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Comparative study on the implementation into the national legislation of certain EU Member States of an adapted burden of proof in the context of the Industrial Emissions Directive

British Institute of International and Comparative Law

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Comparative Report

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Executive Summary

1. This study examines how the adapted burden of proof contained in Article 79a(4) of the proposed revised Industrial Emissions Directive (IED) could be implemented at the national level, as well as what legal barriers to implementation might exist, through a comprehensive study of relevant legal provisions and case law in six EU Member States. In concrete, the study considers the compatibility of the provision with national law; considers how the Member States have implemented other EU directives with provisions that adapt the burden of proof; and surveys relevant national case law on civil liability and environmental pollution.

2. The study synthesises the findings of six country reports prepared by national experts (designed to cover a representative sample of Member States: Bulgaria, France, Germany, Italy, the Netherlands, and Poland). This research is further elaborated with findings from desk research; discussions from a workshop held with ClientEarth and the national experts; and feedback from comparative law experts and reviewers.

3. The report concludes that the concept of adapting the burden of proof in the interests of justice is not alien to any of the jurisdictions studied and that, in principle, Article 79a(4) of the revised IED could be integrated into each system.

4. Key findings include the following:

- The main national provisions that would interact with the proposed adapted burden of proof are found in civil law, civil procedural law, administrative law, and environmental law. Therefore, the compensation right and any burden of proof rules therein must not be confused with criminal law that is of a qualitatively different nature, with different requirements.

- The concept of adapting the burden of proof in the interests of justice was not alien to any of the jurisdictions studied. Where the burden of proof is adapted in existing frameworks, the reasons included the need to achieve greater protection for victims in situations where the normal apportionment of the burden would unfairly prejudice their ability to seek a legal remedy, e.g. cases where the parties are in unequal relationships, such as employer–employee; cases where it is difficult for the claimant to access evidence; or cases involving scientific uncertainty (in conjunction with the precautionary principle). Regarding the proposed Article 79a(4) IED which would adapt the burden of proof in compensation claims based on damage to human health, the rules of evidence in the different jurisdictions show that the implementation of such a clause would not break new legal ground, but rather that room exists to expand currently existing rules on adapting the burden of proof to cover environmental cases under the IED.

- Moreover, States have already successfully transposed other EU law provisions that adapt the burden of proof. In particular, adapting the burden of proof is now firmly anchored in EU anti-discrimination law (for example, Article 8 of the Racial Discrimination Directive) which all Member States have implemented into

domestic law. Furthermore, the European Court of Human Rights has imported this regime into its case law on discrimination, thus providing further entrenchment of such presumptions in the Council of Europe Member States. Another pertinent example can be found in competition law where it is presumed that cartel infringements cause harm (Article 17 of the Antitrust Damages Actions Directive). None of the country reports identified that the implementation of these provisions opened the floodgates to excessive litigation. It is especially noteworthy that constitutional law has not been found to be an obstacle and nor do such presumptions offend the principle of subsidiarity.

- The survey of existing national case law also confirmed that there were few examples of environmental pollution cases in which the burden of proof was adapted. Generally, it was observed that claimants struggle to prove causation in pollution cases without an adapted burden of proof.

Overall, there exist no limitations, constraints or barriers deriving from national legislation in Bulgaria, France, Germany, Italy, the Netherlands, or Poland that would prevent the integration of Article 79a(4) IED.

Introduction

In April 2022, the EU Commission published its proposal for a revised Industrial Emissions Directive (IED), which includes several changes to the current IED framework.[1] The proposal contains a novel provision (Article 79a) that grants a compensation right to victims suffering from health damages caused by the unlawful operation of large-scale industrial activities. Within this provision is a clause (Article 79a(4)) that aims to adapt the burden of proof to enable the victims to make effective use of the compensation right. While provisions that adapt the burden of proof are not novel in EU legislation,[2] this would be a first under the EU environmental law framework in such a context.

As of today, in the majority of cases, victims of violations of the IED do not currently have effective means of claiming compensation for health damages suffered as they are unable to satisfy the procedural rules on the burden of proof that are generally applicable in the Member States.[3] Consequently, the proposed amendments adapt the burden of proof so that where a claimant is able to provide 'sufficiently robust evidence' that a violation of the IED has caused, or significantly contributed to, damage to their health, there will be a presumption that the defendant is liable for the damage.

More specifically, the Commission suggests that there would exist a rebuttable presumption of the causal link between the damage and the unlawful operation if all of the following conditions are met: (1) The claimant has to prove that they have suffered damage to their health. (2) The claimant has to prove that an IED operator has violated obligations following from the IED. (3) The claim has to be supported by evidence from which a causal link between the violation and the harm to the victim may be presumed.

Thus the proposed Article 79a(4) reads as follows:

> '4. Where there is a claim for compensation in accordance with paragraph 1, supported by evidence from which a causality link may be presumed between

[1] Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, COM/2022/156 final/3.
[2] See examples in Part 2 of this comparative report.
[3] As explained in Recital 33 of the IED proposal.

the damage and the violation, Member States shall ensure that the onus is on the person responsible for the violation to prove that the violation did not cause or contribute to the damage.'

More information can be found in Recitals (32) – (34) from the proposal of the revised IED, as well as Section 5 of the Explanatory Memorandum provided in the preamble of the proposal. As the IED proposal is still being discussed by the co-legislators in the ongoing legislative procedure, Article 79a may still be subject to further changes, in particular, different types of evidence and presumptions may be taken into consideration.

To gather information on how a provision on easing the burden of proof would operate in principle within the national law of a representative sample of EU Member States, namely Bulgaria, France, Germany, Italy, the Netherlands, and Poland, the British Institute of International and Comparative Law commissioned several country experts to undertake studies on the possible interactions at the national level with existing law, in particular, civil law and civil procedural law, as well as related jurisprudence/case law. The respective country reports were designed to identify both the elements of overlap as well as any potential conflicts that might exist between such a provision and the relevant national law. The purpose of the study is to evaluate whether there are any obstacles to implementing such a clause at national level. The study does not assess in further detail the need for such a new provision, nor the legal arguments in favour of it.[4]

The present comparative report represents a summary of the six country reports, aiming to present in a synthesised manner the similarities and differences with respect to how the proposed provision on adapting the burden of proof might be implemented into the national law of each country (Part 1); what lessons can be learned from how each country has dealt with the implementation of other provisions of EU law that adapt

[4] Legal arguments have already been highlighted by the European Commission itself, see Recital 32 of the IED proposal: '(…) Such rules on compensation contribute to pursuing the objectives of preserving, protecting and improving the quality of the environment and protecting human health as laid down in Article 191 TFEU. They also underpin the right to life, integrity of the person and health care laid down in Articles 2, 3 and 35 of the Charter of Fundamental Rights of the European Union and the right to an effective remedy as laid down in Article 47 of the Charter. Moreover, Directive 2004/35/EC of the European Parliament and of the Council does not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage.'

the burden of proof in other areas (Part 2); and what can be learned from relevant case law on environmental pollution in each country (Part 3). To strengthen the comparative study, findings from desk research on the topic, discussions from an internal workshop held with ClientEarth and the country experts on the 4th of October 2022, and feedback from comparative law experts and reviewers are included, where appropriate, in the content of Parts 1–3.

Part 1: Implementation into national law

Main national law provisions interacting with the proposal to adapt the burden of proof

In order to determine the main national law provisions that would interact with the implementation of the adapted burden of proof under Article 79a(4) of the IED proposal, the following key elements of Article 79a must be understood:

Compensation right for individuals suffering from health damages: Article 79a of the IED proposal provides a compensation right only for individuals suffering from human health damages. It does not apply to compensation or remediation of environmental damages in general and therefore is different from the scope of application of the EU's Environmental Liability Directive[5] and the national provisions that are solely implementing this Directive.

Compensation right in case of IED violation: Article 79a of the IED proposal provides a compensation right only in cases where there is a violation of obligations resulting from the IED. Therefore, this compensation right does not apply to cases where there was no breach of IED obligations at all. This is different to certain liability provisions at national level that do not require any additional breach of obligations. For example, some countries have laws that require employers to compensate employees if they develop occupational diseases, regardless of whether or not the employer has breached any relevant workplace health and safety obligations.

Furthermore, liability under the IED proposal does not require any guilty intent on the part of the defendant, i.e. all that is required is that a violation of the IED obligations has occurred and that this can be presumed to have caused the claimant's injuries. This is different from criminal law that usually requires proving guilty intent to commit a criminal offence and causation beyond a reasonable doubt. Moreover, as explained in the Environmental Crime Directive, criminal law demonstrates 'a social disapproval

[5] Article 3(3) of this Directive (ELD, 2004/35/CE) excludes explicitly a compensation right for individuals: '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.'

of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law'.[6]

The proposed adaptation of the burden of proof only applies to the causal link between an IED violation and health damage: To grant compensation under the new Article 79a, the claimant must, in particular, provide evidence of health damage and of an IED violation under the general rules of evidence. Where these elements have been proven, Article 79a(4) of the IED proposal then includes a presumption for the causal link between the violation and the damage under certain conditions, and this presumption is rebuttable by the other party. Thus, the presumption does not entail a full reversal of the burden of proof.[7]

In light of the above, the provision in the IED proposal that adapts the burden of proof relates to the law of liability, whether **civil liability** (against an operator) or **administrative liability** (against an authority). Liability is governed by the **law of evidence** deriving mainly from **civil law and civil procedural law** (while the present study shows that specific rules can also exist in other legislation, such as administrative or environmental law).

The main rule of evidence in the context of civil and administrative liability is the same in all six Member States examined: the party who wants to make a claim for compensation based on a certain legal norm has to prove that the requirements of that norm are fulfilled. However, **all jurisdictions have provisions that allow the burden of proof to be adapted by the application of presumptions to certain situations**.

This section will highlight the national rules of evidence in each jurisdiction assessed that are relevant for establishing a causal link in the context of a compensation claim. The national provisions highlighted here are not exhaustive but give the possibility to

[6] Environmental Crime Directive (ECD, Directive 2008/99/CE), Recital 3.
[7] While the terminology of 'reversal of burden of proof' is not always used in a consistent manner, the European Commission recently distinguished between presumptions and a complete reversal of burden of proof in its proposal on the Product Liability Directive (COM/2022/495 final). This proposal includes a presumption with regards to the causal link in Article 9(3) and explains that in the context of the proposal (Section 2 'Proportionality') that such a presumption is not a reversal of the burden of proof. Advocate General Kokott argued in Case C-8/08 of 19 February 2009 (ECLI:EU:C:2009:110 T-Mobile) that a presumption of a causal link does not concern the burden of proof or the reversal thereof, but the standard of proof.

compare existing instruments at national level with a new rule that would implement a provision similar to Article 79a(4) of the IED proposal.

Bulgaria

The main rule on the burden of proof is enshrined in Article 154, paragraph 1 of the Bulgarian Civil Procedure Code and applies to both civil and administrative liability claims. It states that 'each party is obliged to establish the facts on which it bases its claims or objections'. However, Article 154, paragraph 2 states that 'it is **not necessary to prove facts for which there exists a presumption established by law**'.[8] Therefore, each party has the burden of proving the facts on which they rely in the proceedings, unless there is a material law provision which prescribes a deviation from this procedural rule of evidence (a legal presumption in other words). Although not expressly defined in any legal provision, it was noted in the country report that Bulgarian legal doctrine also recognises that courts may make factual presumptions, which are commonly known in Bulgaria as 'human presumptions'.[9]

The most commonly accepted theory in the judicial discourse in Bulgaria is that shifting the burden of proof may be justified in cases where there is (or may be presumed to be) a form of **inequality between the participants** in the legal relationship (e.g. employer and employee, consumer and trader, or bad faith and good faith contractors). The possibility to shift the burden allows more flexibility in such cases, especially when it is likely that a party will encounter challenges in providing evidence or proving fault.

Bulgarian legislation is in line with this justification and provisions containing both **rebuttable presumptions and reversals of the burden of proof** can be found. However, no such exceptions to the main rule of evidence can be found in Bulgarian legislation that regulates similar subject matter to the new Article 79a(4) of the IED proposal (e.g. compensation for damages caused by a form of violation of

[8] Bulgarian Civil Procedure Code, 20 July 2007, last amended 5 August 2022, Article 154, paras 1 and 2 (available in Bulgarian here). Please note that, unless otherwise specified, the translations in this report were provided by the national rapporteurs.

[9] Factual presumptions were mentioned by nearly all of the rapporteurs who took part in this study and refer to the discretionary power of the court to use deductive reasoning to infer from proven facts that, in the absence of sufficient evidence to the contrary, a further unproven fact may be presumed to be true. Such presumptions are not the focus of this report, however, which is primarily concerned with legal presumptions (such as Article 79a(4) of the IED proposal) in the form of legal rules that expressly direct the court that whenever certain facts have been established, another fact must be presumed to be true.

environmental law). Although some amendments have been adopted recently in different areas of environmental legislation, Bulgaria has yet to take structural measures to address environmental pollution and the human harm that can be caused as a result of it.

Nonetheless, despite the lack of presumptions in Bulgarian environmental law, the underlying justification for presumptions that is accepted in other areas of Bulgarian law fits well with the aim of Article 79a(4) of the IED proposal to redress a situation in which claimants and defendants are not equally matched, leaving claimants unable to vindicate their rights. A pertinent analogy can be found in Bulgarian labour law on occupational diseases. According to the Bulgarian Labour Code,[10] an occupational disease is one which has occurred exclusively or predominantly under the influence of harmful factors of the working environment or the work process and which is included in the List of Occupational Diseases issued by the Council of Ministers on the proposal of the Minister of Health.[11] Thus, ordinarily, the causal link between the disease concerned and the conditions of the working environment (not necessarily involving a violation of labour law) would have to be established in each individual claim for compensation. However, for the diseases included in the List of Occupational Diseases there is a presumption of their occupational nature. Therefore, for them is established a presumption of a causal link, which the employee is not obliged to prove.[12]

France

In general, the rules of evidence applicable in civil and administrative liability proceedings are largely identical, as they take their initial sources from the French Civil Code.[13]

According to Article 1353 of the French Civil Code, with respect to proof of obligations, 'whoever claims the performance of an obligation must prove it. Conversely, the person

[10] Bulgarian Labour Code, 1 January 1987, last amended 5 August 2022 (available in Bulgarian here).
[11] The law also provides the possibility for such a disease to be established without being part of the list when it is proved that the disease was caused primarily and directly by the individual's usual work.
[12] Similar provisions can be found in other EU Member States as the European Commission has recommended that all Member States implement a series of measures related to the recognition of, compensation for, and prevention of occupational diseases. Moreover, the Commission promotes the recognition of occupational diseases included in a European Schedule of Occupational Diseases. See Commission Recommendation (EU) 2022/2337 of 28 November 2022 concerning the European schedule of occupational diseases [2022] OJ L309/12.
[13] French Civil Code, 21 March 1804, last amended 1 September 2020 (available in French here).

who claims to be released must justify the payment or the fact which produced the extinction of his obligation'.[14] Article 9 of the French Code of Civil Procedure further clarifies that it is up to 'each party to prove, according to the law, the facts necessary for the success of the claim'.[15]

The rules of evidence include both factual and **legal presumptions**. Regarding factual presumptions, pursuant to Article 1382 of the French Civil Code, the judge has the power to draw from known facts to establish an unknown fact where the evidence is sufficiently serious, precise and concordant to give rise to such a presumption. Legal presumptions are defined in Article 1354 of the French Civil Code, which also provides definitions of different types of legal presumption:

> 'The presumption that the law attaches to certain acts or certain facts by considering them as certain exempts the person for whose benefit it exists from providing proof thereof.
>
> It is said to be **simple**, when the law reserves proof to the contrary, and can then be reversed by any means of proof; it is said to be **mixed**, when the law limits the means by which it can be reversed or the object on which it can be reversed; it is said to be **irrefutable** when it cannot be reversed'.

There are numerous French laws that contain presumptions, including legal presumptions with respect to causation. They are always justified in the interests of justice: **the goal is to achieve greater protection for the victims when it would be too difficult for them to bring conclusive evidence**.

While there is not yet a similar provision comparable to the newly proposed Article 79a(4) of the IED proposal, there are examples in other contexts, in particular in the field of defective products. For example, the law of 4 March 2002, relating to the rights of patients, created a presumption in favour of victims infected with the hepatitis C virus following a transfusion of labile blood products or an injection of blood-derived drugs. In such cases it is up to the defendant to demonstrate that the transfusion or injection

[14] French Civil Code Volume III, Title IV*bis* on proving obligations, Article 1353(1) and (2).
[15] French Code of Civil Procedure, 5 December 1975, last amended 23 January 2023, Volume I on provisions common to all courts, Article 9 (available in French here).

is not the cause of the contamination.[16] If necessary, the Judge may order any measure of inquiry he or she deems useful to help reach a decision, but any doubt in the evidence will favour the claimant.[17] The same presumption can be found with respect to compensation for victims infected by the AIDS virus (law of 31 December 1991 containing various social provisions).[18]

Germany

The general rules of evidence in civil proceedings, which apply for civil and administrative liability, can be derived from §§ 138, 139 and 286 of the German Code of Civil Procedure.[19] According to the **principle of production of evidence**, parties must state their case as to the facts and circumstances fully and completely and designate relevant evidence in support of their assertions; and according to the **principle of free appraisal of evidence**, the court decides, 'at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue' (this is a factual presumption). In specific circumstances, an easing of the burden of proof applies when either the law includes a **written** adaptation of the burden of proof, or when German case law establishes one (this is a legal presumption).

Regarding the burden of proof for the causal link in the context of a compensation claim, such as in the IED proposal, an overlap may be found in the German Environmental Liability Act ('Umwelthaftungsgesetz' or UmweltHG).[20] This German Act must not be confused with the EU Environmental Liability Directive (2004/35/CE). The EU Directive explicitly excludes compensation for individuals and is transposed in Germany via the German Environmental *Damages* Act ('Umweltschadensgesetz' or

[16] See Court of Cassation judgment of 9 May 2001, in which a blood transfusion centre had the burden of proving that its product was not defective where it was established that a claimant had a blood transfusion prior to infection with the virus, there was no other specific way the claimant could have been infected, the origin of the infection did not stem from the claimant's lifestyle or history (Court of Cassation, Civil Chamber 1, Judgment Nos. 99-18.161 and 99-18.514 of 9 May 2001).
[17] Law No. 2002-303 of 4 March 2002 on the rights of patients and the quality of the health system, last amended 21 December 2015, Article 102 (available in French here).
[18] Law No. 91-1406 of 31 December 1991 on various social provisions, last amended 23 December 2000, Article 47 (available in French here).
[19] German Code of Civil Procedure as promulgated on 5 December 2005, last amended 5 October 2021 (available in English here).
[20] Environmental Liability Act ('Umwelthaftungsgesetz') of 10 December 1990, last amended 17 July 2017 (available in English here).

USchadG).[21] The German UmweltHG, however, is different from the EU Directive. It regulates civil liability of the operator for damage, both personal injury and damage to property, caused by environmental impacts that result from the operation of installations listed in Appendix 1 of the UmweltHG.[22] The UmweltHG is therefore applicable to those installations covered by the IED that also fall under one of the categories in Annex 1 of the UmweltHG.

A violation of environmental legislation or permits is not necessary to grant compensation under this act. Although, the UmweltHG does limit the liability of operators of installations to certain types of environmental impact and up to a maximum amount of compensation and entails some other excluding provisions.[23] Moreover, § 18 of the UmweltHG states explicitly that liability based on other provisions (such as general tort law) shall remain unaffected.

§ 6(1) of the UmweltHG provides a presumption of cause between the damage and the installation '[i]f an installation is likely to cause the damage that occurred on the basis of the given facts of the individual case'.[24] It also explains that '[t]he likelihood in the individual case shall be evaluated **on the basis of the operating procedures, the facilities used, the type and concentration of the substances used and released, the meteorological factors, the time and place the damage occurred and the type of damage as well as all the other given facts that speak for or against the causing of damage in the individual case**'. While the liability according to this act does not require a violation of environmental legislation, the compliance or non-compliance is important for the application of the presumption. § 6 (2) and (3) UmweltHG states that the *presumption* is excluded if the installation was operated in accordance with its intended use, e.g., among others, when it was fully in compliance

[21] Environmental Damage Act ('Gesetz über die Vermeidung und Sanierung von Umweltschäden'), entered into force 14 November 2007, last amended 4 August 2016 (available in German here).
[22] Please note that the implementation law of the current IED added installations as mentioned in the IED to Annex I of the USchadG, however, such a provision does not currently exist in the Appendix of the UmweltHG. Nonetheless, there is clear overlap between installations in the IED and installations in the UmweltHG.
[23] For example §§ 3, 4, 5, 15 UmweltHG. P Semmelmayer, 'Climate Change and the German Law of Torts' (2021) 22 German Law Journal 1569.
[24] The rapporteur notes that there may be a discrepancy in the official translation as the original German uses the wording '**able** to cause damage' rather than '**likely** to cause damage'. As explained by the German Ministry of Justice, 'Any discrepancies or differences that may arise in translations of the official German versions of these materials are not binding and have no legal effect for compliance or enforcement purposes.'

with its obligations deriving from administrative permits, requirements and enforceable orders and legal provisions, insofar as they aim to prevent impacts that might cause the damage.

This presumption of cause was included as it is **particularly difficult to prove a causal link in environmental cases**. Without a presumption of cause, a claimant would face almost insurmountable hurdles when asking for compensation. Furthermore, if a case is filed based on the UmweltHG, it is worth noting that the damaged party has the right to information from an operator as well as from authorities insofar as this is necessary to establish a claim for damages against the operator (§§ 8-10 UmweltHG).

Hence, in Germany, in principle, there is already a compensation right for individuals that have suffered health damages caused by (even lawful) pollution from certain types of industrial installations. It explicitly includes a presumption of the causal link between the installation and the damage where the installation is 'likely' (or 'able' – 'geeigent') to have caused the damage that occurred on the basis of the given facts of the case. Furthermore, it is evident from the rapporteur's case law research in Part 3 that this legislation has not resulted in excessive litigation.

Italy

Under the provisions of the Italian Civil Code[25] and the Italian Code of Civil Procedure[26] regarding the rules of evidence, anyone who wants to assert a right in court must prove the facts upon which it is based (Article 2697 of the Italian Civil Code). According to Article 116 of the Italian Code of Civil Procedure, the judge shall analyse the evidence in accordance with their prudent judgment. These principles are impacted by factual (Article 2729 of the Italian Civil Code) and **legal presumptions** (Article 2728 of the Italian Civil Code). Factual presumptions are not specified by law and are subject to the judge's discretion. As in the French legal system, these presumptions must be serious, precise and concordant. Legal presumptions can either be absolute (irrebuttable) or relative (rebuttable). **Relative legal presumptions free those in**

[25] Italian Civil Code, 16 March 1942 (as amended) (available in Italian here).
[26] Italian Code of Civil Procedure, 28 October 1940 (as amended) (available in Italian here).

whose favour they are established from the burden of proving a particular fact and shift the burden of proving the opposite to the other party.

Presumptions are particularly well-established in Italy due to the entrenchment of the **precautionary principle** that has been incorporated into Italian law on environmental protection to address situations of scientific uncertainty.[27] A core element of the precautionary principle is that it shifts the burden of proof to the proponent of a potentially harmful activity to prove that it does not pose an unreasonable risk.[28]

While several presumptions exist in the Italian system, the country report does not identify a presumption of a causal link in the context of a compensation right for health damages caused by unlawful operations similar to Article 79a(4) of the IED proposal.

Netherlands

In the Netherlands, there are several provisions that amend the general rule regarding the burden of proof laid down in Article 150 of the Dutch Code of Civil Procedure ('Wetboek van Burgerlijke Rechtsvordering', CCP).[29] Article 150 states that '[t]he party relying on legal effects of facts or rights asserted by it shall bear the burden of proving those facts or rights **unless any special rule or the requirements of reasonableness and fairness dictate a different division of the burden of proof**'.

In the case of environmental damages, the most notable examples where the legislator introduced a rebuttable presumption of causation concern (material) damages as a result of mining activities (Article 6:177 Dutch Civil Code ('Burgerlijk Wetboek', CC)) and employees who work with hazardous substances (Article 6:175 CC).[30]

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[27] On the application of the precautionary principle in Italian environmental law, see L Butti, *The Precautionary Principle in Environmental Law* (Giuffré 2007).

[28] D Kriebel et al, 'The Precautionary Principle in Environmental Science' (2001) 109 Environmental Health Perspectives 871.

[29] Dutch Code of Civil Procedure, first introduced 1838, last amended 1 October 2019 (available in Dutch here).

[30] Dutch Civil Code, 1992, last amended 1 July 2022 (available in English here).
Article 6:177(1) states that 'The operator of a mining work … is liable for the damage which has been caused by: **a.** effusions of minerals … as a consequence of uncontrollable forces of nature in the earth's underground which are set in motion because of the construction or the exploitation of the work; **b.** movements of the soil or underground as a result of the construction or the exploitation of that work.'
Article 6:175(1) states that 'The person who in the course of his professional practice or business uses a substance or keeps it under his control, while it is known that this substance has such characteristics

Poland

The rules of evidence are laid down in Article 232 of the Polish Code of Civil Procedure and Article 6 of the Polish Civil Code.[31] According to Article 232 of the Polish Code of Civil Procedure, the obligation to present evidence rests on the parties and the judge may also consider additional evidence not submitted by the parties. Article 6 of the Polish Civil Code further contains a general principle on the distribution of the burden of proof, stating that the claimant has the burden of proving the facts that support their claim and the facts justifying their response to the defendant's allegations, while the defendant has the burden of proving the facts justifying their allegations in response to the claim.

In addition to factual presumptions, there are numerous special provisions under the civil law which distribute the burden of proof differently (including in conjunction with the **Environmental Protection Act** (EPA)[32]). In the Polish codification technique, these legal presumptions that **shift the burden of proof to a different party** than the one that would have the burden under Article 6 of the Civil Code, are usually **formulated by presenting a given circumstance in a subordinate clause that begins with the word 'unless...'.**[33] For example, pursuant to Article 24 of the Civil Code it is presumed that an action that infringes a personal right is unlawful, unless the defendant proves that their action was not unlawful.[34]

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that it causes a special danger of a serious nature for persons or property, is liable when this potential danger is realized.' See also relevant case law in Part 3 of this report under 'b' and 'g' of the Netherlands section.

[31] Polish Civil Code, 23 April 1964 (as amended) (available in English here); Polish Code of Civil Procedure of 17 November 1964 (as amended) (available in Polish here).

[32] Act on the Protection of the Environment, 27 April 2001, last amended 29 September 2021 (available in Polish here).

[33] A Wolter, J Ignatowicz, K Stefaniuk, *Prawo cywilne. Zarys części ogólnej* (2nd edition, Wolters Kluwer 2001) 383.

[34] Interestingly, this provision has been the subject of considerable debate with respect to whether or not it encompasses damage to health caused by pollution. In 2021, the Supreme Court stated that the right to live in a clean environment is not a personal right within the meaning of Article 23 (which enshrines personal rights, including health, as protected by civil law) in connection with Article 24 and Article 448 (by which the court may award monetary compensation for infringement of a personal right) of the Civil Code (Resolution of the Supreme Court, 28 May 2021, III CZP 27/20). The Court, however, did not exclude that insufficient air quality standards may lead to infringement of personal rights, e.g. health. This resolution is criticised by scholars as being too unclear to provide sound guidance for lower courts when dealing with cases of civil liability for pollution based on Articles 23 and 24 of the Civil Code. According to the rapporteur's review of the academic literature, notwithstanding the Supreme Court's resolution, in cases against the State Treasury for insufficiently dealing with smog, the claimant would have to prove a disproportionately large damage to their health and an adequate causal link between

As with the other jurisdictions studied in this report, in Poland presumptions may be used in the interests of justice, such as when it is **impossible for the claimant to prove relevant facts because they do not have access to evidence**.

The country report does not identify any existing legal presumptions with respect to the causal link in the context of a right to compensation for health damages caused by unlawful operations similar to Article 79a(4) of the IED proposal.

Limitations, constraints or barriers deriving from relevant national legislation preventing the full integration of Article 79a(4) IED proposal into national law

Overall, there exist **no limitations, constraints or barriers deriving from national legislation, including constitutional law, in Bulgaria, France, Germany, Italy, the Netherlands or Poland** that would prevent the full integration of a provision that would adapt the burden of proof such as Article 79a(4) of the IED proposal.

On the contrary, the assessed **rules of evidence in all of the different jurisdictions show that the implementation of such a clause would not break new legal ground, but rather that room exists to expand currently existing rules on adapting the burden of proof to cover environmental cases under the IED.**

the act or omission of the State or other public authority and the damage. Furthermore, as the resolution of the Supreme Court was issued in the context of State responsibility for polluted air, it remains to be seen how it can or will be relevant in litigation against private entities.

Part 2: Comparison to the domestic implementation of EU law provisions adapting the burden of proof in the context of compensation rights in other areas

EU law provides for an adaptation of the burden of proof in the context of compensation rights in certain areas,[35] including under the following provisions:

a. Racial Equality Directive (Article 8),[36] the purpose of which is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin and to promote equal treatment in the Member States. Under Article 8, where the claimant establishes facts from which it may be presumed that there has been discrimination, the burden is on the respondent to prove there has been no breach of equal treatment.
b. Employment Equality Directive (Article 10),[37] the purpose of which is to lay down a framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation and to promote equal treatment in the Member States. Under Article 10, when the claimant establishes facts from which it may be presumed that there has been discrimination, the burden is on the respondent to prove that there has been no breach of equal treatment.
c. Goods and Services Directive (Article 9),[38] the purpose of which is to lay down a framework for combating discrimination based on sex in access to and supply

[35] For a general background on these provisions, see L Farkas and O O'Farrell, *Reversing the burden of proof: Practical dilemmas at the European and national level* (EU 2015) (available in English here).
[36] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (available in English here). The full text of the presumption reads as follows: 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'
[37] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (available in English here). The full text of the presumption reads as follows: 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'
[38] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (available in English here). The full text of the presumption reads as follows: 'Member States shall take

of goods and services and to promote the principle of equal treatment between men and women in the Member States. Under Article 9, when the claimant establishes facts from which it may be presumed that there has been discrimination, the burden is on the respondent to prove that there has been no breach of equal treatment.

d. Recast Gender Directive (Article 19),[39] the purpose of which is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Under Article 19, when the claimant establishes facts from which it may be presumed that there has been direct or indirect discrimination, the burden is on the respondent to prove that there has been no breach of equal treatment.
e. Antitrust Damages Actions Directive (Articles 5, 6, 17),[40] the purpose of which is to set out rules to ensure that anyone who has suffered harm caused by an infringement of competition law can claim full compensation. Under Article 17, it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption. It is also noteworthy that Articles 5 and 6 which deal with disclosure of evidence provide that the court can order the defendant to disclose relevant evidence which is in their control when this is

such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

[39] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 (available in English here). The full text of the presumption reads as follows: 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

[40] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L349/1 (available in English here). The full text of the presumption reads as follows: 'It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.' (Article 17(2)). Articles 5 and 6 deal with disclosure of evidence: 'Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.' (Article 5(1)).

requested by a claimant with 'a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'.

f. General Data Protection Regulation (GDPR) (Article 82),[41] the purpose of which is to lay down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. While Article 82 does not entail a classic 'presumption' wording, it mandates that data controllers (and where applicable data processors) shall be liable for damage caused by processing which infringes this Regulation, unless they prove they are not in any way responsible for the event giving rise to the damage.

This Part will identify 1) how the above EU law provisions have been implemented in the national law of the countries under review; 2) whether any challenges to the implementation of these provisions have been brought in national courts; and lastly 3) whether any legal barriers to the implementation of Article 79a(4) of the proposed IED exist at the national level based on comparison with the implementation of the above EU law provisions.

Overall, it is found that the possibility to adapt the burden of proof is not an alien concept to any of the EU legal systems reviewed. **The provisions in other EU directives that contain an easing of the burden of proof, in particular by presumptions, have been successfully implemented into national legislation and none of the country reports identified that the implementation of these provisions opened the floodgates to excessive litigation challenging the shifted**

[41] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L119/1 (available in English here). The full text of the presumption is as follows:
'1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.
2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.
3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.'

burden of proof. These findings lead to the conclusion that there exist no limitations, constraints or barriers deriving from national law in Bulgaria, France, Germany, Italy, Poland, or the Netherlands that would prevent the implementation of Article 79a(4) IED.

Bulgaria

1. Implementation of comparable EU law provisions under national law

In Bulgaria, there are national laws that adapt the burden of proof in line with the EU approach to regulating discrimination, gender equality, antitrust, and personal data protection.

It is well-established in the Bulgarian legal system that the burden of proof can be adapted in cases concerning infringement of the principle of equal treatment. Presumptions found in the Racial Equality Directive (Article 8); Employment Equality Directive (Article 10); Goods and Services Directive (Article 9); and Recast Gender Directive (Article 19) are transposed into Bulgarian domestic law in a single provision: Article 9 of the Protection against Discrimination Act (PaDA).[42] Article 9 states that:

> 'In proceedings for protection against discrimination, once the party claiming discrimination has presented facts on the basis of which it can be presumed that discrimination has occurred, the respondent must prove that the principle of equal treatment has not been violated.'

As can be seen from the above summary of the relevant EU provisions, while the wording of the Bulgarian presumption is not identical to the EU law, the content is the same. Thus, where the complainant presents sufficient evidence from which the judicial authority can reasonably presume that direct or indirect discrimination has occurred, this will give rise to a presumption of discrimination that shifts the burden of proof to the defendant. To rebut this presumption, the defendant must prove facts from which it can be inferred that there has been no discrimination, or that the discriminatory acts committed were justified in view of a legal purpose, and the means of achieving the purpose were appropriate and necessary.

Examination of relevant case law in the period 2006 to 2022 shows that the national practice of anti-discrimination litigation is generally coherent. **National courts have**

[42] Protection against Discrimination Act, 1 January 2004, last amended 12 July 2006 (available in English here).

effectively implemented the adapted burden of proof without significant deviation from the legal principle. The approach is illustrated by a 2021 decision of the Sophia District Court which clarified that the **burden of proof does not shift automatically as soon as a claim based on discrimination is made**. Rather, Article 9 of the PaDA shifts the burden of proof only when the party claiming to be a victim of discrimination presents facts on the grounds of which it can be presumed that discrimination has occurred. Therefore, there must be a reasonable suspicion of discrimination in order to shift the burden of proof to the defendant. In the present case, the court decided that the claimant had failed to prove such a suspicion by providing insufficient evidence to give rise to the presumption of discrimination.[43]

The easing of the burden of proof is also applicable in the area of competition law. The Antitrust Damages Actions Directive has been transposed into Bulgarian law by amendments to the Protection of Competition Act (PCA).[44] Articles 5, 6, and 17 of the Directive have been replicated in Bulgarian law almost to the letter.

In line with Article 17 of the Antitrust Damages Actions Directive, Article 113(2) of the PCA states that 'in the absence of proof to the contrary it shall be presumed that cartel infringements cause harm.' The claimant who is the victim of a cartel only has to prove the amount of the damage; although, according to Article 113(3) of the PCA, 'where it is established that the claimant suffered damages, the court shall award compensation pursuant to Article 162 of the Code of Civil Procedure, even when it is impossible to quantify precisely the harm suffered on the basis of the evidence available.'[45]

The GDPR is complemented by the Personal Data Protection Act (PDPA). As being an EU Regulation, in domestic law, there are no variations from the GDPR provisions. The rights of data subjects and access to legal remedies are regulated in Chapter seven of the PDPA.[46]

[43] Sofia District Court, Case No. 59568 2021; Decision No. 8160, 15 July 2021.
[44] Bulgarian Protection of Competition Act, 28 November 2008, last amended 1 January 2019 (available in English here).
[45] For more information, please see D Dragiev, 'Actions for Damages under Bulgarian Law for Protection of Competition and Directive 2014/104/EU in the light of the European Union Private International Law' (European Legal Review, 7 May 2018) (available in Bulgarian here).
[46] Bulgarian Personal Data Protection Act, 1 January 2002, last amended 26 November 2019 (available in English here).

The presumption of liability in Article 82 GDPR is reflected in a number of provisions of the PDPA. Most notably, Article 39(2) establishes that the data subject may claim compensation from the data controller or processor for damage suffered as a result of unlawful processing of personal data, and Article 53(5) states that the controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the data subject's request.

2. Challenges to implementation brought before domestic courts

The present research did not identify any case law where these particular provisions have been challenged before domestic courts.[47]

3. Legal barriers to the implementation of Article 79a(4) of the proposed IED based on comparison with the implementation of EU law in other areas

The examination of the implementation of other areas of EU law which provide for a shift of the burden of proof in the context of a compensation right did not reveal any barriers to the implementation of an adapted burden of proof under the IED into Bulgarian legislation. Overall, the domestic courts are familiar with this legal concept and the examined case law demonstrated that the adaptation of the burden of proof among the parties and rebuttable presumptions in connection to the principle of equal treatment have been applied in various legal areas in a consistent manner. Therefore, it is not expected that any critical legal obstacles will arise from introducing an adapted burden of proof in the IED.

[47] The Bulgarian rapporteurs reviewed all domestic courts via searches in the database <www.apis.bg>. The search criteria were the relevant EU legal Acts and respective Articles, as well as keywords such as 'burden of proof'. The time period reviewed aimed at covering the whole period since each particular legal act/provision entered into force (e.g. for PaDA the examined period covered 2006 to 2022). Separate searches were run at the Supreme Administrative Court Case Law Database (Справки по дела на ВАС); Supreme Court of Cassation Case Law Database (Справки по дела на ВКС); Constitutional Court of Republic of Bulgaria Case Law Database (Е-справки Конституционен съд на Република България). In addition, the rapporteurs examined compilations of annotated case law by Bulgarian authors (e.g. Bulgarian Commission for Protection against Discrimination, *Handbook on case law on the application of the Protection against Discrimination Act* (2008) Chapter III 'Burden of proof', 184-189 (available in Bulgarian here)).

France

1. Implementation of comparable EU law provisions under national law

The provision on burden of proof contained in Article 8 of the Racial Equality Directive and Article 19 of the Recast Gender Directive is transposed into French law by Law No. 2008-496 of 27 May 2008 on provisions for adaptation to Community law in the field of the fight against discrimination.[48]

Article 4 of Law No. 2008-496 provides:

> 'Anyone who considers himself to be the victim of direct or indirect discrimination shall present before the competent court the facts which allow it to be presumed to exist. In view of these elements, it is up to the defendant to prove that the measure in question is justified by objective elements unrelated to any discrimination. The judge forms his conviction after having ordered, if necessary, all the investigative measures he deems useful.'

Thus, as with the domestic legislation in Bulgaria, where the claimant provides evidence of facts that make it possible to presume the existence of discrimination, it is up to the defendant to prove that the measure is not the result of discrimination. The country report highlights that this is not a full reversal of the burden of proof because the burden remains on the victim to provide sufficient proof to allow the fact of discrimination to be presumed. At most, it is a relief: the facts presented by the victim allow us to presume.

The Employment Equality Directive was transposed into the French Labour Code by the order of 12 March 2007 (No. 2007-329).[49] Accordingly, Article L. 1144-1 of the Labour Code reads as follows:

> 'When a dispute arises relating to the application of the provisions of Articles L. 1142-1 and L. 1142-2, the candidate for a job, an internship or a training period

[48] Law No. 2008-496 of 27 May 2008 on diverse adaptations of community law in the field of the fight against discrimination, last amended 7 December 2020 (available in French here).
[49] Law No. 2007-329 of 12 March 2007 relative to the Labour Code, last amended 8 December 2009 (available in French here).

> or the employee presents elements of fact suggesting the existence of discrimination, direct or indirect, based on sex, family status or pregnancy.
>
> In view of these elements, it is up to the defendant to prove that its decision is justified by objective elements unrelated to any discrimination.
>
> The judge forms his conviction after having ordered, if necessary, all the investigative measures he deems useful.'

The mechanism is more one of sharing the burden of proof rather than a full reversal of the burden of proof. The claimant must always provide facts that 'suggest the existence of discrimination'. The judge can then settle for a simple probability, which is permitted by Article 1382 of the Civil Code.

The Goods and Services Directive was transposed by Law No. 2020-1508 of 3 December 2020 transposing measures to adapt to European Union law in economic and financial matters.[50] The domestic law does not provide a specific rule on evidence but the common law of presumptions of fact applies, meaning the court still has the discretionary power to make a presumption based on the facts.

The Antitrust Damages Actions Directive was transposed by Order No. 2017-303 of 9 March 2017 relating to actions for damages resulting from anti-competitive practices.[51] The presumption in Article 17(2) of the Damages Directive is implemented into French law by Article L. 481-7 of Order No. 2017-303 (which is a simple presumption meaning that the defendant can provide evidence to rebut it):

> 'Article L. 481-7.- It is presumed, until proven otherwise, that an agreement between competitors causes damage.'

Law No. 2018-493 of 20 June 2018 on the protection of personal data[52] amended the existing French Data Protection Act in order to comply with the GDPR. However, Article 82 GDPR is not implemented in the national legislation as it is considered that Article 82 is already in line with civil liability law in France. In particular, Article 1240 (formerly

[50] Law No. 2020-1508 of 3 December 2020 transposing measures to adapt to European Union law in economic and financial matters (available in French here).
[51] Order No. 2017-303 of 9 March 2017 relating to actions for damages resulting from anti-competitive practices (available in French here).
[52] Law No. 2018-493 of 20 June 2018 on the protection of personal data (available in French here).

Article 1382) of the Civil Code provides that 'Any human action whatsoever which causes harm to another creates an obligation on the person by whose fault the harm occurred to repair it.' Moreover, of course, the GDPR as a regulation remains directly applicable in France.

2. Challenges to implementation brought before domestic courts

The country report for France did not identify any challenges.[53]

3. Legal barriers to the implementation of Article 79a(4) of the proposed IED based on comparison with the implementation of EU law in other areas

French law contains provisions showing that the creation of presumptions is not prevented, including the type of presumption that is provided for by the IED proposal. Such presumptions already exist in legislation adopted to implement the EU law described in this Part and could be extended to environmental law.

Germany

1. Implementation of comparable EU law provisions under national law

The Racial Equality Directive, the Employment Equality Directive, the Goods and Services Directive, and the Recast Gender Directive (as well as Directive 2002/73/EC) are implemented in one act: the General Act on Equal Treatment ('Allgemeines Gleichbehandlungsgesetz' (AGG)).[54] The AGG consolidates the provisions on burden of proof contained in the Directives into one provision, Article 22 AGG:

> '[w]here, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.'

While the wording used in Article 22 AGG differs from that used in the Directives, the rapporteur explains that the prevailing opinion in Germany is that Article 22 fully captures the adapted burden of proof set out in the Directives.[55]

The Antitrust Damages Actions Directive was implemented by an amendment of the Act against Restraints of Competition ('Gesetz gegen Wettbewerbsbeschränkungen'

[53] Databases used to locate relevant case law include <https://www.legifrance.gouv.fr>, <https://halshs.archives-ouvertes.fr>, and <http://paris.tribunal-administratif.fr>.
[54] General Act on Equal Treatment of 14 August 2006, last amended 3 April 2013 (available in English here).
[55] A general analysis of Article 22 AGG, including case law, can be found in M Herberger et al (eds), *jurisPK-BGB Band 2 § 22 AGG* (Juris 2020).

(GWB)).[56] In the current version of the GWB, the right to have evidence surrendered and information provided (Articles 5 and 6 of the Directive) are implemented in Article 33g GWB. The liability for damages (Article 17 of the Directive) is implemented in Article 33a GWB, which states *inter alia* that

> '[t]here is a rebuttable presumption that a cartel results in harm ... There is a rebuttable presumption that legal transactions with undertakings participating in a cartel regarding goods or services that fall within the scope of a cartel in terms of product type, time period and geographic area were covered by that cartel.'

The 9th amendment of the GWB, which implemented the Antitrust Damages Actions Directive, was welcomed by German politicians as well as the legal profession. In politics, even before the adoption of the new act, the Federal Cartel Office ('Bundeskartellamt') issued a statement on the draft bill, seeing the improvement in the legal framework for compensation claims as a positive development.[57] According to the statement, the new regulations on compensation strike an appropriate balance between the interests of the injured party, the party causing the damage, and the general public's interest in a functioning cartel prosecution.

In the legal profession, lawyers specialised in competition law underlined the **significant improvement in the prospects of claims for damages following the introduction of the rebuttable presumption** in Article 33a GWB.[58]

The GDPR is directly applicable in German law since May 2018. However, because of the flexibility clauses in the GDPR, which allow Member States to concretise, complement, and modify the Regulation, the Federal Data Protection Act ('Bundesdatenschutzgesetz' (BDSG))[59] also finds application in the German legal system. As with France, however, the national legislation does not contain a provision to further concretise or complement Article 82 in national law.[60]

In general, once it comes to a claim based on Article 82 GDPR, the rules of evidence of the German procedural law apply as the GDPR is not considered to contain a specific right of evidence. Thus, abovementioned rules such as the principle of production of evidence ('Beibringungsgrundsatz') and the free appraisal of evidence

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[56] Competition Act ('Gesetz gegen Wettbewerbsbeschränkungen' (GWB)), 1 January 1998, last amended 19 July 2022 (available in English here).
[57] Bundeskartellamt, 'Stellungnahme des Bundeskartellamts zum Referentenentwurf zur 9. GWB-Novelle' (25 July 2016) (available in German here).
[58] See, for example, Heuking Kühn Lüer Wojtek, 'Update Antitrust June 2017. Overview of the main reforms under the 9th ARC Amendment – part 1' (6 September 2017) (available in English here). A general analysis of Article 33a and g GWB including case law can be found in R Bechtold and W Bosch (eds), *Gesetz gegen Wettbewerbsbeschränkungen §§ 1-96, 185, 186. Kommentar* (CH Beck 2018).
[59] Federal Data Protection Act (BDSG), 30 June 2017, last amended 23 June 2021 (available in English here).
[60] Although it does create an exception whereby the GDPR (and, therefore, Article 82 GDPR), does not apply to the specific cases mentioned in Article 2(2)d GDPR, for example when personal data is processed in the field of police and justice. In those cases, § 83 BDSG creates a special compensation regime.

(‘freie Beweiswürdigung’) find application. However, because the GDPR is directly applicable, those rules of evidence would be ‘modified’ in a claim based on Article 82 GDPR, as the presumption of Article 82 GDPR must be applied.[61]

2. Challenges to implementation brought before domestic courts

No challenges were identified in the case database of the BVerfG which would be the natural forum for such cases.[62]

3. Legal barriers to the implementation of Article 79a(4) of the proposed IED

As with the other jurisdictions in this study, the examination of the implementation of other provisions of EU law which provide for a shift of the burden of proof in the context of a compensation right did not uncover any concerns about the prospective introduction of an adapted burden of proof under the IED and subsequently into German legislation. Therefore, it is not expected that any critical legal obstacles will arise from introducing an adapted burden of proof in the IED.

Italy

1. Implementation of comparable EU law provisions under national law

Legislative Decree No. 215 of 9 July 2003[63] transposed Directive 2000/43/EC on equal treatment of people regardless of racial or ethnic origin. The provisions of Article 8 of the Directive regarding the shifting of the burden of proof are not explicitly transposed by the Decree. However, there is other domestic legislation that contains provisions aimed at providing greater protection for the alleged victim. For example, Article 4(5) of Law No. 125 of 10 April 1991 states that

> ‘when the complainant sets out factual elements – which may also be inferred from data of a statistical nature relating to recruitment, remuneration systems, the allocation of duties and qualifications, transfers, career progression and dismissals – capable of providing a precise and concordant basis for the presumption of the existence of acts or conduct that are discriminatory on grounds of gender, it will be up to the defendant to provide proof of the non-existence of discrimination.’[64]

[61] A general analysis of Article 82 GDPR, including case law in the German legal system, can be found in E Ehmann and M Selmayr (eds), *DS-GVO Datenschutz-Grundverordnung Kommentar* (2nd edn, CH Beck 2018).
[62] The court reviewed was the BVerfG, as this would be the competent court for cases challenging the EU law provisions that adapt the burden of proof. Searches of the BVerfG case law database, which covers all significant (‘wesentliche’) decisions since 1998, did not find any relevant challenges.
[63] Legislative Decree No. 215 of 9 July 2003, ‘Implementation of the Council Directive 2000/43/EC for the equal treatment between persons irrespective of racial or ethnic origin’ (available in English here).
[64] Law No. 125 of 10 April 1991, last amended 23 May 2000 (available in Italian here).

Directive 2000/78/EC on equal treatment in employment and occupation, was transposed by Legislative Decree No. 216 of 9 July 2003.[65] Again the presumption in the context of the burden of proof provided for in Article 10 of the Directive was not adopted.

Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services was transposed by Legislative Decree No. 196 of 6 November 2007.[66] Article 9 of the Directive which shifted the burden of proof was originally adopted but was later repealed. However, there is another provision still in force (Article 40) which recalls Article 4(5) of Law No. 125 of 10 April 1991 quoted above.

Directive 2006/54/EC on equal opportunities and equal treatment of men and women in matters of employment and occupation was transposed by Legislative Decree No. 5 of 25 January 2010.[67] The Decree introduced a number of amendments to Legislative Decree No. 198 of 11 April 2006 (Code of equal opportunities between men and women),[68] without any further intervention on the issue of burden of proof in addition to the already applicable domestic provisions aiming at providing greater protection for the alleged victim mentioned above.

The Antitrust Damages Actions Directive was transposed by Legislative Decree No. 3 of 19 January 2017.[69] The Decree provides that any natural person, legal entity or entity without legal personality may claim compensation for damage suffered due to an infringement of Italian or European Union competition law, including through a class action. In accordance with Article 5 of the Directive, Article 3 of the Decree provides that, at the request of a party, the judge may order the other party or a third party to disclose specific items of evidence or categories of evidence within their possession, when

- there is evidence of the plausibility of the claim for damages;

- the evidence to be obtained is relevant to the dispute;

- the production is proportionate, taking into account the interests of the parties concerned, without prejudice to the confidentiality of communications between lawyers and the assisted parties.

Without limiting the non-contractual nature of the liability of those who violate competition law, the damages that may be compensated are the direct losses and, in cases where the claimant is unable to establish these losses adequately and reasonably, the court may settle the case on an equitable basis. A presumption of the

[65] Legislative Decree No. 216 of 9 July 2003 (available in Italian here).
[66] Legislative Decree No. 196 of 6 November 2007 (available in Italian here).
[67] Legislative Decree No. 5 of 25 January 2010 (available in Italian here).
[68] Legislative Decree No. 198 of 11 April 2006 (available in Italian here).
[69] Legislative Decree No. 3 of 19 January 2017 (available in Italian here).

presence of damage brought on by a cartel is acknowledged, again with a view to alleviating the difficulties inherent in establishing the infringement, subject to proof to the contrary by the infringer.

The GDPR was transposed by Legislative Decree No. 101 of 10 August 2018.[70] There is a presumption of fault on the part of the damaging party (the data controller or processor), who will have to provide conclusive proof that they took all the measures prescribed by law to avoid the damage. As for the injured party, the latter has the possibility of resorting to simple presumptions to prove the damage suffered, and the damages may be quantified on an equitable basis, exempting the injured party from the burden of proving the exact amount of the damage.

2. Challenges to implementation brought before domestic courts

The regulations transposing the above-mentioned EU laws do not appear to have been challenged before the national courts and, in particular, no questions of constitutional legitimacy have been raised before the Constitutional Court.[71]

3. Legal barriers to the implementation of Article 79a(4) of the proposed IED based on comparison with the implementation of EU law in other areas

In principle, there are no legal obstacles to the transposition into Italian law of a clause such as the one set out in Article 79a(4) of the IED proposal. The legislation examined in this Part shows that such presumptions already exist in Italian laws.

Netherlands

1. Implementation of comparable EU law provisions under national law

Article 8 of the Racial Equality Directive is implemented in Article 10(1) of the Equal Treatment Act (‘Algemene wet gelijke behandeling’),[72] which stipulates that:

> ‘If the person who believes that a distinction [based on race] has been or is being made to his detriment, alleges in court facts that may suggest such a distinction, the other party shall have the burden of proving that no violation of this law has occurred.’

[70] Legislative Decree No. 101 of 10 August 2018 (available in Italian here).
[71] Searches were conducted of the case law of the trial courts (civil and administrative courts), appeal courts (administrative appeal courts) and the Court of Cassation (which is the highest court in this context). The research covered approximately the last ten years.
[72] Equal Treatment Act (‘Algemene wet gelijke behandeling’) of 2 March 1994 (as amended) (available in Dutch here).

Article 10 of the Employment Equality Directive is implemented in Article 12 of the Equal Treatment Act based on age in employment ('Wet gelijke behandeling op grond van leeftijd bij arbeid'),[73] which stipulates that:

> 'If the person who believes that to his detriment a distinction [based on age] has been or is being made, alleges in court facts that may give rise to the suspicion of such a distinction, the other party must prove that no violation of this law has occurred.'

Article 9 of the Goods and Services Directive is also implemented in Article 10(1) of the Equal Treatment Act ('Algemene wet Gelijke behandeling').[74]

Article 19 of the Recast Gender Directive is implemented in Article 7:646(12) of the Civil Code, which stipulates that:

> 'If the person who believes that a distinction [based on gender] has been or is being made to his detriment presents in court facts that may suggest such a distinction, the other party shall have the burden of proving that no violation of this article has occurred.'

The wording of the above discrimination provisions is almost exactly the same as the wording used in the EU Directives. Although there are slight differences in how each provision is worded, the substantive content is identical.

Some paragraphs of Articles 5, 6 and 17 of the Antitrust Damages Actions Directive did not need implementation as they were covered by the Civil Code and the Code of Civil Procedure already. The rest of the paragraphs were implemented in several (other) Articles in these two Acts.[75]

Article 82 of the General Data Protection Regulation (GDPR) is implemented in Article 49(4) of the Personal Data Protection Act, which must be read in conjunction with paragraph 3 of this Article. These two paragraphs stipulate that:

> '3. The controller shall be liable for the damage or harm resulting from non-compliance with the requirements [that follow from the GDPR]. The Processor shall be liable for such damage or disadvantage, insofar as caused by his activity.
>
> 4.The responsible party or the processor may be relieved of this liability in whole or in part if he proves that the damage cannot be attributed to him.'

[73] Equal Treatment Act based on age in employment ('Wet gelijke behandeling op grond van leeftijd bij arbeid') of 17 December 2003 (available in Dutch here).
[74] See Tweede Kamer 2006/07, 30 967, nr. 3.
[75] See Tweede Kamer 2015/16, 34 490, nr. 3 (see the 'transponeringstabel').

Hence, the burden of proof for the relief of liability is on the responsible party/processor. These two provisions must also be read in conjunction with Article 6:106 of the Dutch Civil Code, which provides the right to compensation for damage that does not consist of material loss.

2. Challenges to implementation brought before domestic courts

The implementation of Article 82 GDPR has been challenged multiple times. However, none of these challenges were against the legality of Article 82 GDPR per se, but rather how the provision implementing it is to be correctly interpreted. Highly relevant to this debate is a 2019 judgment of the Dutch Supreme Court which held that the mere violation of a fundamental right does not create a right to immaterial damages in itself. The norm remains that the person who alleges they have suffered harm must substantiate that harm with concrete facts. According to the Supreme Court, this is only different if the nature and extent of the norm violation entails that the harm is evident.[76]

The rapporteurs were also able to find cases involving allegations of discrimination that invoked the presumptions under the Equal Treatment Act, but again no cases were found that challenged the legality of the provisions.[77]

3. Legal barriers to the implementation of Article 79a(4) of the proposed IED based on comparison with the implementation of EU law in other areas

Based on the assessment of the already existing presumptions in national law that is based on EU law, there is no reason why the Dutch legislator could not implement Article 79a(4) of the proposed IED in national legislation.

Poland

1. Implementation of comparable EU law provisions under national law

The provision on reversing the burden of proof contained in the Racial Equality Directive (Article 8), Employment Equality Directive (Article 10), Goods and Services Directive (Article 9), and Recast Gender Directive (Article 19) was transposed into the Polish legal system in Article 14, paragraphs 2–3 of the Implementation Act[78] and, specifically for employees, in Article 18[3b] §1 of the Labour Code.[79] The Implementation Act more clearly specifies the elements of the analysed provision, indicating that

[76] The Dutch Supreme Court, ECLI:NL:HR:2019:376 (15 March 2019) para 4.2.2. See also R Wiekeraad, 'Kan het Nederlands bestuurs(proces)recht voldoen aan de verwachting die artikel 82 AVG schept?' (Gst. 2020/24).

[77] The official Dutch case law database on <www.Rechtspraak.nl> and the search engine on <www.legalintelligence.nl> were used to search for any relevant challenges in the national courts, using several relevant search terms. These databases cover at least the last 20 years. As a small disclaimer, the rapporteurs note that the database on <www.Rechtspraak.nl> is not absolutely exhaustive as not all cases are published.

[78] Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment, last amended 2020 (available in Polish here).

[79] Labour Code of 26 June 1974, last amended 1 February 2023 (available in English here).

‘[w]hoever alleges a breach of the principle of equal treatment must establish that the breach is probable’, and then ‘the person accused of breaching the principle shall be obliged to prove that he or she has not committed a breach’. The probability mentioned in the Implementation Act is a substitute for proof in the strict sense and does not provide certainty, but only that a statement about a fact is sufficiently probable that it may be presumed to be true. The Labour Code uses less precise wording, listing examples of violations of the principle of equal treatment, and then adding a reservation ‘unless the employer proves that this was due to objective reasons’. Despite the laconic and imprecise provisions of the Labour Code, the rapporteur explains that, according to scholars, there should be no doubt that the legislator introduced the principle of the shifted burden of proof in the Code.

In one of the first cases dealing with Article 14 of the Implementation Act, the Warsaw-Śródmieście District Court observed that, in line with the jurisprudence of the Appellate and Supreme Courts, it is hard for claimants to persuade the court to shift the burden of proof because, especially in discrimination cases, the claimant has to demonstrate the likelihood of their claim. A claim is plausible, according to the court, if, prima facie, there is a significant chance of its existence, in the sense that a given event can lead to a certain effect with a high degree of probability.[80]

Article 17 of the Antitrust Damages Actions Directive was transposed into Polish law by Article 7 of the Act on claims for compensation for damage caused by violation of competition law.[81]

The GDPR, including Article 82 on the burden of proof, is directly applicable in Poland. Article 82 is further reinforced by national provisions stipulating that to the extent not regulated by the Regulation, the provisions of the Civil Code shall apply to claims of violations of the provisions on the protection of personal data. The Polish Civil Code grants the protection of personal rights, irrespective of the protection provided for in other provisions. This additional protection establishes the presumption of unlawfulness of the infringement of personal rights; therefore, it is the defendant’s obligation to prove that its action infringing the personal right of the claimant was not unlawful.

2. Challenges to implementation brought before domestic courts

The implementation has not been challenged.[82]

[80] Judgment of the Warsaw-Śródmieście District Court of 9 July 2014, VI C 402/13, confirmed by the Regional Court in Warsaw in its judgment of 18 November 2015, V Ca 3611/14.
[81] Act of 21 April 2017 on claims for compensation for damage caused by violation of competition law (available in Polish here).
[82] The reviewed courts were civil courts (including the Supreme Court) and the Constitutional Court, as well as reports on the matter drafted by scholars.
The covered time period dated from the incorporation of the said provisions in national law or, as in case of the GDPR, adoption by the European legislator.

3. Legal barriers to the implementation of Article 79a(4) of the proposed IED based on comparison with the implementation of EU law in other areas

As with the other countries reviewed in this report, there are no fundamental barriers in principle to the transposition of Article 79a(4) of the proposed IED.

The rapporteur highlights that – while not being a legal barrier to the implementation of the adapted burden of proof in Article 79a(4) – it would be crucial that the domestic implementing legislation be worded precisely in order to avoid a situation where different courts adopt different interpretations. As shown above, the prohibition of discrimination based on certain criteria was formulated differently in the Implementation Act and in the Labour Code and this has led to a situation where for the latter the courts require claimants to substantiate not only a difference in treatment but also that this difference is based on a prohibited criterion, which is criticised in the doctrine as unnecessarily burdensome.[83]

[83] M Tomaszewska, 'Prawo pracy, nierówne traktowanie w zatrudnieniu, dyskryminacja pracownika, ciężar dowodu, domniemanie faktyczne, obowiązek podania przyczyny dyskryminacji. Glosa do wyroku SN z dnia 14 grudnia 2017 r., I PK 342/16' (2018) 12 OSP 105.

Part 3: Civil liability jurisprudence/Case law on environmental pollution

This section examines compensation claims arising under various categories of environmental pollution, including water, air, soil and land, noise, odour, radioactive substances, and any other categories of pollution as summarised in the country reports. The rapporteurs particularly focused on cases where the burden of proof was adapted and cases involving harm to human health caused by environmental pollution. **Two overarching observations were made: 1) the rapporteurs found that there were relatively very few pollution cases in which the burden of proof was adapted; 2) the rapporteurs found that claimants often struggled to prove causation without an adapted burden of proof.**

Bulgaria

In Bulgaria, civil liability jurisprudence on environmental pollution cases is **extremely limited**. It is possible for a citizen to seek compensation from a person, legal entity or authority on the ground of a violation of certain administrative laws regulating environmental issues, but the rapporteurs found no such cases that could be properly categorised as 'environmental pollution cases'.

It was also observed that environmental pollution tort cases are extremely limited in Bulgaria and one of the reasons for that is the difficulty of proving that the claimant's harm has been caused by pollution.[84]

[84] The rapporteurs searched the most comprehensive and prominent database for case law in Bulgaria, called APIS (АПИС), using multiple search criteria, including specific time periods, statutes, courts, keywords, etc. They searched for case law from all types of jurisdictions, including the Constitutional Court. As well as thematic research on jurisprudence affecting the environment, the rapporteurs also searched for case law from any area that might address relevant aspects of the judicial process. Such case law would have been, for example, abnormal evidentiary techniques that were found admissible by the court, or cases in which the court made some sort of special allowance for the 'weak party' in the trial. The result of such research did not achieve success.
In addition to the database search, the rapporteurs reviewed legal literature on civil law, civil procedure, environmental law, and administrative and criminal law. This examination did not find any relevant case law.

a) Water pollution

The desk research did not find any case law dealing with claims of human harm arising from water pollution.

b) Air pollution

The desk research did not find any case law dealing with claims of human harm arising from air pollution.

c) Soil and land pollution

The desk research identified only one case[85] dealing with claims of human harm caused by soil and land pollution under the general provisions of Articles 170 and 171 of the Bulgarian Environmental Protection Act,[86] regulating damages from environmental pollution. There was no information as to whether the burden of proof had been adapted.

d) Noise pollution

The desk research did not find any case law dealing with claims of human harm arising from noise pollution.

e) Odour pollution

The desk research did not find any case law dealing with claims of human harm arising from odour pollution.

f) Radioactive pollution

The desk research did not find any case law dealing with claims of human harm arising from radioactive pollution.

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[85] Civil case 141/2017 in District Court Chepelare which was appealed before the Regional court in Smolyan; appealed before the Appellate Court in Plovdiv; also see Judgments from the three instances (in Bulgarian) Decision 65 of District Court Chepelare on Civil case 141/2017, 10 May 2017; Decision 62 of Regional Court - Smolyan on Appeal civil case 331/2018, 18 August 2019; Order 421 of Appellate Court - Plovdiv on Appeal civil case 479/2019, 22 October 2019.

[86] Bulgarian Environmental Protection Act, 25 September 2002, last amended 12 March 2021 (available in English here).

g) Other

In the case of *Dimitar Yordanov v Bulgaria*,[87] a man complained about structural damage to his property (not health) caused by a nearby coal mine. The courts did not apply a shift of the burden of proof and, after considering witness testimony and expert reports, the courts concluded that the claimant had failed to prove the causal link between the mining activities and the damage. The claimant appealed to the European Court of Human Rights which held that there was no breach of his right to a fair trial in this case.

France

Cases involving compensation for individuals as a result of environmental pollution are **limited** in France. In cases where compensation has been sought, the claimants have struggled to establish the causal link between the pollution and the harm suffered as they bear the burden of proof.[88]

a) Fauna and flora pollution

In the *Erika* case,[89] a tanker chartered by the company Total ran aground off the coast of Brittany and caused a major oil spill. This resulted in damage to the environment for fauna and flora. Several associations for the protection of the environment, as well as cities, regions and departments requested compensation for the damage caused by the oil spill. The case did not involve claims for compensation brought by individuals for human health damages.

As the defendants were found liable criminally in this case, this entailed a corresponding civil liability and thus issues pertaining to civil causation and the burden of proof did not have the same relevance as in other compensation claims examined in this Part.

The court did award reparations. The rapporteur highlights that one potentially noteworthy element for the purposes of this study is that when determining the amount

[87] *Dimitar Yordanov v Bulgaria* App No. 3401/09 (ECtHR, 6 September 2018).
[88] Databases used to locate relevant case law include <https://www.legifrance.gouv.fr>, <https://halshs.archives-ouvertes.fr>, <https://www.actu-environnement.com>, and <http://paris.tribunal-administratif.fr>.
[89] Judgment No. 10-82.938 of 25 September 2012, Court of Cassation, Criminal Chamber.

of the reparations the court did not require the ecological damage to be 'deeply proved', which could be interpreted as relaxing the evidence required.

b) River, water, fauna and flora

In *Fishing Federations of Indre and Loire v SAS Synthron*,[90] fishing federations demanded compensation for the economic, moral and ecological damage caused by the dumping of toxic substances into a river by a company. The court found the defendant liable under all three types of damage.

The court did not apply any shifting of the burden of proof. It is noteworthy, however, that as with the *Erika* case, the court did not seem to require strict evidence from the claimants with respect to proving specific ecological damage.

c) Biodiversity

In *Calanques National Park* (6 March 2020),[91] various groups concerned with biodiversity brought proceedings against four individuals suspected of fishing illegally in the national park. The burden of proof was not addressed. However, unlike the above two cases, the claimants in *Calanques* did carefully prove and detail the ecological damage. The ecological damage was not presumed.

d) Air pollution

In *L'Affaire du Siècle* (2021),[92] the applicants (the association Oxfam France, the association Notre Affaire à Tous, the Fondation pour la Nature et l'Homme and the association Greenpeace France) asked the court, in essence, to condemn the State for its failure to fight against climate change by not meeting internationally agreed targets for reducing greenhouse gas emissions and to order the reparation and cessation of the ecological damage caused. With respect to the burden of proof, it can be observed that there was a degree of lightening of the burden as the judge was satisfied with general scientific evidence, such as reports of the IPCC on the impact of emissions on global climate change, and did not require the applicants to provide further specific proof of the causal link between the State's emissions and specific

[90] Judgment No. 1747D of 24 July 2008, High Court of Tours.
[91] Judgment No. 18330000441 of 6 March 2020, High Court of Marseille.
[92] Judgment No. 1904967 of 14 October 2021, Administrative Court of Paris.

instances of ecological damage allegedly caused in this case, i.e. the consequences on French biodiversity and, in particular, that found in the claimants' municipality. The court found that there was a causal link between the government's lack of action to combat climate change and damage to the environment. On 14 October 2021, the Administrative Court of Paris ordered the government to take all possible measures to combat climate change. It also ordered the government to repair the damage to the environment already caused and to prevent it from getting worse. The case did not concern a compensation claim for damage to human health.[93]

e) Pollution from high voltage power lines

Farmers operating near a very high voltage power line maintained that the electromagnetic fields emitted caused health disorders to livestock and asked for compensation.[94] The claimants argued that the precautionary principle meant that there should be a presumption of causation. However, the court dismissed the case, finding that causation had not been established as there was too much contrary and divergent evidence on the effects of electromagnetic fields. On appeal, the Court of Cassation explained that 'the Environmental Charter and the precautionary principle did not call into question the rules according to which it was up to the party seeking compensation for damage ... to establish that this damage was the direct and certain consequence of [the defendant's actions]'. In other words, the precautionary principle does not mean that wherever there is scientific uncertainty the defendant will automatically be declared responsible for a claimant's damage. The court may shift the burden of proof onto the defendant but only when the claimant provides sufficient evidence to give rise to 'serious, precise, reliable and concordant presumptions' of the causal link. The judgment is helpful because it shows how presumptions generally work under French law in environmental cases. The approach of the courts is nuanced: it is possible to lighten the burden of proof, but the judge cannot set aside the requirement to prove the case.

[93] 'Notre Affaire à Tous and Others v. France ('L'affaire du siècle')' (*CCRP*) (available here).
[94] Judgment No. 10-17.645 of 18 May 2011, Court of Cassation, 3rd Civil Chamber.

Germany

While France has a significant amount of litigation that involves environmental issues and claims directly arising from violations of legislation and regulations for the protection of the environment, the case law identified in Germany tended to be based on other areas of civil liability, e.g. laws governing contractual relations.[95]

a) Water pollution

German case law relating to water pollution mostly relates to public/environmental law disputes over permits, for example, challenging authorisations. Civil liability claims relating to water pollution mostly dealt with compensation for damages to property, rather than human harm. The few identified cases dealing with claims of human harm arising from water pollution were mostly based on contract law, for example travel agreement law. No cases were identified where the burden of proof was adapted.

b) Air pollution

Again, German case law relating to air pollution mostly contains public law / environmental law cases that are based on issues such as building permits. Civil liability claims relating to air pollution in recent years mostly dealt with compensation due to the Volkswagen emissions scandal,[96] however, not in relation to human harm. No cases were identified where the burden of proof was adapted.

c) Soil and land pollution

There exists no German case law relating to soil and land pollution and human harm in an environmental context. Existing German case law relating to soil and land pollution mostly contains public law / civil law cases, for example dealing with

[95] The German case law was researched using the juris database, which contains 1,310,861 cases from all German courts as well as EU courts. The rapporteur searched for different keywords (e.g. 'burden of proof', 'odour pollution', etc.), courts, laws, among others. The period covered the last 20 years.
[96] In essence, cars made by the Volkswagen Group were found to emit more nitrogen dioxide than the company claimed. Furthermore, it was discovered that VW had installed so-called 'defeat devices' into vehicles in order to manipulate emissions tests.

contaminated grounds at the time of purchase of property. No cases were identified where the burden of proof was adapted.

d) Noise pollution

German case law relating to noise pollution mostly contains public law / civil law cases, for example, dealing with building permits or rent reductions due to construction sites. One case was identified that dealt with a compensation claim for human harm caused by noise pollution.[97] The claims of injury were due to emissions from a railway line. The claimants asked for compensation because of the noise emissions from the operation of the railway line in the area, which they alleged were above the permitted threshold values and led to an aggravation of already existing illnesses, such as high blood pressure. After having lost in the first instance, the claimants filed an appeal. According to the Court of Appeal, the noise-related health damages were not conclusively presented and the presentation of the allegation of an increase in freight train traffic and operational noise was insufficient. The burden of proof was not adapted and the court dismissed the claims.

Three other cases were identified which dealt with injunctive reliefs against a wind farm operator, an airport operator, and an operator of a heating plant based on human harm caused by noise pollution. Cases seeking injunctive relief are more common in the German legal system when it comes to noise pollution than compensation claims. The burden of proof was not adapted in any of the cases and none of them were successful. However, in the wind farm case, an appellate court found that the first instance court had erred by not adapting the burden of proof.

e) Odour pollution

German case law relating to odour pollution mostly contains public law / civil law cases, for example dealing with building permits or injunctive relief because of bakery or restaurant smells. However, one case based on human harm caused by odour pollution was identified,[98] in which the claimant sought compensation from the operator of painting facilities (situated within a 2km radius from the claimant's house), alleging their health had been damaged by polluting emissions. The case is also noteworthy

[97] OLG Frankfurt, Urteil vom 06.10.2016 – 16 U 261/15 <https://openjur.de/u/957182.html>.
[98] OLG Oldenburg, Urteil vom 10.11.2005 – 8 U 86/95 <https://openjur.de/u/318977.html>.

because the claimant invoked the presumption of cause in § 6(1) of the UmweltHG on the basis that the installation was the likely cause of the damage. The case was dismissed at first instance and again on appeal as the courts found that the case did not have a realistic prospect of succeeding given that the evidence presented by the claimant did not indicate that the claimant's illness had toxic causes at all, even less that the cause was emissions from the painting facilities. Thus the burden of proof was not adapted in this case. Moreover, the claimant could also not benefit from any lightening of the burden of evidence ('Beweiserleichterung'), as they refused to support and participate in the evidence gathering stage of the proceedings. According to the Court of Appeal, in environmental liability cases, both the potential polluter and the injured party have extensive obligations to cooperate when it comes to evidence. In particular, 'anyone who, in the case of difficult evidence, especially in the case of liability-based causality, wants to claim a relief of evidence, must not refuse a reasonable clarification of the facts and thereby making it impossible for the opposing party to provide evidence'.

f) Radioactive pollution

There exists no German case law relating to radioactive pollution ('radioaktive Verschmutzung, radioaktive Verseuchung, radioaktive Belastung') and human harm. Existing German case law relating to radioactive pollution mostly contains patent law / competition law cases, or cases dealing with licences to store nuclear waste.

Italy

As explained above, the precautionary principle is deeply entrenched in the Italian legal system and this may allow the burden of proof to be adapted where an activity may pose a risk of harm.[99]

a) Water pollution

A public law case was identified concerning an application to set aside an injunction imposed by a local authority against a company.[100] The injunction was imposed on the basis that the company had committed an administrative offence relating to the

[99] To find relevant case law, the rapporteur used a database commonly used by attorneys at law to find cases, as well as the database of the rapporteur's university to research academic commentary on the case law found. The research covered the last 10-15 years and different search criteria were used to find case law in the different areas of pollution.
[100] Court of Taranto - Judgment No. 206 of 25 January 2017.

discharge of rainwater runoff from the company's yards, flowing into a furrow falling within the Terra delle Gravine park, with changes to the ecological and hydraulic balance. The court upheld the appeal on the grounds that the public administration had failed to provide evidence in support of the unlawful conduct alleged against the appellant, particularly in terms of the causal link between the rainwater runoff and its alleged modifying effect on ecological and hydraulic balances. It was observed that the public administration should have provided probative data on the facts constituting the infringement and the sanction.[101] The court did not adapt the burden of proof, holding that the burden of proving all the objective and subjective elements of the administrative offence is on the public authority. No other cases were identified where the burden of proof was adapted.

b) Air pollution

The case law on air pollution concerns injunctions to prevent businesses from releasing emissions that could be harmful to the environment or to human health. There were no cases identified in which the burden of proof was adapted. Interestingly, however, cases were identified that showed extensive protection against air pollution: a) A case in which the court held that operating a factory without the required permits on industrial emissions was a strict liability offence, i.e. that the court did not have to enter into whether or not the emissions exceeded the levels that would have been permitted.[102] b) A farm was ordered to stop its activity because it exceeded the tolerable threshold of emissions, causing significant damage to the environment and to the health of the claimants. In this case the court adopted an extensive interpretation of Article 844 of the Italian Civil Code (which states a land owner cannot stop a neighbour from producing smoke, heat, fumes, noises, vibrations, or similar intrusions, unless they exceed normal tolerability) due to the consideration of protecting human health. Thus, while this may not be classed as adapting the burden, it is an instance where the court adopted an expansive approach to what would be a tolerable threshold in light of the need to protect health.[103]

[101] Supreme Court, Judgment No. 5122 of 3 March 2011.
[102] *Alfio Bonomo v Tribunale di Siracusa*, Supreme Court - Section III – Criminal Judgment No. 50632 of 7 November 2017.
[103] *Valori v Zeppilli et al*, Supreme Court - Section III – Civil Judgment No. 8420 of 11 April 2006.

c) Soil and land pollution

In the case of *Ministero dell'ambiente v Fassa s.p.a. in persona del legale rappresentante*,[104] the Supreme Court clarified that, although under Article 2051 of the Italian Civil Code, '[e]veryone is liable for injuries caused by things in their custody**',** there were limits on the application of strict liability offences and the owner of a plot of land was not responsible for environmental damage caused before they took ownership. The court rejected the appeal brought by the Ministry of the Environment, reconfirming what had been ruled at first instance that it is not the responsibility of the owner, who has become such at a time subsequent to the environmental damage, to carry out the obligations of soil reclamation and providing compensation for the harmful consequences for human health.

In *Brenntag S.p.a. v Città metropolitana di Milano*,[105] the municipality of Milan prohibited a company from storing hazardous chemicals in a warehouse because it was degrading the land. The Regional Administrative Court of Milan recognised that the public administration has the broadest discretionary power in relation to the measures that may be adopted in the event of soil pollution, given the need to protect human health to the greatest extent possible. It also held that the public administration may legitimately resort to the presumption that it is more probable than not that the defendant is responsible, without therefore having to overcome all reasonable doubts in this regard. The person identified by the authorities as being responsible for the contamination must, on the other hand, provide evidence to discharge their liability, for which it is not sufficient to allege a generic doubt that another third party may be liable, but it is necessary to prove the real dynamics of the events, indicating the specific factor that caused the contamination and endangered human health.

d) Noise pollution

In *Pagano v Garaffa*,[106] the appellant appealed against the judgment of the Court of Appeal which had upheld the judgment of the Court of Ragusa by which the appellant had been prohibited from carrying out its business activity (motor vehicle overhaul) and

[104] *Ministero dell'ambiente v Fassa s.p.a. in persona del legale rappresentante*, Supreme Court - Section III – Civil Judgment No. 17045 of 13 March 2018.
[105] *Brenntag S.p.a. v Città metropolitana di Milano*, T.A.R. Lombardy – Milan - Section III – Judgment No. 1352 of 10 June 2022.
[106] *Pagano v Garaffa*, Supreme Court - Section VI – Civil Judgment No. 19434 of 18 July 2019.

had been ordered to pay damages for intolerable noise emissions. The Court of Cassation explained that it can be presumed that intolerable noise pollution causes damage by preventing the claimant from enjoying family life in their home. It is then for the defendant to prove no damage has occurred.

e) Odour pollution

No cases were identified where the burden of proof was adapted.

f) Radioactive pollution

No cases were identified where the burden of proof was adapted.

Netherlands

The cases highlighted below examine a wide variety of claims causing injury to the environment and human health.[107]

a) Water Pollution

There is case law[108] dealing with claims of human harm arising from water pollution. A group of farmers in Nieuwerkerk aan den IJssel, Wateringen, and Naaldwijk were dependent on water from the Rhine to water their crops. The company, Mines de Potasse D'Alsace S.A. (MDPA), had been discharging waste salts via a network of pipes leading from the various mines it operates in Alsace to the Grand Canal d'Alsace, which eventually end up in the Rhine. These discharges from MDPA comply with the requirements of the permits granted by the French Government. The increased level of salt in the water used by the farmers resulted in a decrease in their profits. To get compensation for their losses, they claimed that MDPA should be held liable. The Dutch Supreme Court considered that a linear relationship existed between the salt load and the quality of the crops. Therefore, MDPA was held liable not only for a share in the total costs to limit and prevent further damages to the surrounding farmers but also held liable for the discharging of salt in the Rhine. With regard to the burden of

[107] The rapporteurs searched the official Dutch legal case law database on <www.Rechtspraak.nl> and the search engine on <www.legalintelligence.nl>. They also used <www.google.com> to find blogs and other relevant sources that could lead to case law on environmental pollution. The rapporteurs searched for all relevant cases and did not limit their search to a particular time period.
[108] Potash mines, The Dutch Supreme Court, ECLI:NL:HR:1988:AD5713 (23 September 1988).

proof, the court followed the regular division of the burden of proof laid down in Article 150 CCP.

b) Air Pollution

Case law[109] dealing with claims of human harm arising from air pollution mainly concerns labour law (Article 7:658 Dutch Civil Code) and general tort law (Article 6:162 Dutch Civil Code). In cases concerning asbestos exposure, the Dutch Supreme Court has ruled that a causal relationship should be presumed to exist if an employee has developed mesothelioma after working with this material. However, before accepting this presumption, the litigant must provide some evidence to prove that the damages result from his working activities. In this regard, the mere fact that the applicant has been exposed to asbestos during his work is insufficient.

A similar case[110] concerned chromium-6. The Dutch Supreme Court ruled on the basis of an expert report, that the employees were exposed to chromium-6 while performing their work, and that they also had a disease or condition that was listed in the expert report of diseases and conditions that may have been caused by exposure to chromium-6. Based on these facts, the employees made it sufficiently plausible that the requirement of causal connection for the establishment of liability had been met. The State was held liable through their negligence, as they should have known the detrimental effects of chromium-6 before the project commenced (see paragraph 7.1.7 of the ruling of the Court of Appeal). In this case, there was an adapted burden of proof.

c) Soil and land Pollution

A rebuttable presumption of causation regarding liability for damages from soil and land pollution has been adopted in cases where a regulation that aims to prevent a specific danger has been violated, and the claimant offers plausible evidence that the specific danger has materialised. The rebuttable presumption of causation has not been laid down in a specific provision but is implemented in the case law of the Dutch Supreme Court as an exception to the regular division in Article 150 CCP. In one such case, concerning soil pollution due to a leak in a tank of toxic waste, the Dutch Supreme Court considered that invoking a rebuttable presumption of causation

[109] Asbestos, The Dutch Supreme Court, ECLI:NL:HR:2018:536 (6 April 2018).
[110] Chromium-6, The Dutch Supreme Court, ECLI:NL:HR:2021:1806 (3 December 2021).

requires that ‘a standard has been violated that aims to prevent a specific danger with regard to the occurrence of damage, and that the person invoking the violation of this standard has made it plausible, even in the event of a dispute, that in the concrete case the (specific) danger against which the standard aims to provide protection has materialised.’[111]

d) Noise Pollution

Case law dealing with claims of human harm arising from noise nuisance/pollution do not lead to new insights regarding the question of causation. In a case where nuisance/pollution resulted from wind turbines,[112] the question of causation was a given, as their sound can be measured. Nevertheless, the litigants had to prove their case under the general division of the burden of proof that is laid down in Article 150 CCP. The court held that the claimant failed to make it sufficiently plausible that there was unlawful nuisance. The company was not held liable.

e) Odour Pollution

Case law dealing with claims of human harm arising from odour pollution / odour nuisance mainly revolves around neighbour disputes and claims are grounded on both Article 5:37 CC (that one may not cause nuisance to his neighbours to a degree or in a manner that is unlawful) and general tort law (Article 6:162 CC). No adaptation of proof was applied in the cases identified.

f) Radioactive Pollution

The case law[113] identified did not apply a shift of the burden of proof/rebuttable presumptions of causation.

g) Others, if any

Several cases dealing with other environmental damages have been litigated in the Netherlands.

[111] The Dutch Supreme Court, ECLI:NL:HR:2002:AE7345 (29 November 2002).
[112] Windturbines Houten, The Dutch Supreme Court, ECLI:NL:RBMNE:2021:4956 (4 October 2021).
[113] Covra, The Dutch Supreme Court, ECLI:NL:HR:1997:ZC2249, AB 1997/265 (17 January 1997).

With respect to cases involving earthquakes in the province of Groningen, Dutch tort law provides for a rebuttable presumption of causation given the nature, severity and number of cases, most of which can be traced back to soil movement as a result of gas extraction from the Groningen field. The administrative body awarded compensation for a number of damages but did not award compensation for damages that the Institute believes are not the result of gas production in Groningen.[114]

The *Urgenda* and *Shell* cases[115] required the Dutch State and Shell to limit their greenhouse gas emissions. In these cases, the general rule on the division of the burden of proof laid down in Article 150 CCP applied. Thus, for example, in *Urgenda*, the claimant NGO – which argued that the Dutch State was violating Articles 2 and 8 ECHR by not taking sufficient measures to prevent further anthropogenic global warming – had to submit sufficient scientific evidence to prove this claim.

Poland

Claims concerning environmental pollution may invoke various provisions of the Polish Constitution, as well as the Environmental Protection Act. The cases discussed below are relevant with respect to civil liability for human and environmental injury.[116]

a) Water pollution

No cases were identified in which an adapted burden of proof was applied.

b) Air pollution

Civil liability for harm to human health caused by air pollution can be based on various legal provisions: strict liability for certain types of companies engaged in activities that pose a particular risk (IV CR 380/76), tort liability (II CR 362/86), no-fault liability for

[114] Administrative Jurisdiction Division of the Council of State, ECLI:NL:RVS:2021:2631 (24 November 2021).
[115] *Urgenda Foundation v The State of the Netherlands*, The Dutch Supreme Court, ECLI:NL:HR:2019:2007 (20 December 2019); *Milieudefensie et al v Royal Dutch Shell plc*, The Hague District Court, ECLI:NL:RBDHA:2021:5339 (26 May 2021).
[116] With regards to Poland, the rapporteur used the database containing the judgments of civil courts available on the website of the Ministry of Justice, and the database containing Supreme Court judgments on the website of the Supreme Court, as well as the Lex Wolters Kluwer database. The judgments of administrative courts were not reviewed. There was no limitation with regards to time period. The search terms used included 'civil liability'/'civil law' (also particular provisions of the Civil Code and Environmental Protection Law) and/or all the types of pollution listed (e.g. 'civil liability and air pollution', and simply 'air pollution').

acts or omissions in exercising public authority (VI C 1043/18) and the infringement of personal rights (no fault is required).

The first case dealing with air pollution dates back to 1976 when the Supreme Court ruled that companies engaged in certain hazardous activities are subject to strict liability for air pollution and claimants do not carry the burden of proving causation.

c) Soil and land pollution

No cases relating to human harm due to soil and land pollution were identified.

d) Noise pollution

Cases relating to noise pollution are often based on legal mechanisms that allow compensation for decreases in the value of real estate (due for instance to nuisances from the construction of a nearby road or airport). In the identified cases based on tort liability, one pertained to the protection of a personal right (namely the right to live peacefully in one's property) and compensation for the violation thereof, [117] a second relied on the no-fault liability mechanism as the damage was caused by an act or omission in the exercise of public authority. In all cases, the claimants had to prove the existence of a causal link between the act and their damage.

e) Odour pollution

One identified case[118] relating to odour (and noise) pollution concerned the operating of a petrol station. The case was based on the normal rules of tort liability, which require an adequate link between the defendant's behaviour and the damage and the burden of proof is on the claimant. The court found that the petrol station did not have any negative effect on the claimant's property and, therefore, they could not have suffered any health deterioration from living in the property.

f) Radioactive pollution

Only one case[119] concerning radioactive pollution was identified in the national case law, resulting from the Chernobyl incident. The claimant, born on 12 November 1937,

[117] XXV C 542/11, 24 June 2019, Regional Court of Warsaw.
[118] I ACa 1235/13, Appellate Court of Krakow.
[119] I ACa 1261/12, 4 April 2013, Appellate Court of Warsaw.

sued the State Treasury for compensation for damage to her health due to failures by the Polish government to act after a nuclear incident. The legal test applied was under Article 417 of the Polish Civil Code – strict responsibility for the unlawful act or omission of an organ in exercising public authority. The claimant must prove the omission (or act) of the public authority, the damage, and the causation between the two. The court dismissed the case due to lack of jurisdiction. However, the court stated that, in any event, the claimant did not submit any proof that the level of radiation in Poland was harmful to her health and contributed to the deterioration of her condition. The claimant also did not submit any evidence to show that her sufferings were - at least in part - the result of the nuclear explosion and the radiation associated with it. Thus it was argued that, in any case, the claimant did not establish the causal link between her health deterioration and the radiation.

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