Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions

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The Environmental Liability Directive (ELD)[1] establishes a new liability regime for preventing and remediating environmental damage in the European Union. The ELD, which is the first European Community (EC) law to establish an environmental liability regime, is unusual in that it contains three types of enforcement provisions. The provisions create, in the event of an imminent threat of, or actual, environmental damage, a duty on competent authorities to act, a power authorising competent authorities to act, and a duty on operators who caused the imminent threat of, or actual, damage to notify the competent authority of the damage and to prevent or remediate it.

This article describes the nature of the three types of provisions. It then examines the provisions and other enforcement provisions of the ELD followed by an analysis of the nature of the enforcement regime established by the ELD. The article concludes that the result of the enforcement provisions is a 'polluter pays' regime that imposes far-reaching liability on operators and which requires them to prevent or remediate environmental damage before, in some cases, they may challenge their responsibility for the costs. If a third party has caused the threat or damage that results from an operator's activity, the operator will not necessarily recover its costs.

Nature of provisions establishing powers and duties and self-executing provisions

Legislative provisions that empower an enforcing authority to order persons who are responsible for threatened or actual environmental damage to prevent or remediate it are the most common type of provision in environmental liability regimes. Provisions that place a duty on an enforcing authority to order such persons to prevent or remediate environmental damage are less common, with regimes that include such provisions also including empowering provisions. Self-executing provisions, that is, provisions that impose a direct duty to act on the person who causes the threat of, or actual, environmental damage are rare and are generally limited to the duty to notify an enforcing authority of the incident or damage.

Provisions establishing powers and duties

Legislative provisions that grant powers to an enforcing authority in respect of the prevention or remediation of environmental damage generally grant the authority discretion to request a potentially liable person (PLP) to prevent or remediate the damage 'voluntarily' before the authority decides whether to issue an order requiring the PLP to carry out appropriate works. Some regimes establish a moratorium period on orders issued by an enforcing authority so as to facilitate voluntary works by PLPs either by legislation or the enforcing authority's internal policy. PLPs may appeal an enforcing authority's order, with some regimes suspending the order during an appeal and others requiring works to proceed during it. The regimes generally empower the enforcing authority to carry out preventive or remedial works itself and to seek to recover its costs from PLPs. In some regimes, the enforcing authority's discretion to carry out such works is restricted by legislation or the enforcing authority's internal policy.

Legislative provisions establishing a duty on an enforcing authority to commence proceedings in respect of environmental damage also generally establish a moratorium on orders during a specified period to facilitate consultation by the enforcing authority with PLPs concerning 'voluntary' works. As with empowering provisions, the period may be established by legislation or the enforcing authority's internal policy. If, after the moratorium period has ended, the enforcing authority concludes that a PLP will not carry out the works, the authority has a duty to order the PLP to carry them out. As with empowering provisions, PLPs may appeal orders which may (or may not) be suspended during an appeal. The enforcing authority generally also has the power but not the

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1 Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, as amended. The deadline for transposing the ELD into the domestic law of Member States is 30 April 2007.

duty to prevent or remediate the damage itself and to seek to recover its costs from PLPs.

The key differences between a power and a duty to act are illustrated by the two main environmental liability regimes in England. The Environment Agency (EA) has the power but not the duty to enforce the Water Resources Act 1991 (WRA 1991), together with the Anti-Pollution Works Regulations 1999.[2] If 'any poisonous, noxious or polluting matter or any solid waste matter' is at a 'place from which it is likely, in the opinion of the [EA] to enter any controlled waters [that is, coastal, surface or ground water]' or if it has entered controlled waters, the EA may order the person who caused or knowingly permitted the potential or actual pollution to carry out preventive or remedial works, respectively.[3] The threshold of pollution for triggering the water pollution regime, as with thresholds under many other environmental liability regimes that empower an enforcing authority to act, is not stringent.[4]

The EA enforces the water pollution regime by 'requesting' one or more PLPs to carry out anti-pollution works. If a PLP fails or refuses to carry out the works, the EA may serve a works notice on the PLP specifying the works to be carried out.[5] The EA may also prosecute the PLP for causing or knowingly permitting the water pollution.[6] In each instance, the EA exercises its discretion as to whether (or not) to enforce the regime. If the EA serves a works notice, a PLP may appeal it.[7] The notice is not suspended during the appeal.[8] Non-compliance with a notice is a criminal offence.[9] If the EA considers that a prosecution would be an ineffectual remedy, it may bring proceedings in the High Court to secure compliance with the notice.[10]

The EA may carry out anti-pollution works itself but only if it concludes that they must be carried out 'forthwith' or it cannot find a person on whom to serve a works notice after a reasonable inquiry.[11] If the EA carries out anti-pollution works, it may seek to recover its reasonable costs and expenses from the person who caused or knowingly permitted the threatened or actual water pollution.[12]

In contrast to the water pollution regime, a local authority has a duty to enforce Part 2A of the Environmental Protection Act 1990 (EPA 1990) in order to ensure that land that has been contaminated is remediated so that it is suitable for its current use. The duty is triggered by a determination by the local authority that an area of land is 'contaminated land' according to criteria in Part 2A and statutory guidance.[13] If the 'contaminated land' meets other specified criteria, it is designated as a 'special site' and the EA becomes the enforcing authority in lieu of the local authority.[14] The criteria for land that meets the definitions of 'contaminated land' and 'special sites', as with thresholds under other regimes that mandate when an enforcing authority must act, is relatively stringent.[15] The local authority retains some discretion in enforcing the regime, however, because it controls the timetable for prioritising parts of its area to inspect and for making determinations of contaminated land in its area.

If, after a consultation period of at least three months with one or more PLPs, who are known as 'appropriate persons', the enforcing authority concludes that an appropriate person will not remediate the contamination, the authority must serve a remediation notice specifying the works to be carried out.[16] If an appropriate person appeals the remediation notice,[17] the notice is suspended during the appeal.[18] Non-compliance with a notice is a criminal offence.[19] If the EA considers that a prosecution would be an ineffectual remedy, it may bring proceedings in the High Court to secure compliance with the notice.[20]

The enforcing authority may carry out remedial works itself during the consultation period and the appeal process

2 SI 1999/1006 (Anti-Pollution Works Regulations).
3 WRA 1991 ss 161(3), 161A(1), 161A(2); Anti-Pollution Works Regulations reg 2.
4 *R v Dovermoss Ltd* [1995] Env LR 258 (CA) (term 'polluting matter' includes substances that may dirty or stain water as well as substances that have ability to, or that cause, harm); *Express Ltd v Environment Agency* [2005] Env LR 98 (QBD)(sufficient for 'polluting matter' to have potential to cause harm).
5 Environment Agency, Guidance for the Enforcement and Prosecution Policy, s 2, para 1 (11 May 2006).
6 WRA 1991 s 85.
7 ibid s 161C(1); Anti-Pollution Regulations reg 3.
8 Environment Agency, Policy and Guidance on the Use of Anti-Pollution Works Notices para 7.2 (April 1999).
9 WRA 1991 s 161D(1).
10 ibid s 161D(4).
11 ibid s 161(1A).
12 ibid s 161(3).
13 See EPA 1990 s 78A(5), (6); Defra Circular 01/2006 (Defra Circular) Annex 3 para A.28 (September 2006). An exception exists if the costs of remediation are not reasonable when considered with the degree of seriousness of the contamination. EPA 1990 s 78E(4); ibid s 78H(5)(a).
14 Contaminated Land (England) Regulations 2006, SI 2006/1380 (Contaminated Land Regulations) regs 2, 3.
15 Defra Circular Annex 3 tables A and B (specifying criteria in respect of contaminated land for significant harm and significant possibility of significant harm, respectively, to human beings, designated ecological systems and property; ibid part 5 (criteria for radioactivity); Contaminated Land Regulations regs 2, 3 (criteria for special sites)). Radioactive Contaminated Land (Modification of Enactments) (England) Regulations 2006, SI 2006/1379 regs 6, 7. If the threshold is not stringent, it would not be possible to determine if the enforcing authority has breached its duty to enforce the regime.
16 EPA 1990 s 78E(1). The enforcing authority is barred from serving a remediation notice in certain instances. See ibid.
17 Contaminated Land Regulations regs 7–9.
18 ibid reg 12(1).
19 EPA 1990 s 78M(1).
20 ibid s 78M(5).

and seek to recover its costs from a PLP. This power, however, is restricted to works to remediate an 'imminent danger of serious harm, serious pollution of controlled waters, or serious harm attributable to radioactivity'.[21]

Self-executing provisions

Self-executing provisions in regimes to prevent and/or remediate environmental damage generally place a duty on a PLP to notify the competent authority of an incident that has caused damage above a specified threshold. Such provisions, which also appear in environmental regulatory regimes, are necessarily self-executing because a competent authority cannot request or order a PLP to notify contamination about which the authority has no knowledge.[22] Not all environmental liability regimes include such provisions. For example, there are no notification provisions in the water pollution or contaminated land regimes in England described above.

An example of a notification provision in an environmental regulatory regime is Article 14 of Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive). Article 14 directs Member States to take the necessary measures to ensure that 'the operator [of an installation] informs the competent authority ... without delay of any incident or accident significantly affecting the environment'. The Pollution Prevention and Control (England and Wales) Regulations 2000 (PPC Regulations),[23] which transposed the IPPC Directive into domestic law, direct the relevant authority to include a condition in a pollution prevention and control permit for a Part A installation to 'inform the [authority], without delay, of any incident or accident which is causing or may cause significant pollution'.[24] The provision imposes a direct duty on an operator without the need for any prior action by an enforcing authority.[25]

The threshold for the duty to notify, that is, 'significant pollution' is imprecise due to the amorphous nature of the word 'significant',[26] which is not defined in the IPPC Directive[27] or the regulations. Further, neither the IPPC Directive nor the regulations provide any criteria to assist competent authorities and operators in determining when the threshold has been exceeded. For example, there is no guidance to state whether the area affected by the 'significant pollution' should be local, national or regional or on determining the degree of severity of pollution that exceeds the significance threshold.

Some regimes have more precise notification thresholds. For example, the US Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund) imposes a duty on the 'person in charge' of a 'facility' to report the release into the environment of a 'reportable quantity' of a 'hazardous substance' during a 24-hour period if the release is not a federally permitted release.[28] The person in charge of the facility must report the release to the National Response Center[29] immediately upon

21 ibid ss 78H(4), 78N(3)(a); see Defra Circular Annex 2 para 5.6. The enforcing authority may also serve an emergency remediation notice during the consultation period if it concludes that emergency remedial works are required, as described above.

22 Notification provisions are distinct from self-reporting provisions. Self-reporting provisions generally require the holder of a permit regularly to monitor permitted emissions of substances and report the results to the relevant regulatory authority and/or to report annual or other periodic emissions of substances to the regulatory authority to enable compilation of registers such as the European Pollutant Release and Transfer Register.

23 SI 2000/1973, as amended.

24 PPC Regulations reg 12(9)(f).

25 If an operator breaches the duty, the authority has the power to serve an enforcement notice specifying 'the steps that must be taken to remedy the contravention or to remedy the matters making it likely that the contravention will arise, as the case may be'. ibid reg 24(2)(c). In addition, the notice 'may include ... steps that must be taken to remedy the effects of any pollution caused by the contravention'. ibid reg 24. An argument could be made that the failure to notify an authority of a pollution incident caused such pollution if, say, the operator lacked sufficient funds to contain it adequately. A notice to remediate such pollution, assuming it applies, is not, however, self-executing.

26 The word 'significant' has been notoriously difficult to define in legislation. For example, over 36 years after it was enacted and despite hundreds of cases, there is still no generally accepted definition of the word 'significantly' in the term 'major federal actions significantly affecting the quality of the human environment' in the US National Environmental Policy Act of 1970 42 U.S.C. ss 4321ff (NEPA). Courts continue to determine its meaning on a case-by-case basis. See generally V Fogleman *Guide to the National Environmental Policy Act: Interpretations, Applications and Compliance* (Quorum Books Westport CT 1990) 86–94.

27 The IPPC Directive uses the word 'significant' in the following terms: 'significant negative effects on human beings or the environment' (art 2(10)(b)); 'significant pollution' (art 3(b)); 'significant effects of the emissions on the environment' (art 6(1)); 'significant quantities' (art 9(3)); and 'significant local pollution' (art 9(4)).

28 42 U.S.C. s 9603(a). The 'person in charge' of a facility is the entity that operates it. *All Regions Chemical Laboratories, Inc. v Environmental Protection Agency* 932 F.2d 73 (1st Cir. 1991). The term 'person in charge' also includes an individual in a supervisory position and an individual who was 'in a position to detect, prevent and abate a release of the hazardous substance'. *United States v Carr* 880 F.2d 1550 (2d Cir. 1989). CERCLA defines the term 'facility' broadly to include virtually any place in which a hazardous substance is present except for a consumer product in consumer use. 42 U.S.C. s 9601(a); see *Tanglewood East Homeowners v Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (residential subdivision is 'facility'); *Environmental Transportation Systems, Inc. v Ensco, Inc.* 763 F. Supp. 384 (C.D. Ill. 1991) (roadside is 'facility'), *aff'd* 969 F.2d 503 (7th Cir. 1992).

29 The National Response Center, which is administered by the US Coast Guard, is the centralised call centre for reports of releases of hazardous substances and oil throughout the US. As part of its duties, the Center maintains details about hazardous substances to enable it to provide advice on identifying releases of hazardous substances and responding appropriately to them.

gaining knowledge of the release.[30] Regulations under CERCLA list over 700 hazardous substances together with their reportable quantities in 10, 100, 1000, 5000 and 10,000 pound increments according to the degree of harm posed by each hazardous substance.[31]

The threshold for notification does not apply to liability for cleaning up contamination under the Superfund programme. The US Environmental Protection Agency (EPA) may issue a unilateral administrative order (UAO), ie, an order requiring a potentially responsible party (PRP) to clean up contamination, if the EPA 'determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility'.[32]

Provisions that place a direct duty on an operator or other person to prevent or remediate environmental damage without the intervention of an enforcing authority are rare. One such provision is Article 13 of the Dutch Soil Protection Act. Article 13 provides that any person who knows or reasonably suspects that its acts are likely to contaminate or impair soil shall take reasonable measures to prevent the contamination or impairment or, if the contamination or impairment has occurred, shall take measures to remediate the contamination and to abate and avoid the impairment or its direct consequences as much as possible. If the contamination or impairment is the result of an unusual event, the measures must be taken forthwith.[33]

A relatively recent provision in English law imposes a duty on the holder of hazardous waste, that is, the producer of hazardous waste or the person in possession of it,[34] to take lawful and reasonable measures to avert an emergency or grave danger posed by the waste or, if doing so is not reasonably practicable, to mitigate the emergency or grave danger.[35] If the actions taken by the holder do not completely avert the emergency or grave danger or if that result is achieved only by actions which would otherwise involve breach of the regulations, the holder must notify the EA 'as soon as reasonably practicable' of the circumstances.[36] It is a criminal offence to fail to carry out the above actions,[37] the penalty for which is a fine of up to £5000 on summary conviction and an unlimited fine, imprisonment up to two years, or both on conviction on indictment.[38] Whilst the provision does not specifically require the holder of hazardous waste to remediate environmental damage caused by such waste, the removal of waste is invariably considered to be a preventive or remedial measure in environmental liability regimes.

Enforcement provisions of the Environmental Liability Directive

The ELD contains provisions that impose a duty on a competent authority to act, provisions that empower a competent authority to act and self-executing provisions that impose a direct duty on an operator not only to notify a competent authority of the imminent threat of, or actual, environmental damage but also to carry out preventive or remedial works 'without delay' or 'immediately', respectively.

The ELD defines an 'operator' as:

> any natural or legal, private or public person who operates or controls the occupational activity or, where this is

30 42 U.S.C. s 9603(a); 40 C.F.R. s 302.6.

31 40 C.F.R. s 302.4. The sanction for knowingly failing to report an unpermitted release of a reportable quantity of a hazardous substance is a fine of up to US$ 27,500 per day for each breach of the duty, imprisonment of up to three years for a first conviction or both. The term of imprisonment for a subsequent conviction is up to five years. 42 U.S.C. ss 9603(b), 9609(a). The Clean Water Act has similar provisions for unpermitted releases of hazardous substances and oil into the navigable waters of the US. The same reportable quantities apply as those in CERCLA. 33 U.S.C. ss 1421(b)(3), (5). Similarly, the Emergency Planning and Community Right-to-Know Act of 1986 has similar provisions in respect of 'extremely hazardous substances'. 42 U.S.C. s 11004(a); see ibid s 11002(a).

32 42 U.S.C. s 9606(a). The hazardous substance at issue is not limited to one that is on the CERCLA list.

33 Dutch Soil Protection Act, as amended, art 13. The author would like to thank Edward Brans of Pels Rijcken & Droogleever Fortuijn, The Hague, for drawing her attention to the self-executing provision in the Dutch Soil Protection Act.

34 Council Directive 91/689/EEC on hazardous waste art 1(3), incorporating definition of 'holder' from Council Directive 75/442/EEC on waste art 1(c) ('"holder" shall mean the producer of the waste or the natural or legal person who is in possession of it').

35 Hazardous Waste (England and Wales) Regulations 2005, SI 2005/894 reg 62(1) (Hazardous Waste Regulations). The term 'emergency or grave danger' is defined to mean 'a present or threatened situation arising from a substance or object which is, or which there are reasonable grounds to believe is, hazardous waste, and the situation constitutes a threat to the population or the environment in any place'. ibid reg 61(2). The provision is derived from Article 7 of Council Directive 91/689/EEC on hazardous waste which provides, in pertinent part that: 'In cases of emergency or grave danger, Member States shall take all necessary steps, including, where appropriate, temporary derogations from this Directive, to ensure that hazardous waste is so dealt with as not to constitute a threat to the population or the environment'. Whereas Article 7 does not specifically direct Member States to transpose the directive by way of self-executing provisions, the UK appears to have done so.

36 Hazardous Waste Regulations reg 62(3); see ibid reg 5(2) (defining 'holder'). Paragraph 6 of the Guidance on Emergencies and Grave Danger, published by Defra, dated November 2005, states that notification must be made immediately after the incident unless such notification is impracticable. The guidance provides a telephone number for notifying the EA.

37 Hazardous Waste Regulations reg 65.

38 ibid reg 69(2).

provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.[39]

The definition, which is intentionally similar to the definition of an operator under the IPPC Directive,[40] provides that an individual may be liable as well as a company, organisation or other private or public entity. The term 'operator' includes not only the person who carries out an occupational activity, but other persons including the holder of a permit or authorisation.

There are two types of operators. The operator of an 'occupational activity'[41] that is carried out under EC legislation listed in Annex III of the ELD is strictly liable for measures to prevent or remedy damage to land, water and protected species and natural habitats.[42] Legislation listed in Annex III includes the IPPC Directive and EC legislation that controls waste management operations, authorised discharges into surface and ground water, water abstraction, the manufacture, storage and use of various substances, the transportation of dangerous goods, operations that cause air pollution, the contained use of genetically modified micro-organisms and the deliberate release of genetically modified organisms as well as the management of mining and other extractive waste.[43]

The operator of an occupational activity that is not carried out under legislation that is listed in Annex III is liable for measures to prevent or remedy damage to a protected species or natural habitat 'whenever the operator has been at fault or negligent'.[44]

39 ELD art 2(6).
40 IPPC Directive art 2(12); see Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, s 3.2 comments on art 2(6). SEC(2003) 1027 final (19 September 2003).
41 The term 'occupational activity' is defined to mean 'any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character'. ELD art 2(7).
42 ibid art 3(1)(a). The ELD defines 'natural resource' to mean 'protected species and natural habitats, water and land'. ibid art 2(12).
43 ibid Annex III as amended by art 15 of Directive 2006/21/EC of the European Parliament and of the Council on the management of waste from extractive industries.
44 ELD art 3(1)(b).

Preventive measures

The ELD provides that an operator shall carry out necessary 'preventive measures'[45] 'without delay' if there is an imminent threat of environmental damage.[46] The ELD directs Member States to make provisions to require operators to notify the relevant competent authority of an imminent threat of environmental damage, as appropriate, 'as soon as possible' and, in particular, whenever preventive measures do not remove an imminent threat.[47]

The self-executing provisions that require operators to carry out measures to prevent and notify the competent authority of an imminent threat of environmental damage are supplemented by provisions that place a duty on a competent authority and that grant it the power to act.

The provisions that place a duty on a competent authority state that the authority:

- shall require an operator to carry out preventive measures[48]
- shall establish the identity of the operator who caused the imminent threat of damage[49] and
- if the competent authority issues a 'decision' that orders an operator to carry out preventive measures, the decision shall state the precise grounds on which it is based, and the authority shall notify the operator of the decision 'forthwith' and inform the operator of available legal remedies and the time limits for such remedies.[50]

The empowering provisions state that the competent authority may 'at any time':

- order the operator to provide information concerning a suspected or actual imminent threat of environmental damage[51]
- order the operator to carry out necessary preventive measures[52]
- issue instructions to an operator concerning necessary preventive measures (if the competent authority issues

45 The term 'preventive measures' is defined to mean 'any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage'. ibid art 2(10).
46 ibid art 5(1). The term 'imminent threat of damage' is defined as 'a sufficient likelihood that environmental damage will occur in the near future'. ibid art 2(9).
47 ibid art 5(2).
48 ibid art 5(4).
49 ibid art 11(2).
50 ibid art 11(4).
51 ibid art 5(3)(a).
52 ibid art 5(3)(b).

such instructions, the operator has a duty to carry them out)[53] and
- carry out necessary preventive measures itself.[54]

A Member State does not have an obligation to prevent (or remediate) environmental damage if the operator cannot be found or fails to carry out preventive (or remedial) measures. This obligation, which was in the European Commission's proposal for a Directive (Proposed Directive),[55] was removed by the Council in its Common Position in lieu of providing a Member State with discretion whether to carry out such measures.[56]

The ELD limits a competent authority's power to carry out necessary preventive measures itself by conditioning the authority's power to do so on the following:

- the failure by the operator to comply with:
  - the (self-executing) duty to take such measures when there is an imminent threat of environmental damage
  - the competent authority's order to carry out such measures or
  - the competent authority's instructions on the measures to be carried out
- the inability of the competent authority to identify the potentially liable operator, or
- a decision by the competent authority that the operator is not required to bear the costs of preventive measures under the ELD due to the application of a mandatory defence.[57]

If a competent authority carries out preventive measures itself, the ELD authorises it to recover its costs by placing 'security over property or other appropriate guarantees' on the operator who has caused the imminent threat of environmental damage.[58] In addition, the ELD authorises the competent authority to institute cost-recovery proceedings against the operator provided that it brings the proceedings within five years from the date on which the measures are completed or the competent authority identifies the operator, whichever is the later.[59]

The provision that authorises the placement of appropriate guarantees on operators does not necessarily ensure that the competent authority will recover its costs. As Professor Bocken eloquently explains, a competent authority may not recover its costs if a Member State does not require operators to have a dedicated source of funding for preventive and/or remedial measures in advance of an imminent threat of, or actual, environmental damage or another type of financial security mechanism is in place.[60] The ELD directs Member States to take measures to encourage the development of financial security instruments and markets but does not contain a controversial amendment by the European Parliament that would have phased in a duty on Annex III operators to have evidence of financial security for their activities in the event of an imminent threat of, or actual, environmental damage.[61]

53 ibid art 5(3)(c).
54 ibid art 5(3)(d).
55 Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage art 6. COM(2002) 17 final, OJ C151 E/132 (25 June 2002).
56 Common Position (EC) No 58/2003 adopted by the Council on 18 September 2003 with a view to the adoption of a Directive 2003/.../EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (Common Position), Statement of the Council's Reasons, Major innovations introduced by the Council, OJ C277 E/10 at E/30 (18 November 2003).
57 ELD art 5(4). See n 83 and text accompanying nn 158–69 (describing application of mandatory defence).
58 ELD art 8(2). The ELD authorises a competent authority to place an appropriate guarantee on the property of only a subset of potentially liable operators. That is, an operator is liable under the ELD if an imminent threat of, or actual, environmental damage is caused by an activity for which it is the operator. Liability attaches even if there is no causal link between the operator and the threat or damage; the causal link is between the activity and the threat or damage. See text accompanying n 149. The competent authority may also place an appropriate guarantee on the property of a third party that caused environmental damage. See Common Position, Statement of the Council's Reasons, European Parliament Amendments at C277 E/28 (although not explicit in art 8(2), 'possibility [of doing so] is clearly foreseen in Article 10').
59 ELD art 10. A competent authority is entitled to decide not to recover the full costs of measures if the expenses in recovering the costs exceed the amount that would be recovered or it cannot identify the operator. ibid art 8(2). A competent authority may also bring cost-recovery proceedings against a third party. ibid art 10.
60 See H Bocken 'Financial Guarantees in the Environmental Liability Directive: Next Time Better' European Env Liability Rev 13–32 (January 2006).
61 ELD art 14(1); see Position of the European Parliament adopted at first reading on 14 May 2003 with a view to the adoption of European Parliament and Council Directive 2003/.../EC on environmental liability with regard to the prevention and remedying of environmental damage art 17. OJ C67 E/186 (17 March 2004) (First Reading Proposal); Common Position, Statement of the Council's Reasons, European Parliament Amendments at C277 E/29 ('given the scarce availability of suitable [financial security] products on the market and the consequent difficulties in implementation, the Council can not agree with the Parliament's suggestion for a mandatory financial security gradually covering the activities listed in Annex III to the Directive').

The effect of the various provisions concerning the enforcement of preventive measures is that an operator who caused an imminent threat of environmental damage has a duty, without the prior intervention of a competent authority, to carry out measures to prevent the damage and to notify the competent authority as appropriate, in particular, if those measures fail. If the operator fails to carry out preventive measures, the competent authority has a duty to order the operator to carry them out and the power to ensure that appropriate measures are carried out. Alternatively, subject to the limitations described above, the competent authority may carry out the measures itself and subsequently seek to recover its costs from the operator.

The provisions imposing a direct duty on an operator to carry out preventive measures were proposed by the European Commission in a comparatively muted manner to that set out in the ELD. Article 4(1) of the Proposed Directive provided that 'the competent authority shall either require the operator to take necessary preventive measures or shall itself take such measures' in the event of an imminent threat of environmental damage.

Article 4(2) provided that:

> Without prejudice to any further action which could be required by the competent authority under paragraph 1, Member States shall provide that, when operators are aware of an imminent threat or ought to be aware of such an imminent threat, those operators are required to take the necessary measures to prevent environmental damage from occurring, without waiting for a request to do so by the competent authority.[62]

Article 4(3) provided that: 'Member States shall provide that where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the relevant operator, operators are to inform the competent authority of the situation'.[63]

During its first reading of the Proposed Directive, the European Parliament combined proposed Article 4(1) and (2) and renumbered Article 4 as Article 5. The proposed new Article 5(1) provided that: 'Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay and without waiting for a request to this effect by the competent authority, take the necessary preventive measures'.[64] Proposed Article 4(3) (which became Article 5(2)) was amended to require an operator 'to inform the competent authority of all relevant aspects of the situation, as soon as possible'.[65] The empowering provisions which a competent authority may enforce 'at any time' in respect of preventive measures were also added.[66]

In its Common Position, the European Council amended proposed Article 5(1) by deleting the term 'without waiting for a request to this effect by the competent authority'.[67] There were no further amendments to Article 5(1) prior to the ELD's enactment. Deletion of the term did not change the nature of Article 5(1) from a self-executing provision. As the European Commission confirmed in its Communication to the European Parliament setting out the Commission's position on the Council's Common Position (Communication), the first paragraph of the new Article 5(1) 'merges the first two paragraphs of Article 4 of the Commission proposal and simplifies the procedure by providing for a direct duty on the operator to take the necessary measures'.[68]

Remedial measures

The ELD requires an operator to carry out 'all practicable steps to immediately control, contain, remove or otherwise manage' the contaminants that have caused environmental damage as well as other aspects of the damage.[69] The operator whose activities have caused environmental damage also has a duty to notify the competent authority of the damage and related circumstances 'without delay'.[70] There is no requirement for a competent authority to take any prior action before the duty on the operator to take the above remedial measures arises.

Various provisions place a duty on a competent authority in respect of 'remedial measures'.[71] The provisions direct a competent authority:

- to order an operator to carry out remedial measures[72]

62 Proposed Directive art 4(2).
63 ibid art 4(3).
64 First Reading Proposal art 5(1).
65 ibid art 5(2).
66 ibid art 5(3). The amended provisions included the provision of information by an operator and instructions to be followed by the operator.
67 Common Position art 5(1).
68 Communication, s 3.2 comments on art 5(1).
69 ELD art 6(1)(a). The purpose of such actions is to limit or prevent any further environmental damage, any adverse effects on human health in respect of land and the further impairment of services provided by a natural resource to the public or another natural resource. ibid.
70 ibid art 6(1).
71 The term 'remedial measures' is defined to mean 'any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II [which establishes a framework for measures to remedy environmental damage]'. ibid art 2(11).
72 ibid art 6(3).

- to establish the identity of the operator who caused the damage, to assess the significance of the damage and to determine the long-term remedial measures to be carried out[73]
- to state the precise grounds on which the competent authority bases any decision that specifies remedial measures to be carried out by the operator[74] and
- to notify the operator 'forthwith' of its decision, the legal remedies available to the operator and the time limits for such remedies.[75]

The empowering provisions provide that a competent authority may, at any time:

- order the operator to provide information supplementary to that which the operator has a duty to provide when environmental damage occurs[76]
- order the operator to carry out, or provide instructions to the operator concerning, emergency remedial measures so as to limit further environmental damage, adverse effects on human health or the further impairment of services from the damaged natural resource[77]
- order the operator to assess the environmental damage caused by it (subject to the competent authority's duty to assess the significance of the damage) and to provide any information and data necessary to assess the damage[78]
- order the operator to carry out necessary remedial measures[79]
- issue instructions to an operator concerning necessary remedial measures (if the competent authority issues such instructions, the operator has a duty to carry them out)[80] and
- carry out necessary remedial measures itself.[81]

As with preventive measures, the ELD limits a competent authority's power to carry out remedial measures by conditioning the authority's ability to do so on:

- the failure by the operator to comply with:
  - the (self-executing) duty to take emergency remedial measures when environmental damage has occurred
  - the competent authority's order to carry out emergency and/or long-term remedial measures or
  - the competent authority's instructions on the measures to be carried out
- the failure of the competent authority to identify the potentially liable operator, or
- a decision by the competent authority that the operator is not required to bear the costs of remedial measures under the ELD[82] due to the application of a mandatory defence.[83]

The competent authority is further restricted in carrying out remedial measures itself by being authorised to carry them out only 'as a means of last resort'.[84]

As with preventive measures, if a competent authority carries out remedial measures, the ELD authorises it to recover its costs of doing so by placing 'security over property or other appropriate guarantees' on the operator who has caused the environmental damage.[85] Also as with preventive measures, the competent authority may bring cost-recovery proceedings against an operator provided that it brings the proceedings within five years from the date on which the competent authority completed the measures or identified the operator, whichever is the later.[86]

The ELD categorises remedial measures as short-term (emergency) remedial measures and long-term remedial measures.[87]The short-term measures, which apply to land as well as water and protected species and natural habitats, are measures to carry out 'all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services'.[88] There is one type of long-term remedial measure for land and three types for water and protected species and natural habitats. In respect of land, the long-term remedial measures, which overlap to some extent with short-term remedial measures, are to remove, control, contain or reduce the contaminants that are causing environmental damage in order to eliminate any significant risk that the contamination will

73 ibid art 11(2).
74 ibid art 11(4).
75 ibid.
76 ibid art 6(2)(a); ibid art 6(1).
77 ibid art 6(2)(b).
78 ibid art 11(2).
79 ibid art 6(2)(c).
80 ibid art 6(2)(d).
81 ibid art 6(2(e).
82 ibid art 6(3).
83 See n 57 and text accompanying nn 158–69.
84 ELD art 6(3).
85 ibid art 8(2). See n 58.
86 ELD art 10.
87 Compare ibid art 6(1)(a) with art 6(1)(b); see Common Position, Statement of the Council's Reasons, Major innovations introduced by the Council at C277 E/30 ('Article 6 differentiates between long-term remediation activity and immediate response. In the event of an incident, to limit or prevent further damage, Article 6(1)(a) foresees the immediate containment and removal of contaminants').
88 ELD art 6(1)(a).

adversely affect human health, taking account of the land's current or approved future use when the damage occurred.[89] The ELD specifies, in particular, that remedial measures include carrying out a risk assessment and considering the no action alternative.[90] If the use of the remediated land subsequently changes, 'all necessary measures shall be taken to prevent any adverse effects on human health'.[91] The contingent duty to carry out measures to remediate land necessarily continues to apply, therefore, if the land is remediated to a lesser use than residential use. The ELD does not specify whether the operator is liable if another person, such as a developer, fails to carry out the measures.

Long-term remedial measures for water and protected species and natural habitats are more extensive than those for land. They consist of primary, complementary and compensatory remediation.[92] Primary remediation is the remediation of water or a protected species or natural habitat and services rendered by it to its baseline condition, that is, its condition immediately before it was damaged. The services that must be restored include services to other natural resources as well as the public.[93] Remedial measures include an evaluation of reasonable remediation options.[94] Complementary remediation is any remedial measures that are carried out to compensate for the inability to restore water or a protected species or natural habitat and services rendered by it to its baseline condition by providing a similar level of natural resources or services at another site. An operator must carry out this type of remediation in addition to partially restoring the damaged site in order to provide a similar level of natural resources and/or services to those that existed before the damage occurred.[95] Compensatory remediation is the provision of improvements and other measures to water and protected species or natural habitats at the damaged site or an alternative site to compensate for the loss of the resource or services rendered by it from the time of the damage to remediation to its baseline condition.[96]

The provisions imposing duties on operators and granting powers to, and imposing duties on, a competent authority in respect of long-term remedial measures are more detailed than those for preventive and short-term remedial measures. The ELD requires the operator to identify potential remedial measures and to submit them to the competent authority for its approval.[97] The competent authority must then determine the remedial measures to be carried out by the operator according to the procedures set out in Annex II of the ELD.[98] The operator has a duty to co-operate with the competent authority during this entire process, as appropriate.[99]

In determining the remedial measures to be carried out, the competent authority must invite non-governmental authorities (NGOs) and other persons who are, or who are likely to be, affected by the environmental damage or who have a sufficient interest in environmental decision-making relating to the damage, to submit comments[100] as well as persons on whose land the remedial measures are being carried out.[101] The comments must be supported by evidence.[102] The competent authority must take the comments into account and, as appropriate, provide the operator with the right to submit its own comments. If the competent authority rejects the NGO's or other person's comments, the authority must provide its reasons for doing so to that person.[103] The NGO or other person may challenge the procedural and substantive legality of the competent authority's decisions, acts or failure to act in a court or another competent impartial public body.[104]

The competent authority has discretion which environmental damage should be remediated first if, due to the occurrence of several instances of damage, the competent authority cannot ensure that necessary remedial measures are taken in respect of all the instances at the same time.[105]

The Proposed Directive did not contain self-executing provisions in respect of remedial measures. Instead, proposed Article 5(1) provided that: 'Where environmental damage has occurred the competent authority shall either require

89 ibid Annex II s 2.
90 ibid.
91 ibid.
92 ibid Annex II s 1.
93 ibid Annex II ss 1(a), 1.1.1.
94 ibid Annex II s 1.3.1.
95 ibid Annex II ss 1(b), 1.1.2.
96 ibid Annex II ss 1(c), 1.1.3.
97 ibid art 7(1). An exception exists if the competent authority has taken the remedial measures itself. ibid; see ibid art 6(2)(e) and (3).
98 ibid art 7(2).
99 ibid.
100 ibid art 7(4); see ibid art 12(1). NGOs that promote environmental protection and that meet any domestic law requirements are deemed to have a 'sufficient interest' in environmental decision making in respect of the environmental damage. ibid art 12(1)(b)–(c).
101 ibid art 7(4). The ELD provides that Member States have the option of deciding whether NGOs and persons other than the landowner have the right to provide comments regarding preventive measures. ibid art 12(5).
102 ibid art 12(2).
103 ibid arts 7(4), 12(3)–(4).
104 ibid art 13(1). A new mechanism in lieu of judicial review may need to be introduced in the transposition of the ELD into UK law to allow a court to hear a challenge to a competent authority's substantive decision; a judicial review action does not go to the merits of a case.
105 ibid art 7(3). In deciding which measures shall be carried out first, the competent authority is to consider, among other things, the nature, extent and gravity of the damage including risks to human health, and the possibility of natural attenuation. ibid.

the operator to take the necessary restorative measures or shall itself take such measures'.[106] The Commission had envisaged Member States establishing 'safety nets', such as financial security mechanisms for operators or funds 'to ensure that "orphan damages" – ie damage for which no polluter can be identified or for which the identified polluter is insolvent will be actually restored'.[107]

The European Parliament amended proposed Article 5(1) during its first reading of the Proposed Directive to state that: 'Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take the necessary restorative measures without waiting for a request to this effect by the competent authority'.[108] As with preventive measures, provisions establishing the powers that a competent authority may use 'at any time' were added as well as provisions directing the competent authority to determine the remedial measures to be carried out.[109] Proposed Article 5 was renumbered to proposed Article 6.

The Council deleted the term 'without waiting for a request to this effect by the competent authority' in its Common Position.[110] The Council confirmed, however, that in deleting the term, it was not changing the nature of the self-executing provisions. That is, the Council stated that amended Article 6(1) 'incorporates the substance of this amendment in that it requires the operator to act, without a request to do so by the competent authority'.[111] There were no further amendments to Article 6(1) prior to the ELD's enactment.

106 Proposed Directive art 5(1).
107 Frequently asked questions on the Commission's proposal on Environmental Liability, MEMO/02/10 (24 January 2002). The Commission stated that: 'This does not mean that the public purse will be heavily hit: the proposal does not impose any specific form for those "safety nets". Member States enjoy the widest possible latitude in determining who and how those "safety nets" should be financed. It might be through collective schemes, such as Funds that can be managed either by public authorities or by the industry itself, or by individual measures, such as requiring operators to have insurance or other forms of financial security (for example bank guarantee)'. ibid.
108 First Reading Proposal, art 6(1); see also ibid art 6(6) (requiring and empowering operators with appropriate emergency plans 'to take the necessary restorative measures available within the scope of such emergency plans, without waiting for a request to this effect by the competent authority').
109 ibid art 6(2), (3).
110 Common Position art 6(1).
111 ibid Statement of the Council's Reasons, European Parliament Amendments at C277 E/28. The Council further commented that 'In the event of an incident, to limit or prevent further damage, Article 6(1)(a) foresees the immediate containment and removal of contaminants'. ibid Statement of the Council's Reasons, Major innovations introduced by the Council at C277 E/30.

The European Commission further clarified that the provisions placing a duty on operators to carry out emergency remedial measures continued to be self-executing. The Commission stated that the new 'Article 6(1) builds on paragraphs 1 and 3 of Article 5 of the Commission proposal and simplifies the procedure by providing for a direct duty on the operator to take the necessary action. … the operator must also take immediate steps to limit or to prevent further environmental damage'.[112]

Threshold for environmental damage

As indicated above, the ELD applies only if there is an imminent threat of, or actual, 'environmental damage'. The definitions of 'environmental damage' for protected species and natural habitats, water and land, respectively, are:

- 'any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of [protected] habitats or species'[113]
- 'any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential … of … waters'[114] and
- 'any land contamination that creates a significant risk of human health being adversely affected'.[115]

All of the definitions necessitate a scientific assessment to determine if the threshold has been exceeded in respect of damage to an individual natural resource. In particular, Annex I of the ELD sets out detailed criteria for determining when the threshold of environmental damage to protected species or natural habitats has been exceeded. The ELD does not, however, provide an operator with sufficient time to carry out such an assessment before the self-executing provisions operate to require the operator:

- to carry out preventive measures 'without delay' or, if the measures do not dispel the imminent threat of environmental damage, notify the competent authority 'as soon as possible' or
- to carry out emergency remedial measures 'immediately' and to notify the competent authority 'without delay' of the environmental damage.

112 Communication, s 3.2 comments on art 6(1).
113 ELD art 2(1)(a).
114 ibid art 2(1)(b). The waters to which the ELD refers are those covered by Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy. Those waters are surface, ground, transitional and coastal waters. ibid art 2.
115 ELD art 2(1)(c).

In addition, an operator could not, in most cases, know that its preventive measures had failed to remove an imminent threat of 'environmental damage', as defined by the ELD, because, unless such damage has occurred, it is not possible to determine whether the threshold would have been exceeded. That is, if an operator successfully carries out preventive measures, no environmental damage has occurred and no threshold for such damage has been exceeded.

It will be difficult if not impossible for a Member State to implement and enforce the regime created by the ELD in respect of the notification and preventive and emergency remedial measure provisions unless the Member State adopts criteria to enable an operator in a very short period of time to determine whether its activity has breached the threshold that triggers the ELD.[116] Any sanction imposed on an operator who fails to comply with the self-executing provisions of the ELD would arguably be unenforceable if compliance was impossible.

A potential solution could be to assign a 'reportable quantity' to each hazardous waste that is listed in the European Waste List in a similar nature to the assignment of reportable quantities to hazardous substances in the CERCLA list described earlier in this article. The reportable quantity would have to be formulated so that it applies to substances that are not waste as well as those that are waste. Also, to ensure that the transposed legislation was not less stringent than the ELD, the reportable quantity of a hazardous waste (or other hazardous substance) that was released into the environment during a 24-hour period (or another specified period) would have to be formulated so that a lesser amount than the reportable quantity would not cause environmental damage that exceeded the threshold for such damage in the ELD.

Nature of the enforcement regime established by the Environmental Liability Directive

In order to determine the nature of the enforcement regime established by the ELD, it is necessary to examine the following as well as the powers, duties and self-executing provisions:

- exceptions
- the standard of liability
- the scope of liability
- defences
- the right to bring an appeal and
- sanctions for breaching the ELD.

Exceptions

The ELD does not apply to all imminent threats of, and actual, environmental damage. It excludes liability for the following:

- 'an act of armed conflict, hostilities, civil war or insurrection'[117]
- 'a natural phenomenon of exceptional, inevitable and irresistible character'[118]
- liability or compensation covered by specified marine and nuclear conventions and the convention concerning civil liability for damage during carriage of dangerous goods by road, rail and inland navigation vessels,[119] and
- an activity 'the main purpose of which is to serve national defence or international security'[120] or the 'sole purpose of which is to protect from natural disasters'.[121]

In addition, the ELD provides that it 'shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators'.[122]

116 Member States may adopt more stringent provisions than those in the ELD. ibid art 16(1). An argument may, of course, be made that the impracticability, if not impossibility, of determining whether the ELD applies before the duty on an operator to carry out preventive or emergency remedial measures or to notify a competent authority arises must mean that the ELD does not impose such a duty. As described above, however, not only does the ELD, on its face, impose such a duty but its legislative history confirms that it is the intent of the ELD to do so. Further, it is the integral nature of directives to leave the details of their transposition and implementation to Member States. Article 249 of the Consolidated Version of the Treaty Establishing the European Community provides that 'A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. The Council stated, in its Common Position, that 'Institutional and procedural detailed arrangements as to how the prescribed results will be achieved are left to a very large extent to the Member States in line with the subsidiarity and proportionality principles'. Common Position, Statement of the Council's Reasons, Objective at C277 E/27. Still further, the self-executing provisions in the ELD are not the first time that the EC has left the establishment of the threshold in a self-notification provision to Member States. As indicated above, the IPPC Directive directs Member States to ensure that 'the operator [of an installation] informs the competent authority … without delay of any incident or accident significantly affecting the environment'. IPPC Directive art 14.

117 ELD art 4(1)(a). The exception includes terrorism. See Common Position, Statement of the Council's Reasons, European Parliament Amendments at C277 E/28 (the term 'hostilities' includes terrorism).

118 ELD art 4(1)(b).

119 ibid art 4(2)–(4), Annexes IV, V. The relevant aspects of the convention must have been enacted into the applicable Member State's domestic law. ibid.

120 ibid art 4(6).

121 ibid.

122 ibid art 4(5).

The burden of proving that the ELD applies to an imminent threat of, or actual, environmental damage is on the competent authority as the enforcing authority (subject, as discussed, to the self-executing provisions), not the operator. If the threat or damage is caused by any of the above exceptions, an operator has no obligations or liability under the ELD.

Unlike the other exceptions, the exception for diffuse pollution is qualified by the failure to establish a causal link between a threat or damage and the activities of individual operators.[123] In some instances, it may be difficult to establish the extent of the exception due to the scope of liability of the ELD in respect of damage by more than one operator, as discussed below.

Scope of liability

The ELD imposes prospective liability only.[124] It has a limitation period of 30 years, that is, it does not apply if more than 30 years have passed since the emission, event or incident that resulted in the environmental damage.[125] As indicated above, the limitation period for a cost-recovery action by a competent authority against an operator or third party is five years from the date on which the measures for which the competent authority is seeking to recover its costs have been completed or five years for the date on which the liable operator or third party is identified, whichever is the later.[126] The ELD does not state whether a competent authority may bring more than one cost-recovery action against an operator or third party for damage to an individual natural resource.

The ELD provides, in a provision entitled 'Cost allocation in cases of multiple party causation' (which title is unchanged from the Proposed Directive), that it is:

> without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation especially concerning the apportionment of liability between the producer and the user of a product.[127]

The provision thus states that *liability* is apportioned only in the context of a product.[128] In all other contexts, *costs* are allocated when a threat or damage is indivisible. Allocation of responsibility for costs is not, of course, apportionment of liability for carrying out measures that incur those costs or for reimbursing the costs of a competent authority. For example, legislation may impose joint and several liability on PLPs who contribute to an indivisible threat or damage to prevent or remediate the damage and to reimburse the enforcing authority for its costs. The legislation may also provide that the overall costs are to be allocated according to equitable or legal criteria.[129] The imposition of joint and several liability means that 'orphan shares' (that is, costs that would have been borne by PLPs who no longer exist or have insufficient or no funds) are borne by PLPs or, at the discretion of the competent authority, the government. The imposition of proportionate liability means that the government necessarily bears responsibility for any orphan shares when environmental damage is prevented or remediated.

The legislative history of the ELD provides some assistance in resolving the meaning of the cost allocation provision. The Proposed Directive provided that:

> where the competent authority is able to establish with a sufficient degree of plausibility and probability that one and the same instance of damage has been caused by the actions or omissions of several operators, Member States may provide either that the relevant operators are to be held jointly and severally liable for that damage or that the competent authority is to apportion the share of the costs to be borne by each operator on a fair and reasonable basis.[130]

The above provision would not have applied if an operator established the extent to which the environmental damage resulted from its activities,[131] in which case the damage would

123 The Proposed Directive was drafted in reverse to exclude diffuse pollution 'where it is impossible to establish a causal link between the damage and the activities of certain individual operators'. Proposed Directive art 3(6); see ibid recital 9 (ELD excludes 'pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with the activities of certain individual actors'); see also Communication, s 3.2 comments to art 4(5) (amended Article 'now refers to the possibility of establishing a causal link rather than to the impossibility of doing so').

124 ELD art 17.

125 ibid.

126 ibid art 10.

127 ibid art 9.

128 See Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended.

129 Equitable criteria may include a PLP's culpability, the amount of pollutant contributed by it and the degree of harm posed by a pollutant and its mobility in soil and groundwater.

130 Proposed Directive art 11(1). Two further proposed cost allocation provisions do not appear in the final version of the ELD. A cost allocation provision in the Proposed Directive that referred to certain preventive measures, ibid art 10, was amended by the European Parliament to add mitigating factors to apply to preventive and restorative measures. First Reading Proposal art 11. The other cost allocation provision concerned cost allocation for biodiversity damage caused by non-annex III operators. Proposed Directive art 8; First Reading Proposal art 9.

131 Proposed Directive art 11(2).

not be indivisible. The Proposed Directive further provided that it was without prejudice to Member State legislation 'concerning the rights of contribution or recourse'.[132]

The European Parliament retained the language of the provision of the Proposed Directive quoted above but deleted the latter two provisions.[133] The Council amended the cost-allocation provision to the version in the ELD set out above,[134] commenting that the amended provision 'is simplified and leaves this subject entirely within the competence of Member States'.[135] The Council did not explain the nature of the 'subject' that was entirely left to the Member States but presumably it is liability for a threat or damage as well as responsibility for costs.

The Commission commented that the Common Position 'leaves entirely to national law the apportionment of liability in cases of multiple party causation'.[136] It further stated that the amended provision provides that 'Member States are responsible for apportioning liability in multiple party causation cases and regulating the right of recourse or contribution'.[137] The implication of these comments is that Member States have full discretion in respect of whether operators are jointly and severally or proportionately liable and/or responsible for costs incurred in carrying out preventive or remedial measures.[138]

The ELD does not, however, authorise an operator to raise the liability of other operators to an imminent threat of, or actual, environmental damage before the operator must carry out preventive or emergency remedial measures. The ELD, therefore, appears to require an operator to have carried out measures that are subject to the self-executing provisions before the application of Member State law that imposes liability and/or allocates responsibility for the costs of such measures. In respect of long-term remedial measures, the ELD appears to permit an operator (in a Member State that applies proportionate liability) to raise responsibility for the costs of those measures in an appeal to an order to carry out such measures as discussed later in this article.

There is a further key issue concerning the cost allocation provision in that the ELD does not state whether cost allocation applies to multiple operators who cause environmental damage sequentially as well as at the same time. The reference to national law concerning 'the apportionment of liability between the producer and the user of a product,'[139] whose acts necessarily occur sequentially, implies that the ELD applies to sequential environmental damage as long as the first time that an individual natural resource is damaged or an incident causing the damage occurs is after 30 April 2007[140] when the ELD should be transposed into the domestic law of Member States.[141] A reading of the ELD to include sequential damage is also implied by the Commission referring, in its Communication, to 'environmental damage resulting from long term pollution' in the context of the 30-year limitation of liability.[142]

If sequential activities that cause environmental damage are covered by the ELD, the following example illustrates a potential problem in enforcing it when more than one operator caused the damage. Assume that four operators have sequentially polluted groundwater that is subject to the ELD between 2008 and 2012 and that the damage to the groundwater is indivisible. Assume further that the cumulative effects of the pollution are such that the groundwater does not suffer any 'environmental damage', that is, any 'damage that significantly adversely affects [its] ecological, chemical and/or quantitative status and/or ecological potential'[143] until the fourth operator has polluted it in 2012.

In such a case, the fourth operator could be faced with a predicament. If its activities have caused environmental damage and emergency remedial measures are needed to abate the damage, the operator would be in breach of the ELD if it did not carry out any those measures and notify the competent authority of the damage. If it was to remediate the damage to the groundwater, however, and discover later that the competent authority is unable to prove that all the pollution was attributable to the four operators and other identifiable

132 ibid art 11(3).
133 First Reading Proposal art 12.
134 Common Position art 9.
135 ibid Statement of the Council's Reasons, Major innovations introduced by the Council at C277 E/30.
136 Communication, s 3.2 comments on art 9.
137 ibid, comments on amendment 41.
138 The WRA 1991 and Part 2A of the EPA 1990, described at the beginning of this article, implicitly impose joint and several liability and modified joint and several liability, respectively, for indivisible damage. The modified joint and several liability imposed by Part 2A is the result of the application of tests that exclude specified appropriate persons from liability in lieu of other appropriate persons in a 'liability group'. Proportionate liability is only applied if more than one appropriate person remains in the liability group after application of the exclusion tests. See V Fogleman *Environmental Liabilities and Insurance in England and the United States* (Witherbys London 2005) 1327–28.
139 ELD art 9.
140 ibid art 17. Even if a Member State has not transposed the ELD by 30 April 2007, the ELD will apply to any environmental damage that occurs after that date. The failure of a Member State to meet the deadline, therefore, could have a detrimental effect on an operator who causes environmental damage to water or a protected species or natural habitat because the operator would be liable for interim costs as well as other remedial measures but would not have the benefit of legislation specifying any particular requirements by that Member State.
141 ibid art 19(1).
142 Communication, s 3.2 comments on art 17.
143 ELD art 2(1)(b).

persons, the diffuse pollution exception would apply because all requisite causal links would not have not been established between the damage and the activities of individual operators. Therefore, the ELD would not apply and none of the four operators would be liable.[144]

Member States may limit the potential for the above situation occurring by specifying typical situations, such as road traffic and nitrate pollution, to which the diffuse pollution exception applies. In this respect, a recital to the ELD refers to 'pollution of a *widespread*, diffuse character'.[145] In addition, the Commission's intent in introducing the exception was to exclude activities such as road traffic and nitrate pollution in a river basin 'where many different actors contribute very small amounts to the overall problem'.[146]

Standard of liability

The standard of liability for an Annex III operator is strict liability.[147] As Andrew Waite explains in his excellent analysis of the spectrum of liability, liability for an Annex III operator is 'very strict indeed' and is 'veering towards absolute'.[148] This is because, as Mr Waite explains, '[i]t is not necessary to show a direct causal link between operator and damage. It is sufficient that the operator establishes the activity and that the activity causes the damage'.[149]

The causal link for a non-Annex III operator is the same as that for an Annex III operator. Instead of strict liability, however, the ELD applies to non-Annex III operators only 'whenever the operator has been at fault or negligent' and only in respect of protected species and natural habitats.[150]

The term 'whenever the operator has been at fault or negligent' does not indicate whether a competent authority or a non-Annex III operator bears the burden in respect of the operator's fault or negligence. The European Commission proposed placing the burden on a competent authority in an article and a recital to the Proposed Directive.[151] The article allocating the burden was unchanged by the European Parliament in its first reading.[152] The Common Position, however, contains neither the recital nor the article imposing the burden of proof on the competent authority. There is no explanation by the Council or the Commission of the effect of this deletion. The Common Position simply added the term 'whenever the operator has been at fault or negligent' to the end of the provision stating that the ELD shall apply to 'damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities'.[153]

The ELD appears to provide that a non-Annex III operator has the burden of showing that it was not at fault or negligent even though it is silent on the issue. Placing the burden on a competent authority would not only conflict with the self-executing provisions of the ELD[154] but it would be in direct conflict with the second optional defence (ie, the state-of-the-art defence) which firmly places the burden of showing that it is not at fault or negligent on an operator by stating that the operator must 'demonstrate that he was not at fault or negligent'.[155] There is nothing in the second optional defence to indicate that it does not apply to a non-Annex III operator

144 A further problem may arise if all the operators who caused the damage are identified but one of them is a non-annex III operator who has not been at fault or negligent. Unless the Member State imposes joint and several liability rather than proportionate liability, the Member State could be obliged to pay the orphan share of the costs of remediation.

145 ELD recital 13 (emphasis added).

146 Frequently asked questions on the Commission's proposal on Environmental Liability, MEMO/02/10 (24 January 2002). The Commission commented, in respect of road traffic, that 'We have more effective and efficient policy tools to deal with diffuse pollution, such as road pricing and technical standards for vehicles'. ibid. It also commented, in respect of nitrate pollution, that 'Other, better suited, policy instruments are being used to tackle the problems caused by nitrates pollution'. ibid.

147 The ELD does not explicitly state that an annex III operator is strictly liable but the Council commented, in its Common Position, that 'The [ELD] differentiates between on the one hand, certain high-risk occupational activities – listed in an Annex – for which all environmental damage is covered and where strict liability applies and, on the other hand, occupational activities other than those listed, for which only damage to protected species and habitats is covered, if the operator is at fault or negligent'. Common Position, Statement of the Council's Reasons, Analysis of the Common Position at C277 E/27. Further, in its Communication, the Commission noted, in respect of Annex III operators, that 'fault or negligence on their part is not a prerequisite of liability'. Communication s 2.

148 A Waite 'The Quest for Environmental Law Equilibrium' in G Betlem and E Brans (eds) *Environmental Liability in the EU: The 2004 Directive Compared with US and Member State Law* (Cameron May London 2006) 49 at 71 ('Environmental Law Equilibrium'); (2005) 7 Env L R pp 34–62.

149 ibid. See ELD arts 3(1), 5(1), 6(1), 8(1).

150 ELD art 3(1)(b).

151 Proposed Directive art 8 (non-Annex III operator is not required to bear cost of preventive or restorative measures 'where it is not established that the operator who has caused the damage or the imminent threat of damage is at fault or has been negligent); ibid recital 16 (non-Annex III operator 'should not be obliged to bear the cost of preventive or restorative measures taken in pursuance of this Directive where it is not established that the operator was at fault or negligent').

152 First Reading Proposal art 9.

153 Common Position art 3(1)(b).

154 If the burden was on the competent authority, an operator who considered that it was not at fault or negligent could argue that a competent authority must prove fault or negligence before the duty to carry out preventive or emergency remedial measures arose.

155 ELD art 8(4). The conflict between the burdens did not arise in respect of the Proposed Directive or the First Reading Proposal because both proposals specified that what became the second optional defence was an exception to liability.

if a Member State adopts it. Therefore, the competent authority cannot have the burden of showing that a non-Annex III operator is at fault or negligent in respect of responsibility for costs because, unless the competent authority had met its burden of showing that the non-Annex III operator was at fault or negligent, the operator would not be liable under the ELD.[156]

A non-Annex III operator would thus appear to have a direct duty to carry out preventive or short-term remedial measures regarding protected species and natural habitats in the same manner as an Annex III operator. In respect of long-term remedial measures, the appropriate time for a non-Annex III operator to assert that it is not liable under the ELD because it was not at fault or negligent would appear to be in an appeal to a competent authority's order to carry out such measures or as a defence to a competent authority's cost-recovery action, as described later in this article.

Defences

There are four defences in the ELD: two mandatory defences and two optional defences. Member States must adopt the mandatory defences but have discretion whether to adopt the optional defences.[157] None of the defences, however, are defences to liability. Instead, they are grounds or defences concerning responsibility for bearing the costs of preventive or remedial measures that have already been carried out by an operator or competent authority. Due to the common reference to the provisions as 'defences', this article uses that term as well as the term 'grounds'.

The mandatory defences provide that an operator 'shall not be required to bear the cost of preventive or remedial measures taken pursuant to [the ELD]' if the operator 'can prove that the environmental damage or the imminent threat of such damage':[158]

- was caused by a third party and occurred despite appropriate safety measures having been in place[159] or
- resulted from compliance with a mandatory order or instruction from a competent authority provided that the order or instruction was not related to the operator's activities in respect of the environmental damage.[160]

The ELD further provides that 'Member States shall take the appropriate measures to enable the operator to recover the costs incurred'.[161] The quoted term in the preceding sentence was added by the Council in its Common Position when it changed the nature of the proposed provisions from exceptions to grounds for an action[162] and, in doing so, inserted the term 'can prove'[163] in respect of an operator who brought an action asserting the grounds. The European Commission subsequently commented that 'A new provision has been added to enable operators to recover the costs incurred when, for example, it would appear later that a third party caused the damage'.[164]

As indicated by the above language, the ELD does not state that an operator is not liable for carrying out preventive or remedial measures if the grounds apply. Instead, as discussed earlier in this article, the ELD provides that, in the event of a threat or damage, an operator must carry out preventive or emergency remedial measures 'without delay' or 'immediately', respectively. If long-term remedial measures must be carried out, the operator must carry these out at the direction of the competent authority.

The result is that an operator may assert a so-called mandatory 'defence' only after it has carried out preventive or remedial measures and only in an action for responsibility for costs[165] against a third party or public authority. If, say, a vandal is the third party who caused the damage that resulted from the operator's activity, the operator has no recourse and no effective legal remedy. If an identified third party has insufficient funds to pay the costs, the operator has only partial recourse.

Alternatively, a competent authority may carry out necessary preventive or remedial measures and seek to

156 It may be argued that an interpretation that places the burden on a non-Annex III operator to show that it was not at fault or negligent would make the language concerning fault or negligence in the second optional defence redundant. This seeming redundancy can be explained, however, by the optional nature of the defence and its application, at the discretion of a Member State, to Annex III as well as non-Annex III operators.
157 ELD art 8(4).
158 ELD art 8(3).
159 ibid art 8(3)(a).
160 ibid art 8(3)(b).
161 ibid art 8(3).
162 Common Position art 8(3). The mandatory grounds were exceptions in the Proposed Directive. Proposed Directive art 9.
163 The ELD's use of the term 'can prove', in contrast to the term 'demonstrates' in respect of the mandatory 'defences', ELD art 8(4), is indicative of the nature of the provisions. If the so-called defences were actually defences, an operator would not have the burden of proof (which remains with the person bringing an enforcement action) but, rather, the burden of showing that a defence applied. The term 'can prove' thus appears to recognise that the operator (or the competent authority) will be the person bringing the action against a third party or public authority, as appropriate.
164 Communication, s 3.2 comments on art 8(3).
165 Environmental Law Equilibrium (n 148) 49 at 71–72 (describing defences as 'financial defences' not 'functional liability defences'); G Betlem 'Transnational Operator Liability' in G Betlem and E Brans (eds) *Environmental Liability in the EU: The 2004 Directive Compared with US and Member State Law* (Cameron May London 2006) 149 at 152 (ELD 'distinguishes between liability and responsibility to bear costs').

recover its costs directly from a third party[166] or directly order the third party to carry out the measures.[167] The extent of a third party's liability is not clear, however, because nothing in the ELD provides that a third party is liable for carrying out preventive or remedial measures or for reimbursing the costs of such measures.[168]

A situation may arise in which a competent authority carries out preventive or remedial measures because it could not identify the operator and, when the authority subsequently identifies the operator (by, for example, establishing the causal link between the operator's activity and the damage) brings a cost-recovery action against the operator. In such a case, the operator would not be entitled to assert the mandatory 'defences' because they are not defences to liability, but are instead grounds for an action against a third party or public authority; if the threat or damage resulted from the operator's activity, the operator is liable.[169]

The optional defences provide that 'Member States may allow the operator not to bear the cost of remedial actions taken pursuant to [the ELD] if he demonstrates that he was not at fault or negligent and that the environmental damage was caused'[170] either by:

- an emission or event that is expressly authorised by and fully in accordance with the conditions of a permit under legislation listed in Annex III of the ELD[171] or
- an emission or activity or the use of a product during the course of an activity that was not considered likely to cause environmental damage according to the state of scientific or technical knowledge when it occurred.[172]

The defences apply only to the cost of remedial measures and, in the case of the first optional defence, only to Annex III operators. The optional 'defences' are grounds for an action by an operator to recover costs incurred by it in carrying out remedial measures. This is because:

- the provision enabling an operator to assert the grounds uses the word 'taken' in the past tense[173]
- the operator has a direct duty to carry out emergency remedial measures[174]
- the competent authority has a duty to order an operator to carry out long-term remedial measures and any emergency remedial measures that the operator fails to carry out[175] and
- if the competent authority has identified a potentially liable operator, it is not authorised to carry out remedial measures unless that operator has failed to carry them out.[176]

In respect of the last point, the ELD authorises a competent authority to carry out remedial measures only if an operator has failed to carry them out, cannot be identified or 'is not required to bear the costs under [the ELD]'.[177] The term 'is not required to bear the costs under [the ELD]' does not refer to the optional grounds because a Member State 'may allow the operator not to bear the cost of remedial actions'[178] in respect of a permit or state-of-the-art activity rather than an operator not being required to bear them.

A Member State may not allow an operator to raise an optional defence to an enforcement action for failing to carry out remedial measures because, as indicated above, the optional 'defences' are not defences to liability. In any event,

166 ELD arts 6(3), 10. The competent authority could also recover its costs from a public authority. Due to both entities being governmental and/or quasi-governmental entities, a different arrangement than a judicial action may be appropriate.
167 ibid art 11(3).
168 The ELD is silent on the liability/responsibility of a third party. It provides that, if appropriate, a competent authority shall be entitled to initiate cost-recovery proceedings against a third party who has caused an imminent threat of, or actual, environmental damage. ibid art 10. In language that is unchanged from art 13(4) of the Proposed Directive, the ELD provides that Member States 'shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or remedial measures'. ELD, art 11(3). The 'third parties' envisaged by the Proposed Directive include but are not limited to persons who are authorised to act on behalf of competent authorities. The preamble to the Proposed Directive states that 'In cases where a competent authority has to act itself or through a third party in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator.' Proposed Directive recital 14. Further, the explanatory memorandum to the Proposed Directive states that 'The proposal leaves it open to Member States to decide when the measures should be taken by the relevant operator or by the competent authorities or by a third party on their behalf'. Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and restoration of environmental damage s 2 p 2. COM(2002) 17 final (23 January 2002) ('Explanatory Memorandum'). See also Explanatory Memorandum s 2 p 3 ('Had the measures been taken by the competent authorities or by a third party on their behalf, the cost of so doing must then be recovered by the operator'; 'Alternatively the competent authority may implement those measures itself or have them implemented by a third party'). The mechanism by which Member States may *require* as well as empower third parties to carry out preventive and remedial measures (see ELD art 11(3)) is unclear.
169 ELD arts 3(1), 5(1), 6(1), 8(1); see text accompanying n 149.
170 ELD art 8(4).
171 ibid art 8(4)(a).
172 ibid art 8(4)(b).
173 ibid art 8(4).
174 ibid art 6(1)(a).
175 ibid art 6(3).
176 ibid.
177 ibid. The restriction may indicate the intent of the ELD that only a court or other competent impartial public body should decide whether an operator should (or should not) bear the cost of remedial measures due to the operator's assertion of an optional defence, not a competent authority.
178 Compare ibid art 8(4) with ibid art 8(3).

providing such a defence would almost certainly result in operators refusing to carry out a competent authority's orders to carry out such measures.

The provisions that became the optional 'defences' were exceptions to liability in the Proposed Directive.[179] The European Parliament changed their status at its first reading of the Proposed Directive to mitigating factors, that is, factors to be taken into account by a competent authority or court 'when deciding the level of responsibility and the amount of financial compensation in respect of liability to be recovered from an operator'.[180]The Council changed their status, in its Common Position, to grounds but retained the past tense of the word 'taken' in the term 'Member States may allow the operator not to bear the cost of remedial actions taken pursuant to [the ELD]'.[181]

Due to the nature of the optional defences, it would appear that a Member State that adopts them must bear the cost of remedial measures to which they apply. The Member State would seem to be responsible for the costs because it has an obligation to reimburse an operator who successfully claims reimbursement of its costs. This situation would seem to lead to a need for a Member State that adopts the optional defences to create a source of funding either as a stand-alone fund or as part of a competent authority's general funding. The Member State would also need to create a procedure by means of which an operator can recover remedial costs if the operator shows that the activity that caused environmental damage was a permit or state-of-the-art activity.[182]

Relatively few jurisdictions have established a forum in which a PLP may make a claim to recover its costs after having carried out preventive or remedial measures. If a Member State does not already have such a forum, the forum that applies in the US for claims under CERCLA provides an example. Such a forum is necessary under CERCLA, not because the statute has self-executing provisions (which it does not, having only empowering provisions in respect of the EPA enforcement programme[183]) but because CERCLA prohibits judicial review of liability until a PRP has cleaned up contamination, the EPA enforces a UAO in court, or the EPA cleans up the contamination itself and brings an action against a PRP to recover its costs.[184]

According to the procedure established by CERCLA, a PRP who fully complies with a UAO may file a petition to claim the costs of doing so against the Superfund within 60 days of completing the remediation.[185] Claims are made to the Environmental Appeals Board of the EPA, the remit of which includes administrative appeals under other environmental laws.[186] In order to succeed in a claim, the PRP must establish that it is not liable under CERCLA and that the costs incurred by it are reasonable in view of the actions specified in the order.[187] If the board denies the claim,

179 Proposed Directive art 9(1)(c)–(d).

180 First Reading Proposal art 11(3).

181 Common Position art 8(4). See Common Position, Statement of the Council's Reasons, European Parliament Amendments at C277 E/29 ('[i]n case of 'permit' or 'state of the art' activities it is up to Member States to allow the operator not to bear the costs of remedial actions *taken* pursuant to the Directive – where the operator demonstrates that he *is* not at fault or negligent' (emphasis added)). The Council's retention of the past tense of the word 'taken' at the same time that it added the provision directing Member States to take appropriate steps to enable operators to whom the mandatory grounds apply to recover costs of measures taken by them indicates that an operator may raise the defences only after it has carried out appropriate remedial measures. The absence of the term 'In such cases Member States shall take the appropriate measures to enable the operator to recover the costs incurred' in respect of the optional defences is not an indication that they may be asserted before an operator carries out remedial measures. It would have been inappropriate for the term to have been placed in the ELD due to the discretion provided to Member States in adopting them. Thus, if a Member State does not adopt the defences, it has no obligation to provide cost-recovery measures in respect of them.

182 The issue may arise as to whether the burden of proof is reversed if an operator must bring a claim to recover its costs rather than defending an action alleging that it is liable for those costs. The burden of proof was discussed when the Commission issued the White Paper and Working Paper. The White Paper stated that it may be appropriate to alleviate the traditional burden of proof concerning a causal link between an operator's activity and environmental damage due to the difficulty in proving such a link. European Commission, White Paper on Environmental Liability, COM(2000) 66 final p 17 (9 February 2000). The Commission stated that the Proposed Directive did not reverse the burden of proof. Frequently asked questions on the Commission's proposal on Environmental Liability, MEMO/02/10 (24 January 2002). Also, an operator who brings a claim for reimbursement of costs is not entirely dissimilar from an operator who appeals an order under the ELD in that both operators instigate the actions.

183 42 U.S.C. s 9606(a). For a discussion of CERCLA and the Superfund programme, see V Fogleman *Environmental Liabilities and Insurance in England and the United States* (Witherbys London 2005) 153–314.

184 42 U.S.C. s 9613(h). The penalty for failing to comply with a UAO is a fine of up to US$ 32,500 per day of non-compliance. ibid s 9606(b)(1); see Environmental Protection Agency, Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (13 February 2004). If the EPA cleans up the contamination itself, it is entitled to seek the above penalty for non-compliance with the UAO, costs incurred in cleaning up the contamination and up to three times the amount of those costs. 42 U.S.C. s 9607(c)(3).

185 42 U.S.C. s 9606(b)(2)(A).

186 Executive Order No 12,580 (23 January 1987) 52 Fed Reg 2923 (29 January 1987); EPA Delegation of Authority 14–27 (June 1994).

187 42 U.S.C. s 9606(b)(2)(C). Only a few claims under CERCLA have succeeded. The published decisions of the board show that, out of 18 claims for reimbursement of clean up costs since 1995, one was granted, two were dismissed (one without prejudice) and 15 were denied. The low level of success under CERCLA need not, of course, be replicated by the ELD.

the PRP has 30 days to file an action in federal court.[188] A court may overturn the board's decision only if it is an arbitrary or capricious abuse of discretion.[189]

The right to bring an appeal

As discussed above, an operator may raise a mandatory 'defence' by bringing an action for responsibility for costs against a third party or public authority. In addition, an operator may raise an optional 'defence' as a ground for a claim to a Member State for reimbursement of remedial costs due to a permit or state-of-the-art activity. Further, an operator may respond to a competent authority on comments made by NGOs and other persons regarding the alleged necessity for remedial and, at the option of a Member State, preventive measures.

The ELD also authorises an operator to appeal a 'decision' by a competent authority that imposes liability for carrying out preventive or remedial measures, that is, an order specifying preventive or remedial measures to be carried out by the operator. The ELD states that the 'decision' must inform the operator 'of the legal remedies available to him under the laws in force in the Member State concerned'.[190]

The provision that authorises an operator to appeal a competent authority's decision is article 13(1) although this is not readily apparent on the face of the ELD. In an obtuse manner, the ELD includes an operator as a natural or legal person who, together with NGOs and other persons who are affected by environmental damage may, among other things, request a court or competent impartial public body 'to review the procedural and substantive legality' of a competent authority's decisions.[191]

The operator's right to challenge a competent authority's order was not always so obtuse. In its first reading of the Proposed Directive, the European Parliament adopted an amendment (No 17), which provided that:

> Operators may appeal against any decision taken by the competent authority under this Article [ie the article setting out the duties and powers of competent authorities] to a court or other independent and impartial body established by law. Such appeal procedures shall not delay the taking of any urgent measures needed to prevent further environmental or economic damage.[192]

The Council did not include amendment 17 in its Common Position, stating that it 'preferred not to take up this modification, considering that the review procedures provided for in Article 13 offer sufficient coverage, also in the case of operators'.[193]

The Commission confirmed that Article 13(1) provides an operator with the right to appeal a competent authority's order by stating, in respect of the European Parliament's amendment 44 (see below) that:

> Articles 12(1) and 13(1) are in line with the thrust of … amendment [No 44] insofar as they allow the operator to avail himself of the review procedures under Article 13. In light of the already wide scope of the review procedures under Article 13, which is inspired by the Aarhus Convention, no reference is made to 'appeal'.[194]

Amendment 44 added the following recital (27) to the preamble to the Proposed Directive:

> The relevant persons and qualified entities should also have access to procedures for the review of the competent authority's decisions, acts or failure to act and a right to appeal. This right of appeal should also be extended to the operator.[195]

The Council accepted amendment 44 but did not include it in its Common Position because, as stated by the Council, 'Amendment 44 is implicitly covered by the present wording of Article 13'.[196] Again, the Commission confirmed that an operator's right of appeal is set out in Article 13(1) by stating that:

> no specific reference is made in the Preamble to the Common Position to the right of the operator to challenge the competent authority's decisions. As explained in relation to Amendment 44, this right is enshrined in Articles 12(1) and 13(1) so that this omission in the Preamble bears no consequence.[197]

188 42 U.S.C. s 9606(b)(2)(B).
189 ibid s 9612(b)(5); compare Administrative Procedure Act 5 U.S.C. s 706(2)(A).
190 ELD art 11(4).
191 ibid arts 12(1), 13(1).
192 First Reading Proposal art 14(6).
193 Common Position, Statement of the Council's Reasons, Analysis of the Common Position, European Parliament Amendments at C277 E/29.
194 Communication s 3.3.1 comments to Amendment 44.
195 First Reading Proposal recital 27, comments to Amendment 17.
196 Common Position, Statement of the Council's Reasons, Analysis of the Common Position, European Parliament Amendments at C277 E/29.
197 Communication s 3.3.2. The Commission also confirmed that arts 12(1) and 13(1) enshrine the right of an operator to challenge a competent authority's decisions. ibid.

Thus, in a less-than-obvious manner, the ELD provides that an operator may appeal its liability under the ELD when a competent authority orders it to carry out preventive or remedial measures.

There are two typical types of substantive grounds in any civil appeal; grounds denying liability and grounds asserting an affirmative reason why the appellant is not liable. Procedural grounds include challenges to the form of the order or other notice that is being appealed and the manner in which it has been issued.

The ELD does not contain any defences to liability. Therefore, the only substantive grounds that an operator may assert in an appeal to a competent authority's order are those denying liability under the ELD. The following are substantive grounds for appealing a competent authority's order:

- the preventive measures are not imposed in response to an "imminent threat' of environmental damage
- the remedial measures are not imposed in response to 'environmental damage'
- the threat or damage was not caused by the operator's 'occupational activity'
- an exception to the ELD applies
- the appellant is not an 'operator' under the ELD
- the emission, event or incident causing the damage occurred over 30 years ago
- if a Member State applies proportionate liability, the order requires the operator to carry out measures for which another operator is liable
- the activity is not an Annex III activity and the operator is, therefore, entitled to show that it was not at fault or negligent, and
- if the appellant is a non-Annex III operator, the operator was not at fault or negligent.

As indicated above, the Council did not include, in its Common Position, amendment 17 that contained the sentence 'Such appeal procedures shall not delay the taking of any urgent measures needed to prevent further environmental or economic damage'.[198] The Council's comments that it 'preferred not to take up this modification, considering that the review procedures provided for in Article 13 offer sufficient coverage, also in the case of operators',[199] do not indicate whether a competent authority's order is suspended during an appeal.

Due to the ELD stating that an operator has a direct duty to carry out preventive or short-term remedial measures, the intent of the ELD appears to be that an order to carry out such measures should not be suspended. The issuance of such an order by a competent authority would only arise if the potentially liable operator had failed to comply with the direct duty to carry out the measures. As indicated above, the grounds on which an operator may appeal an order are that it is not liable for carrying out the measures because the ELD does not apply.

It is less clear whether Member States should provide for the suspension of an order for long-term remedial measures. The intent of the ELD regarding the suspension of such orders would seem to depend, in part, on the nature of the long-term remedial measures. If, for example, further environmental damage was likely to result or emergency remedial works were likely to be required if an order for remediating land or carrying out primary remediation was suspended, it seems unlikely that the intent of the ELD is that the order should be suspended. Another factor is the liability of an operator for the interim costs between environmental damage to water or a protected species or natural habitat and its remediation to baseline condition. If an order includes compensatory remedial measures, its suspension would most likely increase the interim costs.

A Member State's adoption of the optional defences is another factor that could influence the suspension of long-term remedial works. If a Member State adopts the defences, it may be possible (depending on that State's legal system) to include an appeal of liability under the ELD and a claim for responsibility of incurred costs in a single hearing. Such a hearing would necessarily have to take place after the measures had been carried out.

Whether or not a Member State provides that an order regarding long-term remedial measures is suspended during an appeal, the ELD's apparent intent that an order for preventive or short-term remedial measures should not be suspended means that Member States should provide a forum and procedure for an operator who successfully appeals its liability under the ELD to bring a claim for reimbursement of its costs. Such a forum and procedure is described above.

The ELD does not contain any affirmative defences to a cost-recovery action by a competent authority because, as indicated above, it does not contain any defences to liability. Any defences to such an action would thus appear to be limited to those indicated above as grounds for an appeal to an order to carry out preventive or remedial measures.[200]

198 First Reading Proposal art 14(6).

199 Common Position, Statement of the Council's Reasons, Analysis of the Common Position, European Parliament Amendments at C277 E/29.

200 A Member State may wish to establish a procedure by which an operator may raise an optional defence if, for example, a

Sanctions

The ELD does not establish offences, or penalties for those offences, if an operator breaches the ELD by, among other things:

- failing to notify a competent authority of an imminent threat of, or actual, environmental damage or
- failing to carry out preventive or remedial measures when the operator has a duty to do so either because of a self-executing provision or due to non-compliance with an order by a competent authority.

Member States are virtually certain to create such offences and impose penalties for them to provide a deterrent for operators who fail to comply with the regime. If there were no sanctions for breaching the ELD, it would, of course, be unenforceable which would be against its intent.[201]

Conclusion

The powers, duties and self-executing provisions of the ELD, together with the other enforcement provisions, have created the first 'polluter pays' regime under EC law. Indeed, Article 1 specifically states that the purpose of the ELD 'is to establish a framework of environmental liability based on the 'polluter pays' principle, to prevent and remedy environmental damage.'

The polluter pays nature of the ELD was inherent in the Proposed Directive[202] but became more pronounced as the Directive passed through the legislative process. For example, the ELD imposes a direct duty on operators to carry out remedial measures whereas the Proposed Directive directed a competent authority to order an operator to carry them out. The third party and compliance with a public authority's mandatory order are grounds concerning responsibility for costs in the ELD whereas they were exceptions to liability in the Proposed Directive. The permit and state-of-the-art activities (if adopted by a Member State) entitle an operator to claim reimbursement for remedial costs whereas the activities were exceptions to liability in the Proposed Directive.

A major reason for the more pronounced polluter pays nature of the ELD appears to be the removal of a Member State's obligation to carry out preventive or remedial measures if an operator could not be identified or failed to carry them out.[203] In order to maintain the intent of the ELD to prevent or remedy environmental damage, the EC had no choice but to ensure that operators had a broader duty to carry out preventive and remedial measures. An operator may recover the cost of such measures if, for example, a third party caused the threat or damage or if it subsequently shows that the ELD does not apply. The ELD does not, however, provide that an operator whose activity caused a threat or damage will necessarily recover costs expended by it to prevent or remedy the damage, respectively.

The potential for an operator to fail to recover the costs of preventing or remedying environmental damage caused by its activity when a third party is responsible for the damage does not conflict with the fundamental principle of the ELD. That principle is 'that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced'.[204] Minimising the risks does not, of course, guarantee that environmental damage will not occur. The potential for large financial losses under the ELD, however, is a huge incentive to operators to minimise environmental risks from their activities as much as possible and to ensure that they are insured for any unavoidable losses.

competent authority brought a cost recovery action because it had remediated environmental damage before it had established a causal link between the operator and that damage. In such a case, it does not seem sensible for an operator to be obliged to reimburse a competent authority for its costs and then seek reimbursement from a Member State.

201 ELD recital 15 provides that 'Since the prevention and remedying of environmental damage is a task directly contributing to the pursuit of the Community's environment policy, public authorities should ensure the proper implementation and enforcement of the scheme provided for by this Directive'.

202 See European Commission press release 'Making the polluter pay: Commission adopts liability scheme to prevent and repair environmental damage' (Environment Commissioner Margot Wallström said: 'The idea that the polluter must pay is sending a clear message: the time has come for the EU to put the polluter pays principle into practice').

203 See Communication, s 4, Conclusion ('The point on which the Common Position is most departing from the Commission proposal concerns the issue of "orphan damage", that is, those cases in which no operator will remedy environmental damage. The Commission proposal required Member States to find alternative sources of financing; the Common Position now leaves full discretion to Member States to decide to act or not. Although the Commission would have preferred that stricter conditions had been set regarding the subsidiary remedial action by Member States, it can accept the Common Position in the context of an overall agreement').

204 ELD recital 2.