination[161]) and indications of grave soil contamination (historical soil contamination[162]).

87. It is mandatory for a bankruptcy trustee to initiate an initial soil investigation for possibly contaminated soil under two conditions: 1) the economic entity is owner of the land, and 2) this land is an at-risk site.[163] However, if there are indications of new soil contamination or historical soil contamination then the trustee must initiate a descriptive soil investigation.[164] The Protocol Curatoren, which will be discussed below, stipulates that the bankruptcy trustee is released from the obligation to conduct an initial soil investigation if a valid initial investigation has already been performed for a specific piece of land. This investigation must meet the conditions of article 36 of the BD and article 64 of the VLAREBO.[165]

[161] Art. 2, 6º BD.
[162] Art. 2, 7º BD.
[163] Art. 34 *juncto* art. 123 BD.
[164] Protocol betreffende de uitvoering van bodemderzoeken, bodemsanering en afvalstoffenverwijdering in het kader van faillissementen met vastgoed gelegen in het Vlaams Gewest van 18 maart 2016. (Hereafter: Protocol Curatoren 18 maart 2016).
[165] Art. 2.1.1. *in fine* Protocol Curatoren 18 maart 2016.

88. Every time there is a transfer of property rights on land or transfer of the land itself[166], regardless of whether it occurs during bankruptcy proceedings or regular transfer transactions, soil investigations must be conducted. The *ratio legis* behind these mandatory soil investigations, follows from the fact that the Flemish legislator saw an opportunity to create an additional moment to remedy potential soil contamination. In turn, this lowers the pressure on the existing limited open spaces in the Flemish landscape as previously contaminated sites regain their value and use in the private and public market.[167] However, the BD lacks detailed guidance on addressing scenarios where soil contamination remediation costs exceed the available funds of the bankruptcy estate. It merely mentions that the bankruptcy trustee should take the investigative initiative, but provides no legislative procedural framework. To address this legislative gap, the Flemish Bar Association and OVAM[168] agreed to a Protocol which defines obligations of both OVAM and the bankruptcy trustee. This Protocol has consistently demonstrated its efficacy in various cases.

89. An example of a case where this Protocol proved its usefulness can be found in the Buggenhout-Alvat case. The Alvat site in Buggenhout was a 4.6-hectare abandoned industrial area adjacent to the Scheldt River and the residential area of 'Oude Briel'. Alvat NV went bankrupt in December 1995 without initiating any soil remediation efforts. Consequently, OVAM commenced an official procedure to undertake priority environmental clean-up themselves, identifying significant soil contamination extending into adjacent residential areas. This initiative of OVAM, in turn, would enhance the likelihood of private investors being able to realise a profitable remediation and redevelopment project. In April 2007, a phased soil remediation project was approved to address the primary contamination. Despite attempts by Santerra NV, a brownfield developer[169], negotiations regarding site acquisition and remediation failed after a decade of deliberation. As a result, in January 2019, OVAM initiated proceedings to acquire the site for a nominal sum of one euro, following the closure of the initial bankruptcy proceedings, by initiating the procedure to appoint an *ad hoc* bankruptcy trustee. This trustee then gained the necessary authorisation to transfer the land to OVAM.[170] The latter is possible because of the Protocol mentioned above.

90. The Buggenhout-Alvat case is not an isolated incident; numerous contaminated sites similar to the Buggenhout-Alvat-site exist throughout Belgium, termed by OVAM as 'blackfields'. The Protocol outlines two primary approaches for handling contaminated sites: 1) OVAM's acquisition of the site for one euro, mirroring the example provided above, and 2) OVAM prefinancing the remediation costs.[171] The Protocol applies to properties located within the Flemish region, owned by the bankrupt economic entity at the time of the bankruptcy, that hinder the bankruptcy proceedings. Ownership, as defined within the BD and the Protocol, includes: 'traditional' ownership, building rights, long leases and usufruct.[172] If the necessary conditions apply, the bankruptcy trustee must follow the procedure as presented below.

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[166] Art. 2, 18º BD.
[167] P. DE SMEDT and S. VANDAMME, "gevolgen van het bodemdecreet voor de curator en de vereffenaar", 76.
[168] OVAM is the Public Waste Angency of Flanders, know as Openbare Vlaamse Afvalstoffen Maatschappij.
[169] A brownfield developer is an economic entity that specialises in the revitalisation of abandoned, industrial, sites. In turn for redeveloping these sites they often receive some form of tax break or administrative leniency.
[170] https://ovam.vlaanderen.be/buggenhout-alvat.
[171] https://ovam.vlaanderen.be/blackfields.
[172] Art. 1 Protocol Curatoren 18 maart 2016.

2.2.1. Procedure for soil investigations

91. To qualify for the pre-financing and execution of the soil remediation, certain conditions must be met. These are the same for both the initial soil investigation and descriptive soil investigation: 1) the funds in the bankruptcy estate are insufficient to cover the costs, and 2) no mortgage creditor or other creditor is willing to prefinance the investigation procedure.

92. The first step in the procedure, which is the same for both investigations as well, is requesting authorization from the supervising judge[173] to petition OVAM to pre-finance the investigation and carry it out on behalf of the bankruptcy trustee and the bankruptcy estate. The trustee has to inform the mortgage creditors of the financing by OVAM and the qualification of this procedure as debts of the bankruptcy estate. This qualification results in a preferential treatment of these expenses above other creditors, since these expeses have been made to optimise the bankruptcy estate in favour of the creditors.[174]

93. The second step is submitting a written request for pre-financing and carrying out the initial or descriptive soil investigation. This request should contain the following information:

- for the initial soil investigation: a copy of the bankruptcy judgement, the location of the at-risk-site, the information that caused the trustee to determine that there is an at-risk-site and any real rights and/or personal rights that the debtor has on the at-risk-site;
- for the descriptive soil investigation: a copy of the bankruptcy verdict/judgement, the location of the at-risk-site, the real rights and personal rights that the debtor has on the at-risk-site, an overview of the available assets of the bankruptcy estate and an estimate of the value of the site.

94. Unique for the descriptive soil investigation is that after the completion of step 1 and 2 OVAM will decide if the pre-financing of the remediation is in line with its policy priorities. In addition, OVAM must have sufficient guarantees that the pre-financed costs will have a privileged claim to the proceeds of the site (once it is sold) and, if possible, other assets from the bankruptcy estate. OVAM and the bankruptcy trustee, and potential mortgage creditors, can put the latter in an agreement before the start of the soil investigation. OVAM will deny the request if it is clear that the realisation of the site will not be cost-effective. When this occurs, OVAM has a right to acquire the contaminated site for one symbolic euro.[175]

95. The third step remains the same for both investigations: the bankruptcy trustee must do everything in their power to ensure the qualification of the costs of the descriptive soil investigation as a debt of the bankruptcy estate. After the completion of the soil investigation, the trustee will receive an invoice from OVAM.

[173] In Dutch: Rechter-commissaris.
[174] B. TILLEMAN, S. LIERMAN and V. SAGAERT, *De valks juridisch woordenboek*, Antwerpen, Intersentia, 2020, 82-83.
[175] Art. 2.4 Protocol Curatoren 18 maart 2016.

2.2.2. Pre-financing and drafting of the remediation concept/project

96. The remediation concept contains the outlines of the remediation project. By drafting this concept, the bankruptcy trustee and the potential buyer of the at-risk-site gain enough insight into the financial burdens of the remediation project. It is important to note that they are not bound by this concept. Meaning, they can still adjust where needed, e.g. to better fit the new designation of the site. This procedure is similar to the soil investigations discussed above. Besides some minor differences in the details, the same three steps have to be followed.

2.2.3. Acquisition of the at-risk site by OVAM for a symbolic Euro.

97. This procedure can be applied to unsellable property, if the necessary conditions are met. In situations where the immovable property cannot be sold because it is uncertain if the asset will sell for a higher price than the cost of the soil remediation, the bankruptcy trustee can request the authorisation from the Insolvency Court to sell the immovable property to OVAM for one EUR.[176]

98. To initiate this procedure, the following conditions must be met: 1) the costs of the soil remediation are higher than the value of the property or it is uncertain if the asset will sell for a higher price than the cost of the soil remediation, 2) the owner or other person obligated to finance the remediation has insufficient funds to do so, and 3) there is no interest from private investors to buy the property and take the soil remediation costs upon themselves. In addition to the conditions to initiate this procedure, there is an obligation to collect all the necessary data and information regarding the immovable property (e.g. zoning regulations that apply to the property or information regarding the protection of fauna and flora). This obligation rests on both the bankruptcy trustee and OVAM.[177]

99. If the conditions are met and the necessary documents have been acquired, the bankruptcy trustee will have to request the abovementioned authorisation from the Insolvency Court to sell the property to OVAM for one EUR. If the court grants this right, OVAM will bear the costs of the acquisition and the fee of the bankruptcy trustee. The acquisition has to be formalised with a notary.[178]

100. By using the methods described in this chapter, the otherwise not-financially attractive at-risk sites can become valuable again. OVAM gains the possibility to manage the grounds at a later time. Without this acquisition, the at-risk site could end up being left unattended. This, in turn, could worsen the spread of the pollution. However, the PPP is not strictly enforced when OVAM acquires the at-risk site for one EUR. It is OVAM, using taxpayer money and funds gathered from

[176] Art. 2.4 Protocol Curatoren 18 maart 2016.
[177] D. WILLE, *Handleiding toepassing Protocol Curatoren*, Mechelen, OVAM, 17.
[178] D. WILLE, *Handleiding toepassing Protocol Curatoren*, Mechelen, OVAM, 20.

environmental fines, who ensures the soil will be remediated. The bankrupt debtor does not directly pay for the pollution caused.

2.3. Manager liability

101. In addition to the before-mentioned Belgian tort principles (*supra,* Chapter 1.3.2.), Belgian law contains a special liability regime for managers of economic entities or legal persons (hereafter: manager liability). By applying this liability regime, managers are liable for the harm caused by the economic entity that results from their decisions, negligence or mismanagement. Manager liability is important within the scope of this thesis, as it provides a way to recover funds in favour of the bankruptcy estate and/or for enforcement of the PPP.

102. The general principles for manager liability can be found in the Wetboek van Vennootschappen en Verenigingen (Code of Companies and Associations, hereafter: WVV). Article 2:56 WVV states that managers can be liable in tort cases if they behaved, significantly, in such a manner that cannot be expected from a normal, prudent and diligent manager placed in the same circumstances. They can escape liability if they notified other board members or other governing structures of the economic entity of the alleged fault. This notification is valid only when it is written down in official meeting notes of the economic entity.

103. Manger liability related to insolvency proceedings, could be applied in two possible scenarios. For it to be applicable, it is necessary that the debts of the bankruptcy estate exceed its value. First, managers can be liable if the before mentioned debts are the result of an evidential and significant fault that caused the bankruptcy of the economic entity. If this occurs, both the bankruptcy trustee and creditors have the right to take legal action against the manager(s). However, creditors can only execute this right if the bankruptcy trustee fails to do so within a month after a notification by a creditor.[179] Second, manager liability can occur if: 1) the manager(s) knew that at a certain point in time bankruptcy was imminent and that there were no options to salvage the economic entity; 2) the manager(s) had the legal capacity of manager at that time; and 3) the manager(s) did not conduct themselves as rational and careful managers would in same conditions. Here, only the bankruptcy trustee has the prerogative to take legal action.[180] If the Insolvency Court[181] rules that management is liable, the manager(s) will have to pay a sum of money to, partially or fully, restore the bankruptcy estate to its intended value. For the latter manager liability, the hight of the financial restoration is capped at different rates related to the profits of the economic entity.[182]

104. Currently, manager liability can be limited by applying *quasi*-immunity of the executing agent[183]. This immunity was established by case law[184] and contains the principle that the servant,

[179] Art. XX.225 WER.
[180] Art. XX.227 WER.
[181] Art. XX.228 WER.
[182] Art. 2:57 WVV.
[183] In Dutch: *quasi*-immuniteit van de uitvoeringsagent.
[184] Stuwadoorsarrest, 7 december 1973.

body of the economic entity or executing agent cannot be held liable by the principal creditor of the principal debtor, for damage that occurred while the executing agent was performing within its contractual obligations of its contract with the principal debtor. In addition, the principal creditor cannot rely on the liability rules from article 1382 – 1384 OBW against this executing agent (managers) as well, for damage that occurred while the executing agent was performing within its contractual obligations of its contract with the principal debtor. The only option for the principle creditor to hold management accountable is proving that the conditions of concurrence are met or proving that the damage caused by the executing agent is the result of a crime. And even then, only a non-contractual claim against the executing agent is possible. As a result of caselaw, managers can rely on this *quasi*-immunity as well.[185] It should be noted that this *quasi*-immunity does not influence the 'organ theory' discussed earlier (*supra*, nr. 53).

105. Holding management accountable for their actions is an important tool to ensure that corporate structures cannot be abused to avoid liability. It encourages the people behind the economic entity to conduct themselves in such a manner that can be expected from a rational and careful manager. When managers know they can suffer the consequences of the harm done, as a result of their decisions, they might become more due diligent in implementing risk-management strategies in order to avoid said liability. Of course, the regime should not be as stringent as possible, as this might discourage people from taking up management positions. However, a firmer approach would be welcomed by this author. Steps towards such an approach have been taken during the reforms of Book 6 BW (*infra*, Chapter 4.1)

106. Finally, not only managers can face liability claims. The economic entities themselves can be held accountable for their actions as well; either through civil liability mechanisms, as set out in this chapter, or through criminal proceedings (*supra,* Chapter 1.1.2.2.). These liabilities are often referred to as 'company liability'. The influence of the PPP on company liability and its relationship with insolvency proceedings will be discussed in the next Chapter.

2.4. Environmental company liability

107. This chapter is dedicated to the environmental liability of economic entities; hereafter referred to as environmental company liability. To ensure environmental company liability, various frameworks and schemes have been put in place by governments and international organisations. The following paragraphs will provide some significant examples and, if applicable, possible sanctions for non-compliance. A critical analysis of these mechanism and suggestions on how to improve the effectiveness of the available schemes and liability of economic entities are discussed in can be found in Chapter 3.3.3.

2.4.1. Company liability from an economic point of view

[185] HvC 7 november 1997.

108. Before addressing the available frameworks, it is beneficial to provide additional information on the importance of environmental company liability to lay the groundwork for a deeper understanding of this chapter. First, a brief reminder regarding liabilities: the liability for environmental damages in Belgium is a fault-based liability regime. For specific tort cases (e.g. harm caused by a defect in a good) strict liability can be applied as well. Liability regimes under the ELD make a distinction between operators under Annex III and others (*supra*, nr. 50). Additionally, ELD related liabilities have an administrative law nature; and can therefore only be pursued by competent authorities. Lastly, the liability of managers of economic entities can be a useful tool to enforce the PPP in the event of bankruptcy (*supra,* nr. 103).

109. From an economic standpoint, environmental damages represent negative externalities. However, the economic entities responsible for such damage often do not face the negative consequences. This results in costs being imposed on third parties, such as society and the government. Without the PPP, polluters are not compelled to cover the external costs generated by their activities. Consequently, social costs are not factored into the pricing of products or services, leading to artificially low prices and increased consumer demand for goods or services that carry high societal costs. Essentially, environmental damage leads to market failure as economic entities externalise costs, shifting the burden of environmental damage onto society.[186]

110. Analysing environmental company liability from an economic point of view is necessary, as it highlights the reasoning behind the behaviour of economic entities and the consequences that result from this behaviour. First, externalisation of environmental damages is natural behaviour for an economic entity looking for utility maximalisation. Because externalising environmental damages raises profits and shareholder value. If there are no legal rules prohibiting this externalisation, this behaviour can be expected. Second, Ronald Coase (known for the Coase Theorem[187]) argued that if transaction costs are sufficiently low, externalities will be efficiently internalised as a result of 'bargaining between the parties'. Within the scope of this thesis, these externalities are environmental damages. However, applying the Cause Theorem comes with its own challenges. It is very difficult to meet the Theorem's conditions, as there are often many polluters and victims. Which increases the difficulty to reach an efficient bargain. Additionally, the Theorem only refers to efficiency. Meaning, it does not impose the cost on a specific bargaining party (ideally the polluter). This could violate the PPP, because it creates a no-liability regime. On a positive note, it enforces the idea that legal rules are necessary to force an internalisation of the externality. Third, this economic point of view highlights the goal of environmental policy and law: providing a correction to market failures cause by externalities in the form of environmental damages.[188]

[186] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 18.
[187] M. FAURE and R. A. PARTAIN, *Environmental Law and Economics: Theory and Practice*, Cambridge, Cambridge University Press, 2019, 18-27.
[188] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, 2020, European Parliament, Brussels, 19.

111. Continuing this economic approach to environmental company liability, one should keep in mind that liabilities can cause insolvency. In Law and Economics literature, the latter is often referred to as the 'insolvency risk'. It is therefore important that MS follow the suggestions of the EU to implement financial securities (*supra*, nr. 24). This ensures that creditor rights and the PPP can be respected and enforced. Particularly if manager liability cannot be achieved, e.g. through piercing the corporate veil. The latter can be hindered by company structures, such as: limited liability corporations.[189] Some authors argue that these limited liability structures of companies can cause underdeterrence.[190] A second note to remember, is the fact that environmental laws are changing at a rapid pace. As a result, economic entities that do not possess the resources to stay up to date with their knowledge of environmental regulations and frameworks may encounter difficulties in environmental compliance. This could make them more likely to, accidentally, commit an environmental offence or infringement.[191] Which, in turn, raises the bar for admissibility of a liability claim against them in instances where a fault-bases liability regime applies or instances where serious negligence must be proven by the claimant.

2.4.2. Criminal liability of economic entities

112. As briefly mentioned above, the Belgian Criminal Code allows criminal prosecution of legal persons.[192] Criminal liability of economic entities is mentioned since criminal proceedings can be an effective tool to achieve environmental company liability through criminal sanctions as indented by the ECD (*supra,* nr. 26).

113. The Belgian Criminal Justice System requires two conditions to be met to prosecute a legal person: 1) the alleged crime has an intrinsic bond with the operations and goal of the economic entity[193], and 2) the alleged crime is the result of an intentional decision within the legal person or negligence of the legal person with a causal relation to the occurred crime[194]. The presiding judge has the authority to establish if the conditions are met in the case before them.[195] It interesting to note that if the economic entity is found guilty of the alleged crime, the Belgian Criminal Code no longer excludes to possibility to prosecute the natural persons, e.g. managers, that are accused of the same crime or were an accomplice to the crime of the legal person.[196] However, this only applies to crimes committed after June 30th 2018. To prosecute the natural person, two conditions have to be met: 1) there is a crime that is admissible against a legal person, and 2) the same crime has to be admissible against an identifiable natural person. For crimes that occurred before

[189] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, 2020, European Parliament, Brussels, 45.
[190] M. FAURE, *Regulatory strategies in Environmental Liability*, working paper no. 2011/22, 2011, 147.
[191] C.M. BILLIET, "Lappendekens in de rechtshandhaving. Naar een publiekrechtelijke sanctionering in het omgevingsrecht", in C.M. BILLIET & L. LAVRYEN (eds.), In de roos. Doeltreffende sanctionering van omgevingsrecht, Brugge, die Keure, 2015, 9.
[192] Art. 5 Sw.
[193] F. VERBRUGGEN, R. VERSTRAETEN, *Strafrecht en strafprocesrecht voor bachelors*, deel 2, Antwerpen, Intersentia, 2020, 56-57.
[194] Toelichting bij het wetsvoorstel tot invoering van de strafrechtelijke aansprakelijkheid van rechtspersonen, *Parl. St. Senaat*, 1998-99, nr. 1-1217, 1, randnummer 1.3.
[195] F. VERBRUGGEN, R. VERSTRAETEN, *Strafrecht en strafprocesrecht voor bachelors*, deel 2, Antwerpen, Intersentia, 2020, 57.
[196] Art. 5, lid 3 Sw.

June 30th 2018, it is not possible to prosecute both the legal and the natural person for the same crime.[197]

114. It is important to note that the possibilities to prosecute an economic entity are influenced by bankruptcy proceedings. After the finalisation of the bankruptcy proceedings, the legal person of the economic entity seizes to exist under Belgian Law.[198] As a result, it is no longer possible to prosecute the economic entity.[199] Unless, the legal person was charged under article 61*bis* Sv[200] or directly summoned before the Criminal Court before the legal person seized to exist.[201] In these two instances, it is still possible to prosecute the legal person. However, if the economic entity is bankrupt, it will lack sufficient funds to pay its creditors, let alone criminal fines. Pursuing criminal proceedings may therefore not prove effective in enforcing the PPP. Unless the abovementioned criminal liability of managers can be applied.

2.4.3. Environmental Impact Assessment

115. Economic entities operating in industries undertaking projects that can have a significant environmental effect can be subjected to the obligation to perform an EIA.[202] The aim of the EIA is to identify, describe and asses the direct and indirect effects of a project on multiple factors such as: biodiversity, land, soil, water and the climate.[203] MS are instructed by the EIA Directive to implement rules on penalties for economic entities which fail to comply with the EIA obligation.[204] The Flemish government implemented this Directive in a dedicated chapter in the DABM.[205] This chapter encompasses the general provisions, procedural framework and competent authority. However, failure to conduct an EIA by an economic entity is not regarded as an environmental infringement under Flemish Law.[206] As a result, an administrative fine cannot be imposed on the economic entity.

2.4.4. Internal Environmental Care and Eco-management and Audit Scheme

116. Title III of the DABM provides legislative frameworks for economic entities to help them establish sustainable production patterns and mitigate environmental harm.[207] Economic entities from industries that resort under Class 1, these are industries with a high risk of causing

[197] F. VERBRUGGEN, R. VERSTRAETEN, *Strafrecht en strafprocesrecht voor bachelors*, deel 2, Antwerpen, Intersentia, 2020, 57-58.
[198] Art. XX.172 WER.
[199] Art. 20, lid 1 V.T.Sv.
[200] Belgian Criminal Procedure Code.
[201] F. VERBRUGGEN, R. VERSTRAETEN, *Strafrecht en strafprocesrecht voor bachelors*, deel 13, Antwerpen, Intersentia, 2020, 532.
[202] Art. 1 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. (hereafter: EIA Directive).
[203] Art. 3 EIA Directive.
[204] Art. 10a EAI Directive.
[205] Titel IV. Milieu-effect en veiligheidsrapportage DABM.
[206] Art. 16.1.2, 1º, b) DABM.
[207] Art. 3.1.1. DABM.

environmental harm[208], are obligated to appoint an environmental coordinator.[209] Unless the Flemish government provides them with an exception. Other Classes of economic entities are notified by the government if this obligation applies to them.[210] The environmental coordinator has an essential role in guarding the compliance of the economic entity with environmental legislation. Their tasks include, but are not limited to: contributing to the development of sustainable production, advising on investments that could have a positive environmental impact on the economic entity and conducting emission measurements.[211] Failure to ask the advice of the environmental coordinator is considered to be an environmental infringement.[212] As a result, it could lead to an administrative fine or sanction.[213]

117. In the same title of the DABM, the Flemish government implemented the Eco-Management and Audit Scheme Regulation[214] (hereafter: EMAS). The EU created EMAS as a voluntary auditing scheme for economic entities to measure their environmental impact. It is interesting to note that the Flemish government made EMAS mandatory for specific industries and certain aspects of their operations, e.g. emissions and resource management.[215]

2.4.5. Corporate Social Responsibility

118. The methods discussed above rely, mostly, on legislative frameworks. However, legislation is not the only approach to integrating environmental governance into the operations of economic entities. As mentioned earlier in this thesis (*supra*, Chapter 1.2), soft law can be a valuable tool for economic entities looking to limit their environmental liability and insolvency risk through the implementation of environmental governance and risk-management strategies. Many of these frameworks and tools can be found within the context of Corporate Social Responsibility (hereafter: CSR) and Environmental Social Governance (hereafter: ESG).

119. CSR and ESG are gaining prominence in discussions on how companies should conduct themselves. Besides limiting the above-mentioned risk exposures, adhering to these frameworks could benefit the image that economic entities have with the general public. This in turn, could increase profits. As more and more consumers and business partners seek to engage with social and environmental responsible economic entities.[216] This results in a win-win scenario: risks are mitigated and business is booming. However, it should be noted that enforcement of these CSR and ESG engagements of economic entities is not as straight forward as it seems. First, some frameworks can only be applied if the country where the economic entity is based is a member of

[208] Vlarem II.
[209] In Dutch: Milieucoördinator.
[210] Art. 3.2.1. DABM.
[211] Art. 3.2.2. DABM.
[212] Bijlage I Milieuhandhavings Decreet.
[213] Hoofdstuk IV., Titel XVI. DABM.
[214] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC.
[215] Art. 3.3.2. DABM.
[216] P. KSIĘŻAK, "The Benefits from CSR for a Company and Society", *Journal of Corporate Responsibility and Leadership*, 2017, Vol. 3, no. 4, 54-55.

a certain organisation (e.g. OECED) or signatory party to an international agreement (e.g. international investment agreements[217]). Second, these frameworks are often not enforceable as they are a mere gentlemen's agreement or statement.[218] Lastly, someone would have to find it worthwhile to spend time and resources on litigation if they notice an economic entity is not following through on CSR and ESG.

120. Nevertheless, using CSR and ESG tools as guidelines for implementing governance structures is beneficial for economic entities. It enables them to take preventive measures and to build knowledge and procedures regarding environmental liabilities, and their consequences, within their operations. This in its turn might assist economic entities in their search for optimal financial guarantees adapted to the specific risks of their sector and operations, beyond those required by law.

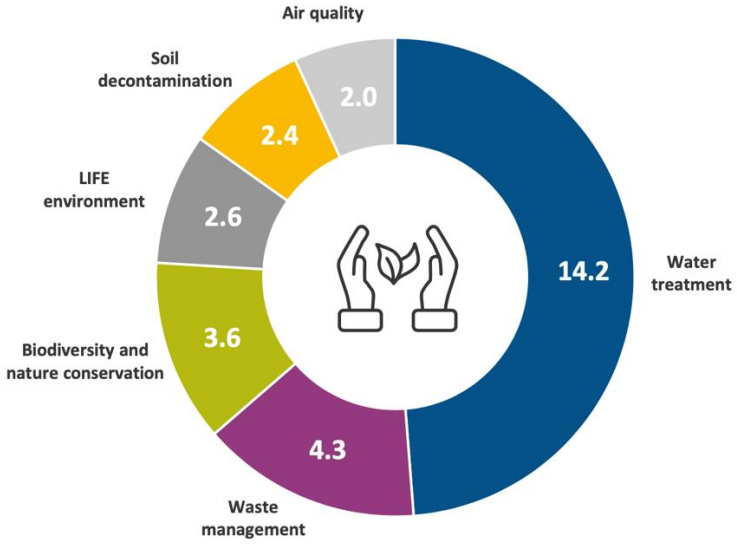
2.5. Monetary efforts

121. The expenses listed below are not limited to insolvency proceedings. They serve as an illustrative example to offer a deeper understanding of the (societal) costs associated with environmental damages. Having these insights, puts the content of this thesis and the importance of well-functioning legislation and instruments into a real-world perspective. It is not merely about law, the cost to society must be taken into account when touching upon a subject related to environmental liabilities.

122. The EU does more than providing legislative frameworks for dealing with environmental challenges, it allocates budgets to help MS in dealing with environmental pollution. Most of the funding is sourced through the cohesion policy funds (the European Regional Development Fund and the Cohesion Fund). These funds resort under the broad theme of "Environment and Resource Efficiency", and the LIFE programme (LIFE). They support different initiatives to, for example, fund waste management or the development of green infrastructure.[219] Figure 1 provides a broad overview of the division and amount of funds allocated to different projects.

[217] E. MCCONAUGHEY, E. OGUT OEHRI and L. DE GERMINY, "Corporate social responsibility under international investment treaties", Lexology, 2021.
[218] B. EGELUND OLSEN and K. ENGSIG SØRENSEN, *Legal issues of Economic Integration: Strengthening the Enforcement of CSR Guidelines: Finding a New Balance between Hard Law and Soft Law*, Kluwer, 2014, 10.
[219] EUROPEAN COURT OF AUDITORS, *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 12, Luxembourg, 2021, ISBN 978-92-847-6308-5, 11.

Figure 1: EU funds under the Cohesion Policy and LIFE program for environmental projects (2014 – 2020, in billion euros)[220].



123. In Belgium, an interesting example to illustrate the financial impact of environmental damages can be found the PROMAZ-fund. Even though its scope is limited to natural persons, it is mentioned in this chapter as the financial impact has been significant. The PROMAZ fund is operational since April 2022. It is dedicated to soil remediation efforts for pollution that occurred as a result of a leaking oil tank on the properties of natural persons. Since it became operational, five million euros have already been dedicated to reimburse natural persons for their soil remediation efforts. More than sixty one percent of this budget has been allocated to clean-up efforts in the Flemish region.[221]

124. Additionally, the Flemish government, more specifically OVAM, often works with private investors to invest money in to developing 'brownfields'. These are industrial sites that have not yet been repurposed. By agreeing on a 'Brownfield Convenant', private investors get fiscal and administrative benefits to develop abandoned, often polluted, sites.[222] An example can be found in the CAT-West site in Vilvoorde, this site used to be a parking space for Renault Industrie Belgique. OVAM agreed to finance the soil remediation efforts, as the soil is heavily polluted with benzene and a landfill. The estimated cost of the investment of OVAM is 6,3 million euros.[223]

125. As can be deducted from these examples, environmental pollution poses a heavy financial burden on society and governments. Even though environmental administrative or criminal fines

[220] EUROPEAN COURT OF AUDITORS, based on data extracted in April 2021 from the European Commission's database of planned EU spending under EU Structural and Investment Funds and the LIFE sub-programme for the environment.
[221] X., "Stookoliefonds Promaz heeft bijna 5 miljoen euro uitgekeerd sinds opstart", Belga 2024, https://www.msn.com/nl-be/nieuws/politiek/stookoliefonds-promaz-heeft-bijna-5-miljoen-euro-uitgekeerd-sinds-opstart/ar-BB1lDODt?ocid=winp2fptaskbarent&cvid=faac4feef3774a87d9df7aa56c475796&ei=4&sc=shoreline.
[222] https://www.vlaio.be/nl/subsidies-financiering/brownfieldconvenant/wat-is-een-brownfieldconvenant
[223] Jaarverslag OVAM 2023.

are, partially, allocated to funds or government organisations to finance environmental clean-up efforts[224], a significant amount of the budget still originates from general taxpayers' money that is being allocated to these environmental efforts by the government. Resulting in a poor application of the PPP.[225]

[224] Art. 16.5.1. DABM.
[225] EUROPEAN COURT OF AUDITORS, *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 12, Luxembourg, 2021, ISBN 978-92-847-6308-5, 5.

3. Evaluation of current approach

3.1. Level of harmonization on EU level

126. This chapter evaluates the current EU approach regarding their legislation harmonisation choices. The level of harmonisation has been mentioned in relation to some regulatory frameworks throughout this thesis, as it has a significant impact on the competencies and legislative leeway of MS in policy creation. When deciding between minimum or maximum harmonisation, EU legislators are met with numerous challenges, various arguments, pros and cons for each option varying on policy matter. Whereas some topics benefit from maximum harmonisation, others resort better under minimum harmonisation. While this chapter might be perceived as an odd addition to this work, discussing harmonisation levels is important when rethinking existing frameworks, legislation and requirements by law. Spending time on this topic is essential, as harmonisation will influence the suggestions presented in Chapter 3.3.

127. Currently, EU Environmental Law resorts mostly under minimum harmonisation.[226] Meaning that MS have the policy discretion to adopt more stringent measures, going beyond the requirements of the EU. As mentioned before, this allows MS to adopt frameworks that fit their specific needs. One should note that allowing MS to have this policy discretion could cause an uneven implementation of environmental legislation across EU MS.[227] In contrast to Environmental Law, Insolvency Law is still mostly governed by the legislation of individual MS (*supra*, nr. 7). However, the latter will change in the near future because the EU has plans for a deeper level of integration and harmonisation regarding insolvency procedures. These plans can be found in the 2022 Proposal for a Directive on harmonising certain aspects of insolvency law[228] (*infra,* Chapter 4.4).

128. Some argue that the above-mentioned policy discretion and dependency on national law, creates a 'race to the bottom' between MS. The argument supporting of this 'race to the bottom'-point of view is that rigorous environmental protection could drive away investors and companies, in favour of MS with less stringent environmental measures and enforcement. As a result, MS could be less inclined to adopt stringent measures in order to protect their economic interests. A similar 'race to the bottom'-point of view can be argued for insolvency procedures. Economic entities might attempt to evade certain jurisdictions with strict insolvency frameworks to appeal to their shareholders and creditors. Which could result in MS adopting legislation that would be attractive to this 'evading'-category of economic entities and shareholders, and hereby prioritising economic

[226] L. SQUINTANI, *Study on harmonisation of EU Environmental Law*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 705.033, European Parliament, Brussels, 2022, 24.
[227] EUROPEAN COURT OF AUDITORS, *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 12, Luxembourg, 2021, ISBN 978-92-847-6308-5, 24.
[228] Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 december 2022.

interests over, e.g. shareholder liability.[229] Yet, this policy discretion could also create a 'race to the top': MS could use their policy discretion to ensure 'the best' creditor protection, while still enforcing strong and robust environmental laws.[230] In a 'race to the top'-scenario, MS 'compete' with each other to provide 'the best legislation possible'.

129. The 'race to the bottom' and 'race to the top' points of view are not the sole reasoning behind choosing amongst maximum or minimum harmonisation. An argument in favour of minimum harmonisation is the fact that it provides more flexibility. Which makes it easier to adapt legislation and frameworks to societal changes, new perspectives and individual needs of MS.[231] This flexibility-argument can be used for both Environmental Law and Insolvency law.

130. In contrast, maximum harmonisation of Environmental Law could deepen the enforcement of the PPP across MS in a more coherent way. However, not every MS might be in favour of a certain level of environmental protection. As a result, it could be challenging to reach the necessary majority when new legislation is presented on the EU-level. Regarding insolvency law, one could argue that maximum harmonisation of insolvency law could benefit the working of the internal market and that it would discourage economic entities form choosing a specific MS for their more favourable insolvency frameworks (e.g. no strict manager liability in the case of bankruptcy procedures). It could eliminate the discrepancies between national insolvency law.

131. However, from the authors point of view, the arguments for maximum harmonisation are not persuasive enough to rule out the more flexible approach of minimum harmonisation. Since both harmonisation techniques have their pros and cons, a mixed approach seems to be most beneficial. Legislative aspects that would benefit from maximum harmonisation, according to this author, are aspects related to procedural matters such as:

- the obligation to appoint competent authority, which often is already included in EU legislation, and providing a list to enforcement authorities of other MS;
- frameworks on how certain environmental offences or crimes should be fined or brought to court. Meaning, a choice across MS between administrative, civil and/or criminal enforcement. This in turn could limit the possibility of, accidental, violations of the *non bis in idem* principle[232];
- the statute of limitations for initiating legal proceedings. Having the same time limit to file a claim in all EU MS could enhance legal certainty and access to justice because procedural differences regarding the statute of limitations no longer creates a barrier for those who are not familiar with these laws from other MS. However, one should consider that for this to work, the judicial backlog of MS should first be managed;

[229] M. FAURE and R.A. PARTAIN, *Environmental Federalism in: environmental Law and Economics: Theory and Practice*, Cambridge University Press, Cambridge, 2019, 282.
[230] M. FAURE and R.A. PARTAIN, *Environmental Federalism in: environmental Law and Economics: Theory and Practice*, Cambridge University Press, Cambridge, 2019, 282-283.
[231] L. SQUINTANI, *Study on harmonisation of EU Environmental Law*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 705.033, European Parliament, Brussels, 2022, 24.
[232] Recital (46) Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC.

- defining the exact time where a debtor has ceased payment and is in a 'state of bankruptcy';
- unifying manager liability, as having the same framework could limit forum shopping;
- obligations related to mandatory financial securities for environmental liabilities.

132. Maximum harmonisation the above-mentioned aspects, could enhance the procedural structure of EU legislation. Adopting a more coherent approach to procedural aspects facilitates cross-border litigation, potentially leading to a higher probability of successful litigation, and allows for quicker remedies. Furthermore, it could strengthen cooperation between MS, because the information on who has which competencies is readily available. In other words, it lowers the access to justice costs. This greater transparency and cohesion across MS benefits creditors, victims, economic entities and governments as it enhances access to justice and legal certainty.[233]

133. For non-procedural aspects, such as imposing stricter emission limits by MS with a higher concentration of industrial activities or promoting additional financial guarantees that go beyond the ones that are mandatory, a minimum approach should be maintained. Of course, such additional or deviating frameworks should be communicated to other MS to ensure legal certainty and transparency. To further secure this legal certainty, it could be beneficial if an agreement could be reached on terminology, to ensure that legislation is interpreted in the same manner in the MS.[234] An example of such a document can be found in the earlier mentioned interpretation guide for 'environmental liabilities' under the ELD (*supra*, nr. 22). Nevertheless, the EU should remain vigilant and aim to avoid significant discrepancies and potential incompatibilities between MS. This approach could result in easier agreement between MS in the legislative bodies, in contrast with maximum harmonisation.

134. Based on the arguments presented above, this author believes that a mixed approach would benefit both the enforcement of the PPP and the further harmonisation of Insolvency Law. Not every aspect of EU law should be subjected to maximum harmonisation, as this deprives MS of their flexibility and their individual legislative power. It is important to remember that currently there in an increase in euroscepticism. Some people argue that the EU has been focussing on matters that should have been dealt with by the individual MS. Strongly relying on maximum harmonisation might enhance this scepticism and this could lead to difficulties in finding a common ground between MS.[235] However, procedural matters should, according to this author, either be harmonised as much as possible or revised thoroughly to improve compatibility and coherence. Minimum harmonisation for non-procedural matters would leave enough policy discretion with individual MS to regulate those matters as they see fit. Reaching an agreement on a minimum

[233] M. VELICOGNA and E.A. ONTANU, "Melhorar o Acesso aos Tribunais e o Acesso à Justiça na Litigação Transfronteiriça:: Lições de Experiências da União Europeia", *Public Sciences & Policies*, 2022, *5*(1), 74, https://doi.org/10.33167/2184-0644.CPP2019.VVN1/ pp.69-92.
[234] M. VELICOGNA and E.A. ONTANU, "Melhorar o Acesso aos Tribunais e o Acesso à Justiça na Litigação Transfronteiriça:: Lições de Experiências da União Europeia", *Public Sciences & Policies*, 2022, *5*(1), 84. https://doi.org/10.33167/2184-0644.CPP2019.VVN1/ pp.69-92.
[235] F. SCHIMMELFENNIG, "Theorising crisis in European Integration" in D., Desmonds, N., Nugent, and W., E., Paterson (eds.): *The European Union in Crisis*, Londen Burough, Palgrave, 2017, 316-336.

baseline of rules will face less opposition from MS that are not prepared for certain regulations, while MS that wish to regulate aspects others are not ready for will still be free to do so.

3.2. Liability regimes

135. The most suitable liability scheme for environmental liability cases has been the topic of many publications and legal debates. Currently, the liability schemes in Belgium and under the ELD encompass fault-based or strict liability schemes (*supra,* nr. 50 *et seq.*). However, one might question the effectiveness of these schemes and if they should take precedence over a negligence-based liability scheme. When deciding between strict liability or negligence, within the scope of this thesis, one of the prominent factors to consider is the insolvency risk in the case of environmental pollution. The insolvency risk is one of the three liability issues developed by Shavell, which will serve as a guide during this discussion. This chapter will weigh the pros and cons of both regimes and discuss different views on the matter, ending with a critical review on how to move forward. To enhance the real-world perspective of this legislative choice, the discussion is supplemented with an illustrative example.

136. The case of 3M in Belgium is an interesting example to illustrate Shavell's three liability issues and will be used throughout this chapter to highlight the different outcomes of liability or negligence schemes. Before diving into the merits, it is important to note that some of the examples given below related to 3M and their liability are fictional, since this is an ongoing case, and therefore serve merely to illustrate the different outcomes of the liability regimes, Shavell's liability issues and other relevant legal or procedural aspects.

137. 3M is a global company, active in many sectors such as chemical industries and automotive industries. Some of its products include: adhesives for post-it's, primers and insulation materials.[236] 3M became a point of focus in Belgium after it was discovered that it released more 'forever chemicals' (e.g. PFAS) into the environment than allowed by regulations and/or permits. In 2022, 3M and the Minister of Environmental affairs[237] entered into a remediation agreement. It was agreed that 3M would pay half a million EUR to finance the soil remediation costs.[238] However, more recent discoveries unveiled that the Belgian holding of 3M could be facing insolvency. Moreover, the costs of the soil and water remediation efforts could easily exceed the available funds of 3M. As a result, the resident collective 'Darkwater3M' decided to file a lawsuit against the American branch of 3M.[239] The impact of the Belgian branch going bankrupt could be enormous, as parent company liability is difficult to prove, poses a high administrative burden[240] and the

[236] https://www.3mbelgie.be/3M/nl_BE/company-base-bnl/
[237] At that time: Zuhal Demir.
[238] C. GALLE and J. VAN HORENBEEK, "Chemiereus 3M betaalt half miljard voor sanering, maar volstaat dat? 'Het lijkt veel geld, maar de verontreiniging is enorm groot", *De Morgen* 2022, https://www.demorgen.be/nieuws/chemiereus-3m-betaalt-half-miljard-voor-sanering-maar-volstaat-dat-het-lijkt-veel-geld-maar-de-verontreiniging-is-enorm-groot~b32af112/.
[239] X., "Gaat 3M straks overkop? 'Wij waarschuwen er al maanden voor, nu noemen experts in de VS het ook waarschijnlijk'." *De Morgen* 2022, https://www.demorgen.be/snelnieuws/gaat-3m-straks-overkop-wij-waarschuwen-er-al-maanden-voor-nu-noemen-experts-in-de-vs-het-ook-waarschijnlijk~b34c263a/?referrer=https://www.ecosia.org/.
[240] R. POSNER, *Economic Analysis of Law*, 9th edn., New York, Wolters Kluwer, 2014, 559.

pollution caused has affected many families and the environment. In other words, the fall-out of 3M going bankrupt is not only economically relevant, as many jobs would be lost, but it would negatively impact the affected families and environment as well.

3.2.1. Negligence regimes

138. Under a negligence rule, an economic entity can 'escape liability' by simply conforming to the legal standard of care. Some even argue that there is no incentive to implement further measures to prevent environmental harm under a negligence regime, given that the economic entity has complied with legal requirements and thus cannot be liable (*supra,* Chapter 1.3.1.). The environmental costs will be externalised and as a result society will carry the weight of the environmental clean-up costs. This argument, however, could be perceived as a to straightforward, as more and more emphasis is placed on CSR and ECR (*supra*, Chapter 2.4.5.). Nevertheless, the latter often relies on soft law or voluntary initiatives and can therefore not completely discredit the argument above. Supporters of the negligence regime argue that because the negligence regime is triggered by harm, it is more cost effective and that is enjoys an enforcement advantage when compared to regulation.[241] Yet, for it to function properly negligence requires strong enforcement mechanisms. If negligence remains undetected, the incentive for taking the optimal level of care will lower. Consequently, this could lead to a weak enforcement of the PPP if the above-mentioned enforcement mechanisms are not optimised (*supra,* Chapter 1.3.1.).

139. In a real-world scenario, the situation could unfold as follows. If 3M obtains a permit to release a certain amount of chemicals into the environment, even though they are harmful, environmental law enforcement or victims will not be able to bring a claim against them. A possible course of action could be the adjustment of the permit.[242] Since 3M is falls within the scope of activities categorised in VLAREM I, meaning that their activities pose certain environmental risks, the prerogative to initiate the permit-adjustment procedure rest with the competent authority that granted the permit. They can do this with a motivated request at their own discretion or after a motivated request of one of the following stakeholders: the involved public[243] or the advising civil servant appointed to the permit in question. The competent authority can: 1) adjust the environmental conditions that 3M must adhere to, 2) limit the object of the exploitation if the environmental risks cannot be adjusted by changing the environmental conditions, or 3) limit the validity of the permit for the exploitation if it is no longer in line with the designation of the zone where 3M is located. However, this adjustment procedure can only be initiated every twenty years for permits which are granted for an indefinite period.[244] Being able to change the environmental conditions would establish a new level of care that 3M would have to adhere to. However, since science moves forward at a high tempo and new discoveries on harmful effects of certain chemicals are being discovered; the timeline for when this procedure can happen is not suited to deal with

[241] S. SHAVELL, *A fundamental enforcement cost advantage of the negligence rule*, Cambridge, National Bureau of Economic Research, 2012, 1.
[242] Hoofdstuk 6 OVD.
[243] As defined in: art. 2, lid 1, 1º OVD.
[244] Art. 83 OVD.

the fast development of new scientific discoveries. Therefore, the adjustment of the environmental permit is an inadequate tool for short-term protection of the environment. Moreover, changing the environmental conditions or limiting the exploitation can cause a disturbance in the activities of the 3M. As a result, they could suffer great financial losses when or if they are not prepared for the financial outcome of the permit-adjustment. Resulting in a higher probability of insolvency. Given that 3M is a major player in the market, this is unlikely to occur. But smaller economic entities might not have the same financial bandwidth. The same outcomes can be argued for the (partial) revocation of the permit by the competent authority that granted the permit or, if the competent authority does not react, the Flemish government. Revocation can occur when the economic entity does not adhere to the environmental conditions as set out in the permit.[245] This example illustrates one of the issues with negligence: the difficulty to adapt permits, based on regulations governing outdated optimal levels of care, to new scientific discoveries. This difficulty results in not being able to apply negligence, because the economic entity is allowed to pollute until the permit is adapted or revoked.

140. Nevertheless, a negligence scheme will result in a lower probability of insolvency, under the condition that the costs of taking care (adhering to the environmental conditions) are lower than the capital of the economic entity (*supra,* Chapter 1.3.1.). In addition, following the level of care as required by law will prevent the economic entity from having to pay compensation to the victims of environmental pollution. This in turn, lowers the probability of insolvency. As one can imagine, the lower risk of insolvency is a frequently used argument in favour of a negligence rule.[246] However, if the economic entity cannot meet the legal level of care, meaning it cannot operate under the environmental conditions of the permit, it will have to either adapt or quit its activities. Going back to the 3M case, a choice was made to adapt activities. The 3M group announced that it will seize production of PFAS at the end of 2025 across the globe. The cost for 3M of this decision is estimated between 1,3 and 2,3 billion dollars, before taxes. The consequences for the jobs in existing factories are still unknown.[247] The Belgian 3M factory in Zwijndrecht is estimated to stop PFAS production in 2024.[248] One should keep in mind that adapting activities is not a possibility for all economic entities. If a smaller economic entity does not possess the means to do so, it could have negative economic consequences, e.g. job loss for employees, having to limit production or having to liquidate the economic entity.

141. The enforcement of the PPP under negligence schemes can be approached from two points of view. On the one hand, the legislator has the opportunity to set a level of care that they deem adequate to protect the environment. However, the polluter will not have to pay for harm caused under a valid permit or under the allowed pollution levels. On the other hand, if or when the polluter neglects to adhere to the set level of care; holding them accountable for the harm caused is less

[245] Afdeling 1, Hoofstuk 7 OVD.
[246] M. FAURE and N.J. PHILIPSEN, *An Economic Analysis of Tort Law and Insurance*, 2019, 10. Excerpts from M. FAURE (2001) and N.J. PHILIPSEN (2019), *Environmental Law and Economics*.
[247] S. GROMMEN, "Chemiereus 3M stopt tegen eind 2025 met productie PFAS", *VRT nws*, 20 december 2022.
[248] M. HERREMANS, "Het Amerikaanse chemieconcern 3M zal de PFAS-gerelateerde productieprocessen op de site in Zwijndrecht 'versneld afbouwen'. Dat laat het bedrijf per brief weten aan minister van Omgeving Zuhal Demir (N-VA)", *De Standaard,* 10 januari 2024.

challenging than under a (strict) liability regime. Meaning, that there is a higher chance that the economic entity has to face the consequences of harming the environment. However, the latter requires strong environmental law enforcement mechanisms, otherwise the harm will remain undetected.

3.2.2. (Strict) liability regimes

142. Contrarily to negligence schemes, (strict) liability does not rely on detailed legal frameworks for economic entities to adhere to. Liability schemes require the existence of a fault, that has a causal relationship to the occurred damages (*supra,* Chapter 1.3). It is the judge who, taking all circumstances into consideration, will rule if an economic entity is at fault. In other words, if it has taken the appropriate level of care to avoid environmental damage. However, enforcement of (strict) liability is met with several challenges. The challenges presented below illustrate why relying on (strict) liability schemes hinders effective enforcement of the PPP and creates insolvency risks.

143. A first challenge with (strict) liability regimes is holding management accountable in the case of environmental damage, because manager liability can be 'escaped' by corporate structures. The latter is especially troublesome if the economic entity itself does not possess the financial means to compensate the environmental tort victims. Many economic entities operate under a limited liability structure, meaning the shareholders and managers cannot be directly held accountable for the environmental damages; unless the legal frameworks for manager liability can be applied (*supra*, Chapter 2.3.). A solution to this challenge is piercing the corporate veil to hold shareholders accountable for the harm caused by the economic entity. However, veil piercing is a difficult task: it comes with a high administrative burden, especially when there are many shareholders and shares change owners frequently.[249] The same can be argued for frequently changing management structures. Courts might rule in favour of veil piercing if the assets have been purposely shifted to disadvantage creditors and tort victims. To apply this approach, courts will often require proof that the corporate structures were used in an abusive way to limit the rights of creditors and tort victims. It is important to note that undercapitalisation of risky, but legitimate, activities is often not seen as sufficient reasons to pierce the corporate veil.[250] When applied to the 3M case, the situation could unfold as follows. Initially the risky activities of 3M were legitimate and therefore not a valid ground to pierce the corporate veil. It was only discovered later that 3M was exceeding emission limits and that its operations cause environmental harm. However, if judges are presented with proof that the corporate structure of 3M is being abused to avoid liability or that the conditions for manager liability are met; they might hold the managers accountable for their decisions that resulted in environmental pollution that occurred after they were informed of the risks or exceeded emission limits. However, since 3M has entered into an agreement with the Flemish government, the likelihood of manager liability to be applied here is relatively low.

[249] R. POSNER, *Economic Analysis of Law*, 9th ed., New York, Wolters Kluwer, 2014, 559.
[250] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 52.

144. The second challenge within liability schemes can be found in proving the causal relationship between the fault and the environmental harm. In many cases the harm manifests itself after a longer period of time. As a result, the economic entity that caused the harm might already have seized to exist, statute of limitations can be in play or managers have disappeared. Additionally, the environmental damage can be widely dispersed, making it unappealing to initiate legal proceedings for individual victims. Especially in legal systems where class action suits are not allowed or only allowed under strict conditions.[251] Belgium, for example, has strict conditions regarding class actions. Furthermore, many instances of harm caused by environmental pollution and crimes are victimless. This refers to damage inflicted upon entities incapable of exercising legal rights, such as forests, bodies of water, and so forth. As a result, if there is no organisation that has the recourses or competency to fight for the protection of these 'victims', there will be no liability claim and the polluter will not be liable. Resulting in no application of the PPP.[252] The problem of proving causation holds great relevance within the 3M case. The pollution caused by 3M has affected many individuals and is widely dispersed. In addition, the environmental damage was only discovered after a considerable period of time. Fortunately for the affected individuals and the environment, 3M has not 'disappeared' and is still operational. As a result, it is still possible to pursue legal action. The before mentioned collective 'Darkwater 3M' has seized this opportunity and aims to hold 3M accountable for their actions. Standing up for both the affected citizens and the environment.[253] This collective decided to carry the burden to prove that it was indeed the pollution caused by 3M that affected their lives and the environment. Some steps to prove this causality have already been taken. For example, a large-scale investigation of the blood of the citizens living close to 3M has been conducted[254]. The results of this investigation could be used as evidence in court, proving that 3M has indeed negatively impacted the health of the citizens living nearby.

145. The third challenge arises, if the damages exceed the capital of the economic entity. In such cases a problem of underdeterrence may arise. In other words, the economic entity will take measures that are equal or lower than its wealth, which is often lower than the optimal level of care required to effectively avoid environmental harm.[255] Some authors even argue that this risk of underdeterrence is greater under strict liability than under negligence.[256] In the worst-case scenario, the liability claims indeed exceed the capital of the economic entity, resulting in insolvency or bankruptcy.[257] This in turn could lead to the inability of the insolvent or bankrupt economic entity to be able to satisfy its creditors and pay for environmental clean-ups or liability

[251] S. SHAVELL, "Liability for Harm versus Regulation of Safety", *The Journal of Legal Studies, 1984,* vol. 13, 363.
[252] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 20–22.
[253] X, "Nieuw burgercollectief lanceert class action tegen 3M", *Vilt*, 2022.
[254] V. MERCKX, "Groot PFAS-bloedonderzoek gaat van start: 9.000 omwonenden van 3M hebben zich al aangemeld", *VRT nws* 2023, https://www.vrt.be/vrtnws/nl/2023/05/22/grootschalig-bloedonderzoek-bij-omwonenden-3m-gaat-van-start/.
[255] M. FAURE and N.J. PHILIPSEN, *An Economic Analysis of Tort Law and Insurance*, 2019, 10. Excerpts from M. FAURE (2001) and N.J. PHILIPSEN (2019), *Environmental Law and Economics*.
[256] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 56.
[257] R. COOTER and T. ULEN, *Law and Economics 6th edition*, Berkeley Law, Berkeley, 2016, 242.

claims from victims. Again, this problem has significant relevance in the 3M case, as it is believed that the Belgian holding of 3M is in bad financial shape. If the outcome of the liability claims does exceed their available capital, the Belgian 3M holding could be facing bankruptcy. Unless 3M has invested in financial securities and guarantees aimed third-party claim and/or environmental liability, the victims will not be able to receive compensation and it might become difficult to conduct further soil remediation efforts. In addition, other creditors of 3M will have to participate in the bankruptcy proceedings to be able to receive the debts owed to them. This insolvency issue could be resolved if the parent company of 3M can be held liable for their debts.[258] In *Akzo Nobel*[259] the European Court of Justice (hereafter: ECJ) held that the parent company can be held liable for their subsidiary if they consist of a 'single economic unit'. Later the ECJ added that, for the liability to apply, it is irrelevant if the subsidiary was encouraged by the parent company to commit the infringement or crime.[260] Since the parent company of 3M is based in the United States of America, PIL will apply to assess if and how this liability can be enforced. The insolvency risk encompassed within this third challenge is, according to some, a significant argument against (strict) liability regimes.

146. As a result of the challenges discusses above, environmental (strict) liability schemes do not guarantee that the PPP can be enforced to its fullest extent. However, not being bound by strict regulated levels of care, in contrast to negligence schemes, provides judges and legislators with the opportunity for a more flexible approach because there is more room for individual interpretation to determine if the economic entity has indeed committed a fault that resulted in environmental damage. This is in contrast with negligence, where frameworks would need constant review for them to meet the latest industrial and environmental developments. To support the (strict) liability scheme, efforts should be made on developing industry standards and soft law instruments together with the relevant stakeholders. This allows judges to make more informed rulings on whether an economic entity is liable or not.

3.2.3. Similar problems in both regimes

147. In addition to the challenges presented above, there are three potential problems that this author encountered in each of the discussed schemes. Before discussing which regime could provide the best possible outcome, it is worth touching upon these problems as they influence the choice at hand.

148. The first problem is the possible existence of information asymmetry between the legislator and economic entities.[261] The available information regarding industry standards and existing legislative frameworks, influences the functioning of liability schemes in the following manner:

[258] M. FAURE, *Tackling Environmental Crimes under EU law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2021, 51.
[259] ECJ 10 September 2009, C-97/08 B, *Akzo Nobel/Commission of the European Communities*.
[260] M. FAURE, *Tackling Environmental Crimes under EU law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2021, 51-51.
[261] M. FAURE, *Regulatory strategies in Environmental Liability*, working paper no. 2011/22, 2011, 137.

- under (strict) liability: the available information influences the perception of the judge when they need to assess whether an economic entity is at fault or not;
- under negligence: the available information influences the economic entities, since it enables them to set the appropriate levels of care.

149. In some instances, the regulator could have an information advantage. Meaning that they have access to information through means that the economic entities do not possess. For example, the possibility to acquire information at a lower transaction cost because of research by government institutions. To avoid this information asymmetry, the legislator could establish an economy of scale by doing research for the entire market to establish the best level of care and pass on this information through regulation or information campaigns.[262]

150. The second problem can be found in the enforcement of environmental legislation. As discussed above, under (strict) liability the probability of having, or completing, a successful lawsuit is lower than under a negligence regime due to the burden of proving causality between the pollution and the damage. But to establish negligence, there must be strong environmental law enforcement. If such enforcement is not in place, the negligence of the economic entity might stay undetected. In addition, it could limit the deterrent effect of the regulations containing the level of care that the economic entities must adhere to in order to not be found negligent.

151. The third problem is the insolvency risk. The cost of care is related to the expected costs of damages. If the economic entity expects damages that exceed its wealth, it will only take measures of care that are equal to that wealth. Consequently, the level of care that has been adopted could be below the optimal level of care.[263] This is an application of the idea that environmental liability rules will only have deterrent effect if the economic entity has the assets to pay for the damages caused.[264] If insolvency remains without consequences, regarding environmental harm, and protects the economic entity or its managers from paying; the problem of underdeterrence arises. As mentioned before, the insolvency risk is lower under negligence schemes. Nevertheless, it is not unthinkable that changing regulations that economic entities must adhere to can have grave financial consequences that could result in financial troubles.

3.2.4. Unilateral and bilateral accident settings and the optimal activity level

152. One more factor that should be considered when reflecting on the optimal liability regime is the accident setting, unilateral or bilateral[265], and the so-called 'activity level'. The latter refers to the frequency of the occurrence of the behaviour that caused the environmental damage.[266]

[262] M. FAURE and R. A. PARTAIN, *Environmental Law and Economics: Theory and Practice, Cambridge, Cambridge University Press*, 2019, 189.
[263] M. FAURE, *Regulatory strategies in Environmental Liability*, working paper no. 2011/22, 2011, 134.
[264] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 23.
[265] M. FAURE and R. A. PARTAIN, *Environmental Law and Economics: Theory and Practice*, Cambridge, Cambridge University Press, 2019, 148-152.
[266] M. FAURE and R. A. PARTAIN, *Environmental Law and Economics: Theory and Practice*, Cambridge, Cambridge University Press, 2019, 152-154.

153. In a unilateral setting, negligence is believed to lead to precaution for each risky environmental activity. But only if the required level of care by the legal system is equal to the optimal care. Here, strict liability will lead to the optimal level of care as well. Because the polluting economic entity will have to compensate in any case, regardless of the level of care they took. Therefore, some argue, that the economic entity will either take excessive precautions or no precautions at all, because whether or not it takes precautions, the economic entity will be liable either way. In contrast, others argue that the former is not true. According to them, the economic entity wants to minimise its costs and will therefore adopt the optimal care for each risky activity to avoid having to pay liability claims. Therefore, in a unilateral setting both regimes will lead to a minimisation of societal costs of environmental pollution, because the economic entity takes the optimal level of care. By taking this care society does not carry the burden of clean-up costs.[267]

154. In a bilateral setting with a negligence rule, both the economic entity and the victim must take the optimal level of care. The economic entity will still take the optimal level of care to avoid liability. Here, victims have an incentive as well to adopt the optimal care because under negligence they carry the loss when an accident occurs. Therefore, by taking care, they can avoid carrying the loss.[268] While strict liability, in a bilateral setting, still requires the economic entity to take the optimal level of care, the victim has no incentive to do so in this regime; because they will receive full compensation anyway as a result of how a strict liability rule operates. To mitigate this, the strict liability rule can be combined with a 'contributory negligence defence'. This means that the victim will not receive full compensation if they did not follow legal due care standards.[269]

155. The so-called 'activity level' plays an important role in this discussion. As it can have a significant role in risk planning by economic entities: the more activity, the higher the chance an accident occurs and therefore adequate risk management strategies taking this activity level into account should be put in place. However, under a negligence rule in a unilateral setting this activity level is less important because here negligence requires and incentivises only an optimal level of care, not an optimal activity level. In contrast, under strict liability in a unilateral setting economic entities benefit from adopting an optimal activity level. As adopting this optimal level is yet another way to minimise potential costs as a result of environmental damage. From a policy perspective, when this 'activity level' is considered, it seems more beneficial to have a strict liability regime for situation where the victim cannot influence the risk of environmental damage. In bilateral accidents, the situation for negligence regimes is similar to the optimal level of care. There is incentive for the victim to adapt an optimal activity level, because the loss lies with them. For strict liability, the victim will have no incentive to adopt an optimal activity level, even when combined with a 'contributory negligence defence'.[270]

[267] M. FAURE, *Regulatory strategies in Environmental Liability*, working paper no. 2011/22, 2011, 135.
[268] M. FAURE, *Regulatory strategies in Environmental Liability*, working paper no. 2011/22, 2011, 135 -136.
[269] M. FAURE, *Regulatory strategies in Environmental Liability*, working paper no. 2011/22, 2011, 135.
[270] M. FAURE, *Regulatory strategies in Environmental Liability*, working paper no. 2011/22, 2011, 136 -137.

3.2.5. Choice between the two regimes

156. One could conclude that there is no ideal answer to the question of which liability regime should be the preferred choice for legislators. Since both regimes can result in the under-enforcement of the PPP and insolvency of the economic entity. In addition, the preferred regime might vary depending on the accident setting. Which makes it even more complicated to establish an 'one size fits all' approach.

157. Whereas it seems more beneficial to have a negligence regime, because of the higher probability that the economic entity will be held accountable for the environmental damage they caused, legislators would have to keep up with ever changing technological and environmental developments in order to set the optimal level of care. In addition, there is a low incentive for economic entities to take extra care through measures beyond those required by law. Furthermore, the negligence rule allows an economic entity to 'escape' liability by conforming to the legal standard of care. In contrast, fault-based liability regimes allow a higher flexibility to keep up with the before mentioned developments. However, because of the abovementioned problems with pursuing liability claims, the PPP would not be enforced to its fullest extent. Yet, some argue that because industries are already highly regulated, the burden of proof is not as heavy as previously argued. Because victims only have to prove the violation of these regulations in order to establish a fault. Therefore, more time can be spent on gathering evidence on causality.[271]

158. A strict liability regime could mitigate the cons of a fault-based liability regime. Because the claimant/victim does not need to prove that the economic entity or manager was at fault (*supra*, nr. 54). A second argument in favour of strict liability is the fact that environmental pollution cases are often unilateral accidents. Meaning, that the economic entity is the only actor that can influence the accident risk and will therefore take risk management measures.[272] Nevertheless, the insolvency risk still lingers behind the corner. Furthermore, under a (strict) liability rule the economic entity could 'escape' liability by maliciously fabricating insolvency. As a result, there will be no more assets in the bankruptcy estate and the victims will not be compensated, unless there were financial guarantees in place that include victim compensation (e.g. insurance).[273] It should be mentioned that this malicious technique has not been observed in many real-world scenarios.[274] An additional argument against imposing strict liability mechanisms, is the fact that economic entities could organise themselves in to smaller units or entities with reduced assets and limited liability structures.[275] This would shield assets from creditors and allows the economic entities to still externalise environmental harm. An example of the latter can be found

[271] M. FAURE and R. A. PARTAIN, *Environmental Law and Economics: Theory and Practice*, Cambridge, Cambridge University Press, 2019, 155.
[272] M. FAURE and R. A. PARTAIN, *Environmental Law and Economics: Theory and Practice*, Cambridge, Cambridge University Press, 2019, 156.
[273] A. STREMNITZER and A. TABBACH, *Insolvency and Biased Standards—The Case for Proportional Liability*, Yale Law School Faculty Papers, 2009, No. 24.
[274] L. BERGKAMP, *The Environmental Liability Directive and liability of parent companies for damage caused by their subsidiaries ("enterprise liability")*, *European Company Law*, 2016, Vol. 13(5), 183-190.
[275] A. ALBERINI and D. AUSTIN, "Liability policy and toxic pollution releases", in Heyes, A. (ed.), *The Law and Economics of the Environment*, Cheltenham, Edward Elgar, 2001, 92-115.

in so-called 'single ship companies', often used by large shipping companies when transporting hazardous goods. These large shipping companies create separate legal entities for individual ships, to limit their liability. If then an environmental pollution accident occurs, victims of this accident can only execute against the singe ship company.[276]

159. Considering all the challenges, pros and cons presented above, this author believes that there is no optimal approach and no argument persuasive enough to end the discussion of which regime should take precedence over the other. One can keep going in circles and advocating for either regime or just accept the fact that there is no optimal approach. Once this is accepted, legislators and scholars can shift their focus and energy towards creating optimal frameworks tailored to specific industries and reviewing existing legislation to ensure it still provides adequate protection for the environment, victims of environmental harm, and against insolvency. Additionally, rather than debating the potential insolvency risks of each regime, it would be more beneficial to develop legislation and frameworks aimed at mitigating these risks as much as possible. This could involve, for instance, placing greater emphasis on the importance of mandatory financial guarantees and insurance. (*infra,* Chapter 3.1.1.). For instances where the risk cannot be avoided at all, it is important to put mechanisms in place to ensure creditors and liability victims receive the compensation they are owed. For example, through reinforcement the previously discussed manager liability and insurance mechanisms.[277] By holding management accountable there are incentivised to ensure the best possible risk management strategies to avoid insolvency and environmental harm.

160. Besides reinforcing existing mechanisms and legislation, the EU and MS should introduce training programmes about the ELD, ECD, national and EU environmental legislation and the importance of having financial guarantees to avoid insolvency. By raising awareness of economic entities about the environmental risks of their activities and the potential insolvency that might occur as a result of these risks, they can implement appropriate risk management strategies.[278] This seems like a more efficient approach to prevent major environmental accidents that could result in insolvency.

3.3. Evaluation of specific frameworks

161. After highlighting the influence of harmonisation levels and liability regimes on the possible outcomes of legislative choices, and discussing preferred harmonisation levels and liability regimes. It is time to use this gained knowledge to formulate suggestions in regard to the frameworks presented throughout this thesis. It should be noted that some suggestions might already be in the works through legislative initiatives that are bound to come in to effect in the near future (*infra*, Chapter 4). While formulating these suggestions, no strict distinction or will be made between EU

[276] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 46.
[277] M. FAURE, *Environmental liability of companies*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2020, 47.
[278] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 269-270.

and national legislation or Insolvency and Environmental Law. That is because this author prefers a holistic approach and wishes to discuss things simultaneously to better present how certain challenges and legislative gaps are related to one and other. For each suggestion made, a clear indication will be provided regarding the legislative level where it should take place.

162. While reading the suggestions, it is important to remember that the scope of this work is somewhat limited and that further research might be needed in order to assess the viability and possible approach to the suggested improvements.

3.3.1. Financial securities and guarantees

163. Even though progress has been made in the development of legal frameworks, financial securities and guarantees related to environmental liabilities and associated insolvency risks, challenges still exist in the application of the ELD on large-scale incidents and insolvency situations.[279] In addition, most of the financial securities and guarantees reviewed in this work are either voluntary or are significantly different across EU MS.[280] Because they have such an important role in ensuring compensation during bankruptcy proceedings and protection against insolvency, it is crucial to reflect on their current form and harmonisation level to create lasting solutions.

3.3.1.1. Insurance

164. As insurance policies for ELD and other environmental liabilities are developing, it may be beneficial to reconsider whether making them mandatory would enhance their effectiveness as a tool to enforce the PPP, to protect the economic entity form bankruptcy and/or to protect victims and creditors in the event of bankruptcy following a pollution incident. In addition, one should consider whether placing these mandatory insurance requirements under maximum harmonisation would not be more beneficial than the current approach.

165. Mandatory insurance for environmental liabilities ensures that economic entities will be able to meet their environmental obligations and avoid underdeterrence; even if they face bankruptcy, as the payment from the insurance will be allocated to the clean-up efforts and victims (depending on the coverage of the insurance policy).[281] However, there is currently no broad base of support for compulsory insurance schemes by insurance providers (*supra,* nr. 58). A concern regarding compulsory insurance is the fact that estimating the risk that has to be insured is not as easy as it seems. This is due to the fact that estimating the effects of an environmental accident and the costs it could create are hard to predict. Subsequently, environmental insurance is a *niche* market and policies often contain very detailed risk criteria related to specific industries and economic entities, which makes it challenging to create 'default criteria'. In addition to being a

[279] Report from the Commission under art. 18(2) of the ELD, SWD (2016) 121, final, 6.
[280] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 242.
[281] M. FAURE, *Tackling Environmental Crimes under EU law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2021, 107.

niche product, the insurance policy would only cover the necessary bases for a short period of time, due to potential changes in legislation or the financial conditions of the economic entities. Meaning that the economic entity would have to spend a significant amount of time to renegotiate their insurance contract for each change that could impact their current policy. This creates a considerable administrative burden on both the economic entity and the insurance provider.[282]

166. To combat this administrative burden, mandatory mechanisms should have a flexible character. Meaning that they are created in such a way that is easy to renegotiate the terms and adapt the policy and it coverage to the changing operations of the economic entity and changes in legislation. To achieve this flexibility, the EU could provide some general rules in the form of a Guidance Note, while leaving the details of the content of the insurance policies to the MS and insurance providers. In addition, such a Note could, for example, also contain suggestions on risk assessment.[283] This approach, however, requires that the EU adopts frameworks to harmonise certain aspects of insurance practices in the EU. By doing so, cross-border insurance can work better and forum shopping to avoid certain insurance requirements would be minimised.

167. As previously highlighted, some EU MS have already imposed compulsory insurance schemes related to ELD liabilities (*supra,* nr. 62). It could be useful to learn from these examples and investigate how they could be adapted on an EU-wide scale. To assess this, an overview of mandatory insurance policies across EU MS should be compiled to create a starting point, such baseline would provide the necessary insights as to why certain MS have chosen to apply mandatory insurance to certain economic entities, what challenges they encountered, best practices and how this could be transposed to other MS. By doing this, a more coherent approach would be achieved in the EU.

168. Such as assessment has been made quite recently in a 2020[284] study. In this study, several suggestions regarding the improvement of financial securities are being formulated. In relation to insurance, the study seems to favour stand-alone insurance policies over environmental extensions to general liability or property insurance. The reasons for this preference is the fact that stand-alone insurances often require risk assessments, which then in turn determines the hight of the premium. As a result, economic entities, who are prospective insureds, will take steps to lower their risk exposure in order to obtain a lower premium. In contrast, insurance companies often do not require additional risk assessments for extensions to general insurance policies. This often limits the coverage provided by such an extension. In addition, some reinsurance companies will not reinsure these extensions do due the lack of the underwriting of the environmental extension.[285]

[282] EUROPEAN COMMISSION, *Implementation of Directive 2009/31/EC on the Geological Storage of Carbon Dioxide, Guidance document 4 on art. 19 Financial Secuirity and art. 20 Financial Mechanism*, 2011, 6.
[283] M. FAURE, *Environmental liability of companies, Brussels, Policy Department for Citizens' Rights and Constitutional Affairs*, European Parliament, Brussels, 2020, 121.
[284] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 312 p.
[285] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 248-249.

169. This argument in favour of stand-alone insurances is followed by this author. Conducting risk assessments, such as EMAS (*supra* nr. 117), will ensure underwriting of the insurance policy adequate to the risks of the economic entity in question. This is especially valuable for economic entities who do not possess a lot of in-house knowledge, which could otherwise lead them to possibly underestimating their environmental risks. Furthermore, this could help the further development of the environmental insurance market, because stand-alone insurance underwriting will require more specialists and specialised insurance companies. If this market expands, awareness of the benefits of environmental insurance and risk assessments will also increase. This could motivate businesses to critically review their operations to remain risk-averse, thereby reducing their exposure to environmental liability claims and the potential insolvency risks associated with such liabilities (*supra*, nr. 151).

170. Another way to ensure that economic entities have financial securities in place is by making them mandatory. This authors strongly believes that statutory insurance is a viable option towards better enforcement of the PPP, victim protection and insolvency risks. However, it should be noted that insurance comes with a risk of moral hazard. This risk of moral hazard is not absolute, it can be mitigated by techniques such as deductibles or coinsurance. In addition, insurance companies often impose safety standards that must be maintained by policy holders in order to remain insured. These standards are contractual obligations, this means that the economic entity explicitly agrees to them and therefore is aware of the consequences should they fail to maintain them.[286] As a result, this author is not convinced that this moral hazard is a strong argument against the introduction of mandatory insurance.

171. Another advantage of insurance, which makes it an excellent mechanism, is that it provides *ex ante* financial security. Meaning that it exists before the damage occurs. As a result, the financial burden of an environmental liability claim will not 'manifest suddenly', preventing the economic entity from being rendered unable to continue its activities. The economic entity, which has paid its premiums, can rely on the insurance company to provide coverage for the harm done. Of course, if the type of damage that occurs was included in the policy. If then, there are grounds for the insurance company to execute recourse on the economic entity or manager, a reasonable payment plan can be created to ensure reimbursement to the insurance company, without causing bankruptcy of the economic entity.

172. Given that insurance simultaneously protects the interests of the economic entity by shielding it from financial harm caused by environmental liability claims, and safeguards liability victims through the possibility of direct action against the insurance company (*supra*, Chapter 2.1.1.), this author believes it might be the most effective tool to provide a positive outcome for all parties involved.

[286] R. COOTER and T. ULEN, *Law and Economics 6th edition*, Berkeley Law, Berkeley, 2016, 238.

3.3.1.2. Funds and risk-sharing facilities

173. Funds find themselves in a similar position as insurance policies: EU-wide (public) funds and mandatory funds are not supported by the field (*supra,* nr. 58) and similar concerns regarding the moral hazard exist here as well. In addition, some argue that public funds breach the enforcement of the PPP *sensu stricto*. As it is the public fund that bears the expenses caused by environmental harm and not the polluter themselves. Especially in cases where the public fund is, partially, subsidised with funds that are not obtained through environmental administrative or criminal fines (e.g. taxes).[287] Nevertheless, funds and risk-sharing facilities can be a viable approach to ensure that environmental liability costs do not cause the bankruptcy of the responsible economic entity. In cases where bankruptcy has already occurred, risk-sharing facilities can prevent the clean-up costs from falling on taxpayers and the government due to insufficient assets in the bankruptcy estate to cover the expenses.

174. To counter concerns about public funds breaching the PPP, they could be set up in such a way that they can only be used if other (market) instruments fail to ensure victim compensation and/or cover clean-up costs. Another approach to mitigate this breach, is already in place in Flanders, is allocating administrative and criminal fines to public funds. In addition, environmental taxes, imposed on high risk activities, could be allocated to public funds as well. Regarding membership-based funds, PPP-related concerns can be limited by creating specific conditions that must be met to qualify for financial aid from a fund. Some suggestions for such conditions are:

- economic entities should only be able to rely on financial aid after being a member of a fund for a certain period of time: this would limit malicious memberships to funds by economic entities that are aware of their environmental and insolvency risks and have only applied to be a member of a fund to have a last-resort option. For cases where the economic entity finds itself in trouble when applying for membership to a fund, a membership risk assessment could bring this to light. The fund could then estimate the membership fees accordingly or, via contract, impose a minimum years of membership that the economic entity needs to have to be eligible for aid;
- the economic entity should only be allowed to rely on financial aid from the fund if there is no 'foul-play': meaning that the environmental harm and/or bankruptcy is not the result of serious negligence, a grave fault or deliberate behaviour of the economic entity and its governing bodies;
- the economic entity and its manager(s) are not serial offenders, meaning that if they have had multiple claims or legal proceedings against them for causing significant environmental damage or bankruptcy they would not be eligible for financial aid from the fund. Of course, still being able to rely on aid could be made dependable on paying higher contributions to the funds, depending on the amount of previous incidents.

[287] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive, European Commission*, Brussels, 2020, 264-265.

175. The risk, however, of creating such conditions is that some economic entities will not be able to meet them and therefore not be able to rely on assistance of membership-based funds. If then there are no other financial possibilities left, the environmental damage might be left unremedied and victims without compensation. Unless, of course, a public fund steps in and finances the remediation costs and compensates the victims. However, this leads back to a breach of the PPP.

176. Besides conditions related to participation in funds, limiting the use of public funds to a last-resort option would ensure that the PPP is not automatically breached. Where possible, the polluting economic entity should have the obligation to, partially, reimburse the public fund. For example, through a payment plan adapted to their financial situation. In cases where the economic entity cannot reimburse the public fund, due to bankruptcy or insolvency, application should be made of manager liability or parent company, if the necessary conditions are met. And if such possibility does not yet exist in a MS, to create frameworks to make it possible.

177. This author shares the concerns about an EU-wide (public) fund for ELD liabilities, if it were to be a single fund covering all sectors and industries. Having one fund that covers all industries and sectors could be problematic and hard to manage, because it will be almost impossible to determine criteria and membership conditions due to the major differences between industries.[288] For example, waste transportation has different risks than storage of carbon dioxide. However, sectors who could cause large scale and/or wide spread pollution (e.g. nuclear facilities, *supra* nr. 74) or economic entities which are active in multiple EU MS could benefit from an EU-wide (public) fund designed for their sector, because it eliminates the process of having to obtain fund-membership in each MS that could possibly be affected by pollution or each MS where the economic entity is active.

178. Nevertheless, economic entities should have the freedom to establish EU-wide risk-sharing facilities/membership-based funds for their sectors if they wish to do so. Such private risk-sharing facilities, tailored to specific activities and industries, can be beneficial because the industry is often best positioned to identify the risks they face and to estimate contributions based on those risks. In turn, this could create a form of 'self-governance' within the industry, where economic entities themselves ensure the best possible protection and frameworks to handle environmental liabilities and the insolvency risk that accompanies it.

179. In addition to the funds discussed above, economic entities that form a group through parent and daughter companies, franchising or enterprise structures could create a 'private fund' for their group and/or franchisees. The controlling economic entity can set contribution requirements for the group and/or franchisees, based on the estimated risk of their activities. The funds collected through this system, can be placed within a trust or a special account managed by a trusted (legal) person (e.g. bank). Of course, this suggestion is entirely dependent on the

[288] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 264.

goodwill of the economic entity and would not be legally possible in all legal systems. Yet, it is a possibility for economic entities that want to take additional steps towards financial security on their own terms.

180. Akin to insurance, membership-based funds and risk-sharing facilities are *ex ante* financial securities and guarantees. Which means they encompass similar benefits as insurance: coverage if conditions are met and possibilities negotiate reimbursement by the economic entity. Which, according to this author, gives them benefits over *ex post* mechanisms, where reimbursement might be hindered by bankruptcy or general insolvency issues. Yet, contrarily to insurance, this author does not believe that mandatory membership-based funds should be the norm for all sectors or industries. Because of the administrative burdens that management of such a fund creates.[289] Compulsory membership to risk-sharing facilities should, however, be mandatory for high risk activities, such as nuclear facilities or the oil-industry, because the damage that could be caused by these activities would be of such magnitude that insurance alone might not suffice to remedy the harm. Which could lead to insolvency.

181. As for public funds, this author believes that relying on taxpayer money, to remedy harm caused by economic entities, should be a last-resort option; which includes an obligation to reimburse the public fund. Either through manager liability and/or (parent) company liability, if necessary through a payment plan that spans multiple years. By doing this, the PPP can be enforced, as it is not the governments job to clean-up after polluters. This approach regarding public funds should be harmonised as much as possible across EU MS.

182. Another concern of this author is that currently there are no funds, which comply with the PPP, that apply strictly to insolvency risks.[290] Considering the extensive time and resources devoted to researching insolvency risks in liability mechanisms, the impacts of climate change and environmental harm, the creation of a zero-carbon EU, and methods to strengthen the internal market, and then allowing this research to shape legislation, it is surprising that the brightest minds across the EU have yet to determine how to establish such a fund. Both on EU and MS level. Because integrating the PPP further in to insolvency and bankruptcy frameworks, through mechanisms as financial securities, manager liability and (parent)company liability will reinforce the possibility to achieve the goal of moving towards a greener EU and stronger internal market.[291] Perhaps the administrative burden associated with such frameworks, particularly in the context of insolvency and bankruptcy that actively enforce the PPP, is currently deemed not worthwhile, or it may still be unclear how such a fund should function. If such a fund would be created, this author thinks that a public fund, managed by the competent authority of the MS that is tasked with PPP enforcement, could be an appropriate method. This author is uncertain if maximum harmonisation would be beneficial for this type of fund, since it currently does not exist in any MS. Therefore, it might be challenging to pass legislation that makes this mandatory at EU-level.

[289] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 268.
[290] V. FOLGEMAN, *Improving financial secuirity in the context of the Environmental Liability Directive, European Commission*, Brussels, 2020, 263.
[291] EUROPEAN COMMISSION, Communication from the commission: the European Green Deal, *, European Commission*, Brussels, 11 december 2019.

3.3.1.3. Bank guarantees

183. Akin to insurance and risk-sharing facilities bank guarantees are often *ex ante*. However, in some instances they can be *ex post* as well (*supra*, nr. 77). Because the competent authority can establish the hight of the guarantee and the fact that once introduced the bank guarantee is often mandatory, it seems like an adequate mechanism to enforce the PPP (*supra,* nr. 75). Another advantage is the fact that the guarantee does not become part of the bankruptcy estate (*supra,* nr. 76). Hence, it does not breach the PPP in any way, since it is the polluting economic entity's capital that will be used to remedy the harm done, even if bankruptcy has occurred.

184. Furthermore, the facts that most MS make this financial security mechanism compulsory, once introduced in to their legal system (*supra,* nr. 75), signals that it is an effective tool to ensure enforcement of the PPP and that further harmonisation regarding the compulsory character of bank guarantees might be in order.

3.3.1.4. Concluding remarks

185. Despite the fact that mandatory financial security and guarantee obligations are met with resistance form the insurance market (*supra*, nr. 58) some EU MS are gradually phasing in mandatory financial securities and guarantees for ELD liabilities. These often start with a risk assessment of the economic entity to determine if its operations have a high or low risk of causing environmental damage. Depending on the outcome, the economic entity will receive which financial security requirements it has to adhere to.[292] This is a good approach, and should be adopted by more MS. Perhaps the requirements from the new Corporate and Sustainability Due Diligence Directive will have a positive impact on the development of more mandatory financial securities and guarantees across MS (*infra,* Chapter 4.3.).

186. However, this authors still favours a top-down approach regarding this matter. The EU should determine which activities should have mandatory financial securities and guarantees. Seeing that the market regarding these financial securities is growing, CSR/ESG frameworks are gaining traction and MS have started to implement mandatory financial securities and guarantees for ELD liabilities themselves, it seems like the appropriate time to start developing EU-wide mandatory requirements. In addition, the EU has taken steps in the past towards imposing *ex ante* mandatory financial securities and guarantees by amending the original ELD Directive. Examples some of these amendments can be found in:

- Directive 2006/21/EC on the management of waste from extractive industries;
- Directive 2009/31/EC on the geological storage of carbon dioxide; and
- Directive 2013/30/EC on safety of offshore oil and gas operations.

[292] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 249.

Within all three Directives, a provision related to *ex ante* mandatory financial securities and guarantees can be found.[293]

187. Taking these amendments in to account, this author believes it would be more beneficial to amend the ELD itself to add a clause that contains which activities, classified by the Annexes of the ELD, should require *ex ante* mandatory financial securities or guarantees. Currently, the ELD only contains an *ex post* mandatory security related to the obligation of competent authorities to require guarantees from an economic entity. However, most MS have not put this obligation in place.[294] By amending the ELD itself, the financial security obligations for activities connected to the it would become standardised. If any exclusions are necessary, they can be embedded in the specific legislation governing them to avoid confusion.

188. Overall, this author believes that emphasis should be placed on requiring mandatory *ex ante* financial securities and guarantees. This can be achieved by amending the ELD to transform the current recommendation in article 14 into a provision that goes beyond the vague suggestion that MS should encourage economic entities to establish financial securities and guarantees. (*supra*, nr. 56). At the very least, mandatory financial securities and guarantees should be enforced for high risk activities. Once these have been established, the compulsory character can be expended towards all activities that fall within the scope of the ELD. This gradual approach allows the financial securities and guarantees market to adapt and develop.

189. This author believes that the EU should make use of maximum harmonisation for the obligation to provide financial securities and guarantees, with funds as an exception. This approach ensures that all MS there is an equal obligation for economic entities to provide financial securities and guarantees. Insurance seems to be the most effective mechanism to ensure compliance with the PPP during bankruptcy proceedings. Consequently, this will minimise forum shopping to avoid these mechanisms, insolvency caused by environmental liability and better risk-awareness amongst economic entities about their activities.

3.3.2. Protocol Curatoren

190. This Protocol is a great example of how legislative gaps can be addressed through cooperation of legal practitioners and competent authorities. The Protocol covers the necessary bases and creates an easy-to-understand framework to resolve soil contamination issues in bankruptcy proceedings. This author does not believe that the EU should govern these types of details. They provided a minimum rules regarding the need for soil remediation, which resulted in the opportunity for legal practitioners and the competent authority to design a viable and efficient approach that fits their needs.

[293] Art. 14 Directive 2006/21/EC, art. 19 Directive 2009/31/EC and art. 4 Directive 2013/30/EC.
[294] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 132.

191. The procedure to finance the remediation costs has proven its efficiency and allowing OVAM to acquire contaminated sites for a symbolic price of one EUR, as a last resort in this procedure, can be viewed as a great alternative for cases where the 'standard' procedure is out of the question.

192. The fact that OVAM has the right to acquire these sites is not in breach of any creditor rights or property rights of the economic entity. As the site would have been sold anyway to pay the outstanding debts of the economic entity if it were in good condition. It should be noted that the acquisition by OVAM for one EUR might be perceived as a breach of the PPP. As it is not the polluter itself that is bearing the remediation costs (*supra,* Chapter 2.2.3.). Nevertheless, this Protocol is a viable approach to ensure environmental clean-ups can be done. Therefore, it can be argued that breaching the PPP in this case serves the environment more efficiently than the principle itself.

193. To minimise the breach of the PPP, a potential approach could be to expand the texts of the Protocol to include frameworks on how to apply manager liability within this specific context. The BD contains a clause that states: *"The person who has caused soil contamination is liable for the costs incurred in accordance with this decree for the descriptive soil investigation, soil remediation and the other measures mentioned in Chapter VI, as well as for the damage caused by these activities or measures."*[295] (*own underlining*). However, the person that this article refers to is the economic entity, which is bankrupt. Thus, if manager liability were to be applied here, specific conditions must be created. These conditions can be similar to those who already exist (*supra,* nr. 102-103), depending on whether the bankruptcy is the result of the environmental liabilities or not. The Protocol could then serve as a guiding document to determine whether the conditions for manager liability are met, by providing examples of various action that could be classified as a grave fault or the behaviour of a non-prudent and due diligent manager. However, since this approach could have grave financial consequences for the person involved, this author deems it necessary that this manager liability should be established by a judge. OVAM should not have the authority to determine whether someone is liable or not. Maintaining a fault-based approach therefore seems beneficial.

194. A similar PPP-breach can be argued for instances where OVAM prefinances the soil remediation costs and is not fully compensated by the bankruptcy estate (*supra*, nr. Chapter 2.2.2.). Thus, a similar approach to manager liability as the one presented above should be established here as well.

195. In addition to manager liability, it could be interesting to explore the possibility of applying parent company liability, or even group liability, in these situations. However, this would likely necessitate legislative changes regarding Corporate Law, company structures and the accountability for other group members. Perhaps the new Directive governing corporate sustainability due diligence (hereafter: CSDDD) (*infra,* Chapter 4.3.) will bring forward such changes, but it is too early to fully analyse all the possible outcomes of this new legislation.

[295] Art. 16, §1 BD.

196. The further development of frameworks regarding environmental liability within roadmaps such as this Protocol will enhance the enforcement of the PPP and minimise the current breaches. Additionally, this could have a deterrent effect. If the manager or parent company decides to start new economic activities (assuming there is no court order prohibiting them from doing so[296]), there will be a stronger incentive to adopt more robust environmental and insolvency risk management policies to avoid repeating the same mistakes. Because they are aware of the possible consequences.

197. While on the topic of court orders regarding professional bans, a suggestion to prevent serial polluters is the amendment of the statute regarding these bans. This amendment entails that repeatedly causing significant environmental harm is grounds for imposing such a ban. The choice for including the word 'repeatedly' is deliberate, as this author believes that everyone is entiteled to a second chance to do better. Additionaly, being to rigid might discourage people from shooting their shot at wanting to start their own business. A second note regarding the wording of the suggestion is the deliberate ommission of adding a condition such as 'grave fault'. This was deliberatly ommitted because some people, even if they have the best intentions at heart, just cannot help themselves from committing the same mistakes. Thus, by not including the condition that a grave fault has to be committed, the door is open for imposing such a ban on them. This is a very strict approach, but repeatedly causing environmental harm should no longer be accepted. It will be the judge who will determine whether a professional ban is necessary or not.

198. A second suggestion regarding the Protocol itself, is considering whether it could be valuable to expand this Protocol to other types of environmental damages. For example, to aquatic soil[297]. The author mentions this type of soil, because the BD contains remediation obligations for aquatic soils which are similar to those of 'regular' soil.[298] Since these obligations are fairly similar, it is a good place to start experimenting whether it is feasible to expand this Protocol to other types of pollution. A first step towards expansion of the Protocol, is the amendment of article 34 and article 123 BD. Currently, the scope of these articles is limited to remediation obligations for at-risk sites in bankruptcies. Hence, it should be expanded to include aquatic soil. The second step is adapting the conditions of the applicability the Protocol to ensure that they are suitable for the practical aspects of remediation of aquatic soil. The third step is testing the new approach to simulated cases to determine where there is room for improvement or if the project should not be continued. If these tests are successful, the new Protocol can become operational. These steps should be maintained for each new type of pollution introduced to the Protocol or similar framework.

199. To conclude, this author does not have a lot of critiques related to this Protocol. As mentioned in the introduction to this chapter, it is a great example of cooperation between competent authorities and legal practitioners. The main suggestions related to this Protocol are

[296] Art. XX.229 WER.
[297] Art. 2, 2º BD *juncto* art. 1.1.3., §2, 50º Decreet 18 juli 2003 betreffende het integraal water beleid.
[298] Hoofdstuk XII Waterbodems BD.

that it would be useful to apply manager liability to minimise PPP-breaches and to research how to apply this Protocol, or a similar framework, to other types of environmental damage.

3.3.3. Manager liability and environmental company liability

200. This chapter contains suggestions related to manager liability and environmental company liability. The approach in this chapter is similar to the preceding ones, meaning that the author maintains a more holistic approach. Therefore, both liability schemes will be discussed simultaneously, because of their connectedness. There will be no strict distinction between European and national frameworks, where relevant the legislative grounds for suggestions will be provided.

201. Throughout this work, many approaches to manager liability and environmental company liability were touched upon. Due to the number of available frameworks, one could assume that this this aspect of corporate governance is closely monitored and regulated. However, the actual application and enforcement of manager liability or company liability does not live up to these expectations.[299] Suggestions on how to address these application issues will be discussed throughout this chapter.

202. Firstly, it appears to lack meaningful purpose to formulate suggestions related to the general Belgian tort principles (*supra*, Chapter 1.3.2.) within the context of both manager and company liability, because these rules will seize to exist. As mentioned before, they will be replaced (*infra*, Chapter 4.1.). The main suggestion here is for legal practitioners to hold on to their knowledge of these principles, because they will still apply to damage that occurred before the new legislation becomes enforceable (*supra*, nr. 52).

203. Secondly, a specific suggestion related to environmental manager liability within Belgian Insolvency Law is to incorporate it into Article XX.225 WER. Currently, §1 contains a general provision regarding manager liability for instances where the manager has committed a grave fault that caused the bankruptcy. This offers an indirect method to impose environmental manager liability, provided that the arguments are sufficiently compelling to persuade a judge that the environmental liability claim leading to bankruptcy was due to the manager's fault. However, this is a complicated hoop to jump through and might not be the most effective approach. The second paragraph of §1 provides an interesting possibility. It currently states that each type of fiscal fraud will be considered to be a grave fault. This author suggests to add a similar provision regarding environmental harm. A likely discussion point regarding this suggestion will be whether it should encompass all environmental harm or only specific categories. According to this author, all possible categories of environmental harm should be included. However, recognising the practical challenges, the author acknowledges that such an approach is not realistic and that such an

[299] M. FAURE, *Tackling Environmental Crimes under EU law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions*, Policy Department for Citizens' Rights and Constitutional Affairs,European Parliament, Brussels, 2021, 15.

amendment most likely may not pass in Parliament. Therefore, a more realistic suggestion is to include ELD-liabilities and the list of offences encompassed in the ECD.

204. Thirdly, the suggestion presented above should apply to general manager liability form art. 2:56 WVV as well. Currently, this article does not specify grounds for manager liability in cases of environmental damage caused by the economic entity; instead, it addresses fault-based liability, assessed by the manager's due diligence. By amending this article and including a strict liability regime for ELD-liabilities and the list of offences encompassed in the ECD, this provision can be a strong ground for the enforcement of the PPP through manager liability.

205. This liability approach encompasses both a fault-based and strict liability regime. According to this author this is a correct approach to establish manager liability in these instances. Because it leaves room for interpretation by a judge, adapted to each individual case. A negligence regime does not account for the individual characteristic of these cases and the people involved. Which this author finds too impersonal for situations where a lot is at stake for the people involved.

206. Fourthly, regarding suggestions for the current manager liability approach under the ELD, reference is made to nr. 208 below. A similar approach to interpretation of the definition of 'operator' will include manager liability in to the ELD. Since it is the manager who has the "*decisive economic power over the technical functioning of such an activity"*. In addition, the suggestion to amend the definition of 'operator' can be applied here as well.

207. When parent company liability should be applied, one of the first obstacles is the difficulty to pierce the corporate veil and being able to reach beyond often complicated corporate structures (*supra*, nr. 111). Hence, the first suggestion is to create a system where the limited liability of the subsidiary can no longer be used as protection by the parent company. This is already possible due to the *Akzo Nobel* ruling of the ECJ, discussed earlier in this work (*supra*, nr. 111). However, this ruling, concerns EU competition law. Therefore, the possibility to pierce the corporate veil in a same manner for environmental liability cases is merely a theoretical idea. As the ECJ has not yet applied this approach to environmental cases.[300] Theoretical or not, this author believes that creating a similar approach for environmental cases is beneficial. But, for this approach to become official, a case must first be brought before the ECJ, allowing the Court to outline the appropriate roadmap to follow. This means that in the meantime, there is still a lack of veil piercing.

208. Therefore, a second suggestion is to apply the definition of 'operator'[301] in such a way that it includes parent companies, because they *de facto* control their subsidiaries and are therefore match the description of operator: "*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,*

[300] M. FAURE, *Tackling Environmental Crimes under EU law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions*, Policy Department for Citizens' Rights and Constitutional Affairs,European Parliament, Brussels, 2021, 52.
[301] Art. 2(6) ELD.

including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity" (*own underlining*). If this definition is applied in this manner, the claimant would need to prove the control of the parent company. If they succeed the ELD will be applicable and parent company for ELD-liabilities is established. A more effective approach would be to amend the ELD definition of 'operator' to explicitly include parent company liability and/or enterprise liability. Moreover, this definition should fall under maximum harmonisation in order to avoid forum shopping and inconsistencies with transposition to national law.

209. The two suggestions above consist mostly of civil liability of companies. As discussed earlier (supra, Chapter 2.4.2.) criminal liability can be applied to economic entities as well. However, because the ECD has recently had an update (*infra,* Chapter 4.2.), formulating suggestions seems senseless. In the chapter where this legislative change is discusses, some remarks of this author regarding the new Directive can be founds.

210. With regard to cohesion and harmonisation of this approach to company and parent company liability across EU MS, this author thinks it is premature to formulate suggestions due to the CSDDD (*infra*, Chapter 4.3.). This Directive could have an enormous impact on how environmental risks are dealt with by economic entities. Therefore, this author believes that is wise to first observe the impact of the CSDDD and then formulate suggestions on further harmonisation accordingly.

211. However, for economic entities that do not fall within the scope of the CSDDD, the suggestion is less focused on legislation. Instead of focussing on legislative changes, it would be desirable if the EU invested in education campaigns for economic entities on the content of the ELD and ECD (and its successor). Regardless of whether they belong to a bigger group. Improving knowledge regarding these frameworks will create better awareness about environmental liabilities and the importance of these frameworks to maintain a healthy environment. These educational campaigns should be developed in collaboration with the competent authorities of MS, as they possess valuable insights into the challenges that economic entities face concerning the ELD and ECD.

212. Lastly, this author believes using existing mechanisms, such as EIA (*supra*, Chapter 2.4.3.), EMAS (*supra*, Chapter 2.4.4.) and CSR/ESG soft law instruments (*supra*, Chapter 2.4.5.) to further develop risk-assessment mechanisms, education of economic entities and their governing bodies and competent authorities instead of creating new formulas is the most beneficial approach. Furthermore, the voluntary character of these instruments should be revised. Or at the very least, more value should be assigned to them. Wanting to be risk-averse toward environmental liabilities and insolvency should not depend on the goodwill of the economic entity.

3.4. General suggestions

213. In this chapter, some general suggestions regarding the context of this work are presented. These suggestions are not tied to any specific legislation or framework discussed in the previous chapters, therefore they are briefly discussed separately.

214. Firstly, improving knowledge of economic entities and competent authorities regarding the ELD, ECD, insolvency risks and risk-management strategies. Additionally, the importance of financial securities and guarantees should be included in these educational campaigns as well. As mentioned before, these educational campaigns should be developed in collaboration with the competent authorities of MS, as they possess valuable insights (*supra*, nr. 211).

215. Secondly, besides the education of economic entities and competent authorities it might be worthwhile to invest in education of the general public on the basics of CSR, ESG, general corporate governance and the importance of financial securities and guarantees. This could inspire future entrepreneurs to invest in risk-management strategies from day one. Thus preventing them from having to seek help once it is too late.

216. Thirdly, detangling the complex web of Environmental Law. Once one starts researching environmental legislation, both on European as national level, one quickly discovers that it is a complex, intertwined, overwhelmingly entangled network. Without the necessary background knowledge, a layman will hardly be able to find its way through it. This is problematic. Legislators expect compliance with the law, which of course is a logical expectation. However, how can one expect compliance with regulations and frameworks that are designed in such a complex manner. This author believes that in order to raise awareness and compliance with Environmental Law, the first step should be to comb through available legislation and improve its readability and structure. In addition, it would be beneficial to investigate which legislative texts could be combined. This eliminates similar frameworks for mostly similar issues. Once the legislative network has been through a extensive 'clean-up', an easy to comprehend flowchart should be designed for economic entities, and or people in general, to establish which particular activity or risk is governed by which legislative text and what the relevant competent authority is. This 'legislative clean-up' should commence at EU level, in order to have a coherent baseline for MS to work with. By doing this, incompatibilities between legal text can be identified and possible mitigated as well.

217. A last suggestion, is to adapt legislation to exclude economic entities from receiving government funding (e.g. grants), if it is established that they abuse corporate structures to avoid and or limit their exposure to liabilities ELD. For example, by placing all polluting activities in a single subsidiary without sufficient funds.[302] As, according to this author, evading behaviours should not be rewarded. An additional, yet even more radical step, is the complete reformation of corporate law, on EU level, to create legislation that prevents the abuse of corporate structures and allows for easier veil piercing.

[302] V. FOLGEMAN, Improving financial secuirity in the context of the Environmental Liability Directive, European Commission, Brussels, 2020, 271.

218. To conclude, if the EU and its MS wish to improve compliance with the law, it is important that the law is crafted in such a way that is easy to navigate and comprehensible for persons who do not have a law degree. The improvement of knowledge regarding environmental challenges and their relationship with insolvency and bankruptcy plays an important role in enhancing this compliance as well.

4. A look into the future

220. Law is everchanging, therefore it is important to pay some attention to future legislative changes and their possible influence on the existing frameworks and the challenges addressed in this thesis. As some legislative gaps, points of critique and suggestions might not stay relevant after this future legislation is fully operational. This chapter provides a brief overview of changes in EU and Belgian legislation that, in the author's opinion, are the most noteworthy.

4.1. Book 6 – Belgian Civil Code

221. The changes in tort regimes because of the entering in to force of Book 6 BW (*supra*) could change the legal grounds for environmental tort cases and influence the possibility to keep certain persons accountable for their actions that created the pollution. Since the majority of this new Book is an implementation of well-established case law, it could mean that in practice some aspects of the new tort regimes might not change as drastically as expected. This chapter will therefore highlight aspects that have undergone the most significant transformation during the creating of this new tort regime and what influence these changes can have regarding environmental liabilities in or during corporate bankruptcy proceedings.

222. The first change is that Book 6 now explicitly mentions that natural and legal persons (public and private), must treated equally under the new law.[303] By adding this provision, the Belgian legislators acknowledge the current practice, established by legal practitioners and scholars, of placing legal persons on equal footing with natural persons in instances of non-contractual liability claims. Formalising this equality is a good step towards creating legislation acknowledges the impact of legal persons on our society.

223. A second change can be found in the redefining of the 'fault' or 'negligent behaviour'. The 'fault – harm – causality' principle still applies, but the new legal text provides improved legislative frameworks and definitions to determine if there was indeed a fault or negligent behaviour, making it easier for legal practitioners to estimate if a lawsuit will be effective and aiding judges in their liability assessment in their rulings.[304]

224. The third change is related to the liability of persons (appointer) for damage caused by people that are appointed by them (servant). A regime of strict liability applies to the 'appointer' for damages that result from the actions of the servant that occurred during the fulfilment of their obligations.[305] For example, if the servant has the obligation to replace the drainage filters to avoid contaminated water ending up in a local stream and the servant has failed to do so or replaced the

[303] Art. 6.4 BW.
[304] Art. 6.6 *juncto* art. 6.18 *juncto* art. 6.24 BW.
[305] Art. 6.14 BW.

filters in a negligent manner, the 'appointer' will be liable for the damage caused to the local stream resulting from appointees behaviour.

225. A fourth change is the new provision that states that the legal person is liable for their management/board and its members.[306] This liability is a strict liability as well and is the codification of the 'organ theory' (*supra, nr.* 53). So, for example, if the board decides that the economic entity should exceed its allowed emission levels in order to maximise profits, the legal person will be held accountable for this decision.

226. The fifth change concerns the provision related to the liability caused by a defect in a good under one's care. For example, a broken air filter in a factory that causes air and soil pollution, because the chimney now emits dangerous particles into the environment. The liability for these defects in a good remain a strict liability regime, but the provision now encompasses a more concrete description of when someone is responsible for the defect in a good and the conditions that must be met for an object to be classified as defective.[307]

227. This sixths change is more of an update than a change. Besides providing more detailed frameworks related to when a person is at fault or negligent, the causality principle has gotten a well-deserved update. The new provision contains a clear description on how causality should be established.[308] Codifying this principle will ensure a more uniform approach, thus enhancing legal certainty.

228. Lastly, a significant change is the abolition the *quasi*-immunity of the executing agent (*supra,* nr. 104) By abolishing this principle, employees and managers can now be held directly liable by the principal creditor. This was already possible in some scenarios, but only if the necessary conditions were met (e.g. fraud or serious negligence). The previously established immunities for employees protected by Belgian Labour laws[309] still apply. However, managers will no longer have the opportunity to rely on the *quasi*-immunity principle. Meaning that they can be held directly liable by third parties, if the necessary conditions are met. However, Economic entities can limit the application of this new rule by adding exoneration clauses in their contracts with the principal creditors. But, these exoneration clauses might not hold up in court, therefore the risk will still linger behind the corner.

229. It is not entirely clear to the author how this change would work within the current liability regime related to the mismanagement of the economic entity[310] that caused the insolvency (*supra*, nr. 103) and if this new possibility should even be applied within this context. If this new approach were to be applied *sensu stricto,* would that mean that an executing agent of the economic entity can be held accountable by creditors for the insolvency of the economic entity, if this insolvency

[306] Art. 6.15 BW.
[307] Art. 6.16 BW.
[308] Art. 6.18 BW.
[309] Art. 18 WAO.
[310] Art. XX.224 – XX.227 WER.

results from the contractual obligations of the executing agents? According to this author, adopting such an approach would bewilder many legal practitioners, as it can be perceived as an exceedingly far-reaching method to ensure that damages can be compensated..

230. The transitional law that was adopted with Book 6 governs how the Belgian legal systems should deal with the transition period (*supra,* nr. 52). The new rules will be applicable after the 1st of January 2025.

231. With the above indicated changes in mind, the possible influence of Book 6 on environmental liabilities during corporate bankruptcies can be summarised as follows:

- The abolition of the *quasi*-immunity opens the door towards new litigation methods against managers and employees who are responsible for environmental damage caused by the economic entity. This, in turn, could strengthen the enforcement of the PPP;
- Within the context of corporate bankruptcies, the abolition of the *quasi*-immunity allows the contracting party of the bankrupt economic entity to now file a claim against the executing agent for damages that occurred during the execution of the contract between the executing agent and the bankrupt entity. This change is beneficial for contracting parties, because under the old legislation did not have the possibility to file a claim directly against the executing agents (*supra*, nr.104). Hence, if bankruptcy of the economic entity had occurred they had no possibility to seek damages. This has now been mitigated;
- As for the defect in a good, the regime stays similar so it will not have a significant influence on future liability cases in that regard. However, by providing a clearer legislative text perhaps more successful claims will be brought to court as it is easier to understand the parameters of this liability scheme and the conditions that have to be met in order for it to be applicable;
- This author believes that the creating of risk-management strategies to avoid liabilities will gain significant prominence as a result of this rule. In addition, insurance policies to insure the risk of being held liable for by third parties will probably gain popularity.

232. Overall, this author welcomes the change in legislation brought forward by Book 6. The OBW has been in need for an update for a some time now, seeing that the majority of its content originates from 1804 and was no longer adequate to deal with legal issues of modern society. In addition, the vast amount of case law and numerous amendments to the OBW, have created a scattered legal landscape that was somewhat challenging to navigate. Expanding the rules from article 1382 – 1386 OBW, from six acticles toward fifty five new legal provisions to better accommodate the changes in non-contractual liability is a welcome change. These new provisions are easier to comprehend for laypersons, provide more clarity on certain concepts (e.g. causality principle) and are better suited to current society.

4.2. Directive for Environmental Protection through Criminal Law

233. As briefly mentioned before, the Council adopted a new Directive for environmental protection through criminal law (*supra,* nr. 28). It aims to improve investigations and prosecution of environmental crimes and serves as a replacement for current Directives, such as the ECD, that paved the way for environmental criminal law on the EU-level. It is refreshing to see, that numerous of the recommendations from the European Parliament Resolution of 20 May 2021 on the liability of companies for environmental damage have found its way into this new Directive.

234. The Directive contains minimum rules, meaning that MS can be more severe in criminal law enforcement if they wish to do so. Additionally, it provides MS with the legislative freedom to extend their jurisdiction beyond EU borders, to prosecute environmental crimes that have been committed beyond their territory. By allowing this the EU aims to extend its reach concerning environmental matters beyond its territory in an attempt to expand environmental protection across the globe.

235. The list of offences covered by this new Directive has been expanded. Under the previous Directives nine types of offences could be criminally pursued. Now the scope has been enlarged to twenty possible offences. By expanding the list of the offences, the Council ensured that a larger number of environmental crimes can be investigated and prosecuted across EU MS. Thereby strengthening and enhancing EU criminal environmental law enforcement. Furthermore, it bolsters the enforcement of the PPP because it broadens possibilities for holding (legal) persons criminally accountable for the environmental damage they have caused. Next to accountability, the Directive allows MS to impose additional measures on legal persons. Some examples of these measures are:

- the obligation to restore the environmental damage;
- withdrawal of permits related to the criminal offence;
- the obligation to implement due diligence frameworks to enhance compliance with environmental standards.[311]

236. The PPP could be further reinforced, if the MS allocate the collected fines to remediate environmental pollution, in addition to the measurements proposed by the Directive.

237. Besides the expansion of the list of offences, there is a significant shift in the approach to criminal environmental law enforcement in this new Directive. Whereas the ECD did not include administrative law and procedures, Recital 4 now explicitly mentions administrative law and administrative procedures as a means of enforcing criminal environmental law. This is a welcome change, as many MS use these administrative frameworks as their primary means for environmental criminal law enforcement. Belgium, for example, has taken a very administrative approach to environmental (criminal) law enforcement. This change was also suggested by point 31 of the above mentioned Resolution of 20 May 2021.

[311] Art. 7.2 Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC.

238. The liability of legal persons is explicitly adressed in this Directive in article 6. This article stipulates that legal persons can be criminaly liable if the offence has been commited for the benefit for the legal person, by a person who either: 1) represents the legal person, 2) has the authority to take decissions on behalve of the legal person, 3) or has the authority to exersise control within the legal person.[312] In Belgium, a similar approach is already in place (*supra*). Nevertheless, seeing it explicitly mentioned in new legislative initiatives further strenghtens the possibilities to apply company liability across EU MS. Additionaly, the third paragraph of article 6 contains a provision that included the possibility of manager liability alongside the procesuction of the legal person.

239. Overall, this new Directive contains a robust framework that expands the possibilities for environmental criminal liability. Within the context of this thesis, it is interesting to see that past recommendations regarding the liability of legal persons and administrative law have been taken into account. In addition, the author welcomes the expansion of the list of offences, without limiting the possibility of MS to expand the list even further. This expansion will, hopefully, create a deeper and more coherent environmental protection across EU MS, while still allowing MS to be more stringent where needed. However, it should be noted that there is no mention of steps to be taken in cases where the polluter has solvency issues or is already going through bankruptcy proceedings. In addition, it does not mention the implementation of, mandatory or voluntary, financial guarantees to support environmental clean-ups in cases where the before mentioned insolvency or bankruptcy are in play. This is, according to the author, a missed opportunity to bring these branches of law closer together and anticipate possible challenges related to incompatibilities between insolvency and criminal environmental frameworks. Both on the EU and national levels. Not including such steps or suggestions for procedures in this new legislation could lead to enforcement issues. Rather than waiting for incompatibilities to occur, a more pro-active approach would be welcomed. Thus, the author feels that the EU should consider creating a Guidance Note or other supporting document to adress this issue. By doing so, the EU would also ensure more coherence between procedures in the EU which might be beneficial for enforcement, legal practice and litigation.

4.3. Corporate Sustainability Due Diligence Directive

240. On 23 February 2022, the Proposal for the CSDDD was adopted by the EU Commission.[313] On April 24th 2024, the EP adopted the CSDDD, meaning that the next steps in harmonising due diligence procedures in the EU have officially begun. The Directive aims to promote sustainable and responsible corporate behaviour by providing minimum rules.[314] It contains a framework for economic entities to identify and address the environmental impact of their operations inside and outside the EU and imposes sanctions on to economic entities who fail to do so. As a result,

[312] Art. 6.1 Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC.
[313] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.
[314] Art. 4(2) Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

economic entities will have to improve their risk management strategies, which in turn strengthens their resilience and competitiveness in the market. This improved resilience could make them less likely to end up in insolvency issues as a result of environmental liabilities, criminal or civil. In addition, economic entities will be stimulated to innovate and adapt their risk management schemes in line with both scientific and legal developments.

241. This Directive is a welcome addition to EU legislation. It presents the willingness of EU legislators to change stay their course of action towards a more sustainable EU by holding economic entities accountable for their impact on environmental and human rights issues. This aligns with the objectives of the Paris Agreement and targets form EU Climate and Environmental Law, such as the EAP 2030. The author applauds these next steps towards a more sustainable EU, as economic entities have a significant impact on reaching the goals as set out in the before mentioned agreement.

242. However, it should be noted that the focus of this Directive is directed at larger economic entities. To fall under the scope of this Directive an economic entity based in the EU, needs to have more than one thousand employees and a net worldwide turnover of EUR 450 000 000, in the last financial year for which annual financial statements have been or should have been adopted, or be the ultimate parent company.[315] For this Directive to apply to non-EU economic entities, the entity will have to meet a net turnover of EUR 450 000 000, in the EU in the financial year preceding the last financial year, or be the ultimate parent company.[316] While the author understands this approach, because the environmental impact of larger economic entities is often more significant, it does seem like a missed opportunity to include smaller economic entities. A possible approach to include them could have been providing them with certain exclusions or longer timeframes to adjust their operations.

243. A second observation regarding the CSDDD that is worth mentioning is the fact that the EU seized the opportunity to address parent company liability in this Directive.[317] Ensuring that corporate structures will not be abused to evade the application of the content of this Directive and that the whole corporate chain has to adhere to similar imposed risk management strategies. This approach will hopefully limit the creation of complicated corporate structures in order to avoid CSR or ESG.

244. Overall, the author believes that implementing Directives such as the CSDDD will positively impact the further development of environmental protection and risk management. By making the latter mandatory, economic entities will have to consider the risks that come with environmental damages. In addition, the result of this awareness could lead to economic entities implementing financial guarantees and securities to protect themselves from insolvency, caused by large

[315] Art. 2(1) Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.
[316] Art. 2(2) Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.
[317] Art. 6 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

environmental liability claims or criminal charges that would have led to bankruptcy should they not have implemented these guarantees and securities. This in turn would enhance the enforcement PPP, because the polluter is taking the necessary steps to ensure that they can mitigate or remediate potential environmental harm. To add on to this thought, the EU legislator is doubling down on PPP enforcement through the additional measures that can be imposed on economic entities should they not comply with the CSDDD. However, and as mentioned before, it is a missed opportunity to exclude smaller economic entities from the scope of this Directive.

4.4. Harmonising Insolvency Proceedings

245. Harmonising certain aspects of insolvency is embedded in the 2022 Proposal regarding harmonising certain aspects of insolvency.[318] This Proposal focuses on three dimensions of Insolvency Law: 1) recovery of assets of the liquidated insolvency estate, 2) the efficiency of procedures, and 3) predictable and fair distribution of recovered assets amongst creditors. The Proposal explicitly mentions that is coherent with the ELD and PPP. The Council states that more efficient insolvency frameworks for recovery of asset value would facilitate compensation for environmental claims without having to recourse to financial securities.[319] In spite of this, the actual text of this Proposal does not contain any detailed frameworks or guidance on how one should manage environmental liability claims during insolvency and bankruptcy proceedings. It only mentions that the obligation under the ELD to establish financial security mechanisms and guarantees aims to ensure that ELD-claims will be served in cases of bankruptcy.

246. The author does agree with the vision of the EU legislator that harmonising more aspects of insolvency law could benefit the enforcement of the ELD, and therefore the PPP, as being able to recover more assets increases the value of the bankruptcy estate. Which in turn could be beneficial for financing environmental clean-ups. But concerning the coherence of this Proposal with the ELD obligations, related to financial security mechanisms and guarantees, the author disagrees. These obligations have been in place for a significant amount of time and have proven to be ineffective to guarantee the enforcement of the PPP. Therefore, the author views this Proposal as a missed opportunity to address this ineffectiveness. The Proposal should have contained at least one article on how to address ELD-claims, or environmental claims in general. Even simply mentioning that it will be governed by the national legislation of the MS would have strengthened the idea that these claims have to be considered during insolvency and bankruptcy proceedings. By not providing such a provision, the EU missed a significant opportunity to harmonise this aspect.

247. To conclude, this Proposal is of great importance to the insolvency field as it will harmonise a part of insolvency and bankruptcy proceedings. However, not providing any frameworks or

[318] Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 december 2022, p. 6.
[319] Explanatory memorandum to the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 december 2022.

guidance on how to manage ELD-claims, or environmental claims in general, is a missed opportunity.

5. Conclusion

248. This thesis explored the intersection between Environmental and Insolvency Law, identifying significant challenges and proposing pathways for legislative improvement to enhance the enforcement of the PPP during corporate bankruptcies, advocating for preferred harmonisation levels that ensure coherence between frameworks related to environmental protection and insolvency procedures. In addition, the thesis discussed the impact of different liability regimes on insolvency risks and how this challenge should be approached.

249. Firstly, a comprehensive overview of the many legislative frameworks related to both Environmental and Insolvency Law, each with varying degrees of compatibility, was presented. In addition to discussing available legislation, time was spent on highlighting the several significant principles, soft law frameworks and the difference between negligence and (strict) liability regimes.

250. Secondly, the current approach to enforce the PPP principle in corporate bankruptcies was addressed. This included discussions on various financial securities and guarantees (e.g. insurance and bank guarantees), the obligations of the bankruptcy trustee if the bankruptcy estate contains contaminated soil, manger liability, environmental company liability and mechanism to assist economic entities in establishing an adequate risk management approach for their activities. To enhance the understanding of the financial consequences of environmental pollution, monetary efforts on both the EU and national level were presented.

251. Thirdly, the above mentioned approaches and frameworks were critically reviewed and suggestions for their improvement were formulated. These suggestions will not be repeated fully here. It is important note that while some steps have been taken to bridge the gaps between these two branches of law, significant efforts are yet to be taken to ensure compatibility of these frameworks and PPP enforcement in corporate bankruptcy proceedings, highlighting the need for more integrated and harmonised approaches.

252. Some findings, however, should be mentioned in this conclusion since they represent the general impediments of the current approach. One of these impediments is the administrative burden imposed on economic entities by rigid legal mechanisms. The need for flexible, adaptive policies that can respond to changing economic and legislative landscapes can no longer be ignored. Furthermore, the education of economic entities on the ELD, environmental risk assessment and management plays an important role in avoiding bankruptcies as a result of environmental liability. A second impediment is the uneven implementation of the PPP and the frameworks to support its enforcement, such as financial securities and guarantees. For frameworks where minimum harmonisation is the best approach; introducing EU Guidance Notes, to provide general rules while allowing MS to tailor specifics, can help create adaptable and responsive legal mechanisms. A last impediment is the difficulty in applying manager or company

liability in situations where bankruptcy results from environmental harm or where environmental damage is discovered during the liquidation of the economic entity. This can be mitigated by facilitating the application of concepts such as piercing the corporate veil and amending legislation to explicitly include causing environmental damages as a legal basis for manager and company liability.

253. The most significant suggestion, that should be mentioned here, is the need for proactive steps, such as including *ex ante* or *ex post* mandatory financial securities and guarantees in new environmental EU and national legislation. Because *ex ante* mandatory financial securities and guarantees can pre-emptively address the insolvency risk created by environmental liabilities and helps to generate awareness around environmental risks of an economic entity. *Ex post* mandatory financial securities and guarantees can address potential conflicts between the PPP and lack of assets in the bankruptcy estate to restore the environment during bankruptcy proceedings. Which makes gives them a significant role in the efforts to avoid having to rely on taxpayer money to remediate environmental damage.

254. Lasty, time was spent on discussing the influence of current legal reforms in relation to the topic of this work. This included discussions on Book 6 BW, the new ECD, the CSDDD and the Directive Harmonising certain aspects of Insolvency proceedings. Besides the possible influence, some time was spent pointing out if the new legislation lacks provisions for handling polluters facing insolvency. In other words, if they contain mechanisms for the enforcement of the PPP. Such omissions represent a missed opportunity for greater integration of the PPP and insolvency laws.

255. To conclude, ensuring that the PPP is adequately enforced in insolvency proceedings remains a significant challenge. Moving forward, comprehensive reforms and harmonised approaches at both the national and EU level are necessary to create a more cohesive and effective legal landscape. The author recommends a holistic approach to legislative reforms, to better manage the interplay between environmental and insolvency issues. By addressing these critical areas, policymakers can better align environmental protection goals with insolvency proceedings, fostering a more sustainable and resilient legal system. This balanced approach aims to protect environmental interests while maintaining economic stability, ultimately contributing to a more coherent and effective legislative framework.

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