

The temporal provisions of the Environmental Liability Directive: the start date, direct effect and retrospectivity

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I. Introduction

On 6 May 2014, the Cardiff Administrative Court approved an unusual consent order. The order directed Natural Resources Wales (NRW) to issue a liability decision under the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (Regulations)¹ to give direct effect to temporal provisions of the Environmental Liability Directive (ELD),² instead of applying the Regulations that had transposed the ELD into Welsh law. The new decision must specify liability for remediating environmental damage caused to Llyn Padarn, a lake in Snowdonia, since 30 April 2007, the deadline for transposition of the ELD, instead of 6 May 2009, the date on which the Regulations came into force. The decision highlights similar issues that may arise, not only in the remaining jurisdictions in the UK which also brought the ELD into effect after the deadline for transposition, but also in the other 16 Member States with post-30 April 2007 effective dates.

This article examines the case, which was brought by Fish Legal on behalf of the Seiont Gwyrfaï and Llyfni Anglers' Society,³ and issues raised by it. First, the article sets the scene by describing Llyn Padarn and its status, followed by a discussion of the case. The article then examines the start date for liability under the ELD and the ELD's direct effect in Welsh law, followed by the implications of the litigation. Next, the article analyses the other temporal provisions of the ELD by examining whether the ELD imposes retroactive or retrospective liability and, if so, the extent of such liability.

The article concludes that liability under the ELD does not apply to a pre-30 April 2007 activity that resulted in

an emission, event or incident that caused environmental damage before that date and that continued after that date even if distinct emissions, events or incidents after 30 April 2007 resulted in further damage owing to the migration, or rerelease, of pollutants. The article also concludes, however, that liability for a pre-30 April 2007 activity that continued after that date applies if damage caused by a continuous or intermittent emission is progressive. In such a case, the operator must prove that damage occurred before 30 April 2007 in order to avoid liability for remediating or preventing further damage resulting from the activity.

II. Llyn Padarn

Llyn Padarn is a 3.2 kilometre long glacial lake in Snowdonia, with an average depth of 16 metres. The lake is designated as a surface water body under the Water Framework Directive (WFD).⁴ It is also designated as a heavily modified water body under the WFD⁵ owing to substantial changes to its character by a slate tip on its eastern shore from a former quarry and a tourist railway and other urban development on its western shore.⁶

Llyn Padarn is also designated as a site of special scientific interest (SSSI) under the Wildlife and Countryside Act 1981⁷ as a result of the presence of floating water plantain (*Luronium natans L.*), a rare plant species, and Arctic charr (*Salvelinus alpinus*), a rare species of fish that became isolated in the lake when the ice age ended about 10,000

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1 SI 2009/995 (W 81).

2 Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, as amended (2004) OJ L143/56 arts 17 and 19.

3 *R (on the application of Seiont Gwyrfaï and Llyfni Anglers' Society) v Natural Resources Wales* Consent Order (Cardiff Administrative Court Case No CO/14846/2013, 6 May 2014) (unreported).

4 See Directive 2000/60 establishing a framework for Community action in the field of water policy (2000) OJ L327/1 art 2(10). Llyn Padarn is designated as a specified lake No GB31033730. See Part 9 Specified Lakes <https://www.yumpu.com/en/document/view/16949748/water-framework-directive-archive-defra/47>.

5 See WFD art 2(9).

6 See Amy Burgess, Ben Goldsmith and Tristan Hatton-Ellis 'Site condition assessments of Welsh SAC and SSSI standing water features' (CCW Contract Science Report No 705, 2006) s 4.21 at 224–29.

7 See Wildlife and Countryside Act 1981, as amended s 28.

years ago.⁸ Although Arctic charr exist in two other lakes in Wales, the species in Llyn Padarn is genetically distinct.⁹

Dŵr Cymru Welsh Water (DCWW) discharges treated and untreated sewage from the Llanberis sewage treatment works and sewerage system into Llyn Padarn.¹⁰ The society, which owns and leases fishing rights at the lake, has campaigned for over 20 years to stop the discharges, in particular owing to their effect on the waters and ecosystem of the lake and the potential extinction of the Arctic charr as a result of eutrophication caused by the discharges.¹¹

Fish Legal (previously known as the Anglers' Conservation Association (ACA)), of which the society is a member, is a non-profit-making organisation founded in 1948¹² 'to fight pollution on behalf of angling clubs ...'.¹³ In 1993, the ACA brought an action against DWCC, in which it submitted evidence of 'an historic rise in phosphorus concentrations in

the llyn, causing eutrophication, with the source of the phosphates substantially attributed to the discharges from the Llanberis sewage treatment works'.¹⁴ Treated and untreated sewage contains substantial quantities of phosphates/phosphorous.¹⁵

The action was unsuccessful. The regulatory authority (now NRW), however, issued a new discharge consent to DCWW that reduced permitted discharges of phosphate into the Afony-Bala, which flows into the lake.¹⁶ In addition, DCWW introduced phosphate stripping at the sewage treatment works.¹⁷

In 2009, using data collected between 2003 and 2008, the then Countryside Commission for Wales (CCW) (now NRW) classified the waters of Llyn Padarn as 'good' under the WFD.¹⁸ The CCW also concluded, however, that the overall condition of the lake was unfavourable¹⁹ and that 'the results from [its study suggested] that the lake has experienced eutrophication'.²⁰

8 See Countryside Commission for Wales (now NRW) Llyn Padarn Site of Special Scientific Interest <http://www.ccw.gov.uk/idoc.ashx?docid=5d2302e2-9822-44f1-877d-70f2e2a8f155&version=-1>. A third feature for the designation of Llyn Padarn as a SSSI is the presence of volcanic and sedimentary rocks from the Cambrian era, which allows geologists to study the relationship between them and underlying Precambrian rocks, making it a nationally important geological site. *ibid.*

9 See *ibid.* The other two locations are Llyn Cwellyn and Llyn Bodlyn. *ibid.* Arctic charr are not designated as a protected species under Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (consolidated version, 1 January 2007).

10 See *Seiont, Gwyrfaï and Llyfni Anglers' Society v Natural Resources Wales* Background and Grounds of Claim (Cardiff Administrative Court Case No CO/14846/2013, 4 October 2013) paras 34–38. The discharge permit, No CG0089101, was granted by NRW. DCWW has operated the Llanberis sewage treatment works since 1989. The sewerage system began operations in 1959 and was previously implemented by Gwyrfaï Rural District Council. See *In an application for permission to apply for judicial review between Seiont, Gwyrfaï and Llyfni Anglers' Society v Natural Resources Wales*, Summary Grounds of Resistance on Behalf of the First Interested Party (Cardiff Administrative Court Case No CO/14846/2013, 4 November 2013) para 13.

11 See Fish Legal 'NRW admits unlawful investigation into Llyn Padarn' <http://fishlegal.net/page.asp?section=1030§ionTitle=Natural+Resources+Wales+admits+unlawful+investigation+into+Llyn+Padarn>.

12 See Roger Bate 'Saving our streams: the role of the Anglers' Conservation Association in protecting English and Welsh rivers' (2003) 14 *Fordham Environmental Law Journal* 375 at 384.

13 See Roger Bate 'Water pollution prevention: a nuisance approach' (1994) 14(3) *Economic Affairs* 13 at 14. The clubs pay annual subscriptions to Fish Legal in exchange for legal representation and other benefits. See Roger Bate (n 12) 384–85, 409–13; see also Case C-279/12 *Fish Legal v Information Commissioner* (CJEU 19 December 2013) (not yet published) para 15 ('Fish Legal, the legal arm of the Angling Trust ... is a non-profit-making organisation whose object is to combat, by all legal means, pollution and other damage to the aquatic environment and to protect angling and anglers'). Fish Legal now operates UK-wide. Its objectives are to 'promot[e] and encourag[e] the conservation of our rivers, lakes and coastal fisheries; using the law to protect them and the interests of ... members to fish in them'. Fish Legal 'Frequently asked Questions' (September 2014).

14 See Fish Legal 'Environment Agency complacent about toxic algae' (30 June 2009) <http://www.anglingtrust.net/news.asp?section=29&itemid=288>.

15 See *Seiont, Gwyrfaï and Llyfni Anglers' Society v Natural Resources Wales* Background and Grounds of Claim (Cardiff Administrative Court Case No CO/14846/2013, 4 October 2013) paras 24–26.

16 See Fish Legal (n 14).

17 See Snowdonia Active 'Red alert' (1 July 2009) <http://www.snowdonia-active.com/news.asp?newsid=653>.

18 See Natural Resources Wales 'Llyn Padarn, Decision Document Pursuant to the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (EDR)' 66 (Decision Document). The WFD classification system has five levels for ecological (biological) classification; high, good, moderate, poor and bad; and two levels for chemical classification; good and fair. A key objective of the WFD is to prevent deterioration of the status of surface water bodies so that, by 2015, they achieve good ecological and chemical status, with heavily modified and artificial water bodies to achieve good ecological potential (a lower standard than good ecological status) and chemical status. See WFD art 4(1)(a)(ii). The overall classification of surface (and groundwater) bodies is determined by a 'one-out-all-out approach' by which the overall status of a surface water body is determined on the basis of the ecological, chemical or quantitative element that scores the lowest in the assessment. See Commission Staff Working Document 'European overview (2/2), Accompanying the document Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) River Basin Management Plans COM(2012) 670 final' SWD(2012) 379 final (14 November 2012) 121. Fish Legal has campaigned for Llyn Padarn to be reclassified because its classification as a heavily modified water body allows a lower standard of ecological status. See Fish Legal 'EA confirm sewage pollution of Llyn Padarn' *Fishing Magic* (26 August 2011) <http://www.fishingmagic.com/index.php?news=15330>.

19 'Site condition assessments of Welsh SAC and SSSI standing water features' (n 6) 228. The Annex I feature type is oligotrophic to mesotrophic standing waters with vegetation of the *Littorelletea uniflorae* and / or *Isoëto-Nanojuncetea*. *ibid.* 1. Annex I refers to Annex I of Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (consolidated version, 1 January 2007).

20 'Site condition assessments of Welsh SAC and SSSI standing water features' (n 6) 208.

In May 2009, high levels of toxic blue green algae (*Anabaena flos-aquae*) were observed in Llyn Padarn.²¹ Although the algae can occur naturally in surface waters, it was the first time they had occurred at Llyn Padarn.²² In response to the algae, Gwynedd Council issued a warning advising the public not to swim in the lake, swallow water from it, or eat fish caught in it. The warning stated that the 'algae produce toxins which can cause skin rashes, nausea, vomiting, stomach pains, fever and headache if swallowed. Occasionally it can cause more serious illness such as liver and brain damage'. The warning also advised against allowing dogs or livestock to come into contact with lake water because the algae could be fatal to animals.²³ The algae are also harmful to fish and other aquatic wildlife because they can deoxygenate waters, resulting in eutrophication.²⁴

The algal bloom had a significant adverse economic effect on businesses near the lake, many of which depend on the use of the lake and its surroundings for tourism and recreational activities.²⁵ The algae persisted at the lake until October 2009.²⁶ The Environment Agency Wales (now NRW), which had originally described the algal bloom as a 'naturally occurring phenomenon',²⁷ subsequently concluded that its primary cause was elevated total phosphorous levels during 2009.²⁸

Meanwhile, the numbers of adult Arctic charr in Llyn Padarn were in an overall decline. In 2007, estimates of the mean population of adult fish were 2072, falling to

699 in 2008, before recovering slightly to 815 in 2009.²⁹ In 2010, there were an estimated 787 adult Arctic charr in the lake; in 2011, the estimate was 595.³⁰ In order to increase their numbers, artificially/hatchery-reared juvenile Arctic charr have been released into Llyn Padarn each year since 2009,³¹ with a further 1700 to be released later in 2014.³² During the winter of 2011, however, there was an 'exceptionally low' number of spawning Arctic charr, which the Environment Agency Wales considered was owing to 'the influence of the mild winter'.³³ By 2012, only 239 adult Arctic charr remained in the lake.³⁴ By 2014, levels of Arctic charr were 'dangerously low'; only 48 adult fish were identified leaving Llyn Padarn to spawn.³⁵

III. Legal proceedings

On 7 February 2012, Fish Legal, on behalf of the society, notified NRW that it considered that DCWW had caused 'environmental damage,' as defined by the Regulations, to the Llyn Padarn SSSI as a result of the presence of Arctic charr as a feature for its designation, and to the waters of Llyn Padarn.³⁶ The Regulations (and the ELD) provide that a person who is, or is likely to be, affected by environmental damage, or who has a 'sufficient interest' may notify the enforcing (competent) authority of a threat of, or actual, environmental damage.³⁷ The enforcing authority must then consider the notification and inform the person who submitted it of any action it intends to take.³⁸ In order to determine whether there had, in fact, been environmental damage to the SSSI and waters of Llyn Padarn, NRW initiated an assessment.

The Regulations define 'environmental damage' to an SSSI as 'an adverse effect on the integrity of the site (that is, the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat,

21 Decision Document (n 18) 67.

22 See Gwynedd Council 'Blue-green algae – Llyn Padarn, Llanberis' (press release June 2009) http://www.gwynedd.gov.uk/gwy_doc.asp?cat=6610&doc=23919&Language=1&p=1&c=1.

23 See *ibid.*

24 See Snowdonia-Active 'Llyn Padarn latest' (5 February 2010) <http://www.snowdonia-active.com/news.asp?newsid=683>.

25 See Snowdonia-Active 'Blue green algae latest' (15 October 2009) <http://www.snowdonia-active.com/news.asp?newsid=674>. On 15 May 2014, the Welsh Government added Llyn Padarn to the list of 100 designated bathing waters in Wales. Bathing Water (Amendment) (Wales) Regulations SI 2014/1067 reg 2, amending Bathing Water Regulations (SI 2013/1675). See Directive 2006/7 concerning the management of bathing water quality and repealing Directive 76/160/EEC (2006) OJ L64/37.

26 Decision Document (n 18) 34.

27 See Fish Legal 'EA confirm sewage pollution of Llyn Padarn' *Fishing Magic* (26 August 2011) <http://www.fishingmagic.com/index.php?news=15330>; see also Gwynedd Council 'Algae warning for Llyn Padarn, Llanberis' (issuance of an algae warning '[f]ollowing the discovery of naturally occurring blue-green algae in Llyn Padarn') http://www.gwynedd.gov.uk/GWY_atborth.asp?cat=6610&doc=23824&iaith=1&teitl=Algae+Warning+for+Llyn+Padarn%2C+Llanberis&rhaglen=/gwy_doc.asp&Language=1; Fish Legal 'Environment Agency investigates anglers who exposed sewage pollution at Llanberis Lake' (7 August 2012) ('Agency said [algal bloom] was a "natural phenomenon"') <http://www.anglingtrust.net/news.asp?section=29&itemid=1295>.

28 Decision Document (n 18) 67.

29 *ibid* 23. The estimates were deduced from vertical hydroacoustic monitoring. *ibid.*

30 *ibid.*

31 See BBC News North West Wales 'Arctic charr released into Llyn Padarn, Llanberis' (23 October 2013) <http://www.bbc.co.uk/news/uk-wales-north-west-wales-24627842>.

32 See Natural Resources Wales 'Sonar tests monitor Arctic charr in Llyn Padarn migrating to spawn' (18 June 2014) <http://naturalresourceswales.gov.uk/about-us/media-and-news-centre/press-release/sonar-tests-monitor-arctic-charr-lllyn-padarn-migrating-spawn/?lang=en>.

33 Environment Agency Wales 'Llyn Padarn charr monitoring' (Winter 2011–12) *Newsletter* 1 <http://www.cpwf.co.uk/NewsletterQ3%201112.pdf>.

34 Decision Document (n 18) 23.

35 See Natural Resources Wales 'Sonar tests monitor Arctic charr in Llyn Padarn migrating to spawn' (18 June 2014) <http://naturalresourceswales.gov.uk/about-us/media-and-news-centre/press-release/sonar-tests-monitor-arctic-charr-lllyn-padarn-migrating-spawn/?lang=en>.

complex of habitats or the levels of populations of the species affected'.³⁹ This test is not in the ELD but is specific to Wales, owing to the Welsh Government having extended liability for damage to species and natural habitats protected by the Birds⁴⁰ and Habitats⁴¹ Directives, as required by the ELD,⁴² to include liability for damage to those protected by national nature conservation legislation.⁴³

The Regulations define 'environmental damage' to surface waters as:

damage to a surface water body [as classified under the WFD] such that ... a biological quality element ..., the level of a [specified] chemical ..., or ... a [specified] physicochemical quality element ... changes sufficiently to lower the status of the water body in accordance with [the WFD] (whether or not the water body is in fact reclassified as being of lower status).⁴⁴

The Regulations exempt liability for:

- (a) [environmental] damage that took place before the coming into force of these Regulations
- (b) damage that takes place after that date, or is threatened after that date, but is caused by an incident, event or emission that took place before that date or
- (c) damage caused by an incident, event or emission that takes place after that date if it derives from

an activity that took place and finished before that date.⁴⁵

On 11 July 2013, based on its assessment of the alleged environmental damage since 6 May 2009, NRW issued the liability decision. NRW concluded that there had not been environmental damage to the Llyn Padarn SSSI because:

- the floating water plantain was in good conservation status in May 2009 and also in 2012, when it was reassessed⁴⁶ and
- whilst NRW was aware from a condition assessment carried out in 2010 that the Arctic charr had an unfavourable conservation status before 2009 and were in decline, it did not have sufficient information to assess whether there had been further damage to them, in particular damage by DCWW, after May 2009.⁴⁷

NRW thus concluded that, because the Regulations 'do not apply to damage that occurred before [they] came into force ... there is no demonstrable reduction in the habitat supporting the features of the SSSI, nor has the condition or quality of the habitat been affected adversely, taking into account the 2009 baseline'.⁴⁸ NRW further concluded that there had not been any environmental damage to the chemical and physicochemical status of the waters of Llyn Padarn.⁴⁹

Finally, NRW concluded that there had been environmental damage to the ecological status of Llyn Padarn because evidence

36 See Decision Document (n 18) 7.

37 Regulations reg 29(1); ELD art 12(1) ('sufficient interest in environmental decision making relating to the damage').

38 Regulations reg 29(3); ELD art 12(3).

39 Regulations sched 1 para 4(2).

40 Directive 2009/147 on the conservation of wild birds (codified version) (2010) OJ L20/7.

41 Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (consolidated version 1 January 2007).

42 ELD art 2(1)(a).

43 See *ibid.* The UK Government and the Northern Ireland Government have extended liability to SSSIs in England and areas of special scientific interest in Northern Ireland, respectively. See Environmental Damage (Prevention and Remediation) Regulations 2009/153, as amended reg 4(2) and sched 1 para 4; Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) SRNI 2009/252, as amended reg 3(2) and sched 1 para 4.

44 Regulations reg 4(3). The pertinent part of the definition of water damage in the ELD is 'any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in [the WFD], of the waters concerned'. ELD art 2(1)(b). This definition, which has been interpreted by some Member States to apply to all waters, and other Member States to apply only to surface and groundwater bodies, under the WFD, has been applied in Wales and the rest of the UK only to water bodies. See BIO Intelligence 'ELD effectiveness: scope and exceptions' ss 4.1.3.1–4.1.4 at 100–08 (DG Environment Contract No 07.0307/2013/658873/ETU/D.4, February 2014) (ELD Effectiveness) <http://ec.europa.eu/environment/legal/liability/>.

45 Regulations reg 8(1). The exemptions are less stringent than the ELD and, therefore, arguably unlawful in part. The ELD does not exempt 'damage that ... is threatened after [the deadline for transposition], but is caused by an incident, event or emission that took place before that date'. *ibid.* (emphasis added); see ELD art 17. Wales is not the only country that has adopted less stringent temporal provisions. See eg Act on the investigation, prevention and remedying of environmental damage (Environmental Damage Act) s 60(2) (Denmark) ('Act shall not apply to environmental damage or an imminent threat of environmental damage caused by an emission or event which takes place after 1 July 2008 if it is a consequence of a specific activity which took place and was terminated before that date') (emphasis added). Member States may adopt more stringent provisions. *ibid.* art 16(1); TFEU art 193. Member States may not, however, adopt less stringent provisions. See Case C–213/89 *Queen v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I–2433 para 23 ('Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule').

46 Decision Document (n 18) 9.

47 *ibid.*

48 *ibid.* 9. NRW also assessed whether environmental damage had occurred in respect of other protected species and habitats at, and outside, the SSSI, namely the European otter (*Lutra lutra*), Atlantic salmon (*Salmo salar*), sea trout (*Salmo trutta morpha trutta*) and brown trout (*Salmo trutta*). NRW concluded that no such environmental damage had occurred. *ibid.* 9–11.

49 *ibid.* 12.

indicated that there had been a change in status owing to the quality of phytoplankton in the 2012 assessment. Whereas the waters were classified as 'good' in 2009,⁵⁰ their overall ecological status had declined to 'moderate' by the time of the 2012 assessment.⁵¹ NRW stated that the drop in status was the result of the high levels of blue green algae in the lake in 2009.⁵²

NRW further concluded that DCWW had caused the environmental damage at Llyn Padarn owing primarily to its operation of the sewage treatment works, as well as storm sewage overflows from the sewerage system serving those works.⁵³ NRW also identified DCWW as the source of the nutrients that caused the algal bloom in 2009.⁵⁴ The liability decision stated that DCWW was strictly liable for remediating the environmental damage caused by it. Strict liability applies because DCWW has a permit under the Environmental Permitting Regulations for its sewage discharges.⁵⁵ The litigation had revealed that, in addition to permitted sewage discharges, DCWW had a sewage discharge that was not permitted, for which DCWW subsequently sought authorisation.⁵⁶

Meanwhile, on 10 July 2013, NRW had served a notification on DCWW, directing it to submit proposals to remediate the environmental damage by 10 October 2013.⁵⁷ The notification did not, however, direct DCWW to submit proposals for measures to prevent future damage from sewage discharges.⁵⁸ The liability decision stated that NRW had varied DCWW's permit to reduce phosphate limits from 1.6 to 1.0 mg/l in 2010 and considered that measures carried out by DCWW since 2010 to comply with the revised limit, together with other measures carried out by DCWW to reduce the input of nutrients into the lake, should result in a continued

improvement in phytoplankton quality.⁵⁹

On 4 October 2013, Fish Legal filed an application for judicial review on the basis that NRW should have assessed whether environmental damage had been caused to the SSSI and waters of Llyn Padarn from 30 April 2007 instead of 6 May 2009, and should also have required DCWW to carry out measures to prevent future environmental damage.⁶⁰ The issues were settled just before a scheduled hearing, following acceptance by NRW⁶¹ and Welsh Ministers⁶² that the temporal provisions of the ELD had direct effect. Accordingly, NRW agreed to reassess whether environmental damage had been caused since the earlier date.⁶³

On 6 May 2014, the Cardiff Administrative Court approved the consent order, allowed Fish Legal's application for judicial review, and quashed the liability decision and the notification of liability. The schedule attached to the consent order directed NRW to:

... take into account all environmental damage arising after 30 April 2007, and not merely all that arising after 6 May 2009 as had been the case in the original Decision/Notification. This is because it is accepted that Article 17 of [the ELD], which defines the temporal application of the [ELD], and the first sentence of Article 19 of the same Directive, have direct effect.

The schedule further stated that:

In its fresh consideration, [NRW] will also take into account all environmental damage caused by an emission, event or incident taking place after 30 April 2007 if it derives from an activity which started before that date but which was not finished before then.

50 *ibid* 64.

51 *ibid* 66.

52 *ibid* 67.

53 *ibid* 69.

54 *ibid* 12.

55 Regulations sched 2 para 2; see Environmental Permitting (England and Wales) Regulations 2010/675, as amended sched 2; see ELD annex III para 1 (now referring to Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (Recast) (2010) OJ L334/17. The Regulations establish strict liability for preventing and remediating environmental damage to protected species and habitats, and water, on operators of specified activities, including activities permitted under the Environmental Permitting Regulations. Regulations reg 5(1); see *ibid* sched 2 para 2.

56 See Fish Legal (n 11).

57 Natural Resources Wales 'Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009, Regulation 18(1), notification of liability' (10 July 2013); see Regulations reg 18(1)(c).

58 See Fish Legal 'Fish Legal takes Natural Resources Wales to court' (24 October 2013) www.fishingmagic.com/news_events/news/17279-fish-legal-takes-natural-resources-wales-to-court.html.

59 Decision Document (n 18) 12–13. The other measures include improved management of phosphate stripping, installation of additional phosphorous stripping and a reduction in the quantity of clean surface water entering the sewage system. *ibid* 13.

60 *Seiont, Gwryfai and Llyfni Anglers' Society v Natural Resources Wales* Background and Grounds of Claim (Cardiff Administrative Court Case No CO/14846/2013, 4 October 2013) para 19. Fish Legal joined the Welsh Government, which had issued the Regulations, as well as DCWW to the proceedings. Fish Legal also alleged that NRW had used an unlawful baseline to assess the damage, had taken an unlawful approach to falling populations of Arctic charr, and had unlawfully failed to treat the change in ecological status from reduced dissolved oxygen as environmental damage. *ibid* paras 100–18.

61 See *R (on the application of Seiont, Gwryfai and Llyfni Anglers' Society) v Natural Resources for Wales* Detailed Grounds of Defence (Cardiff Administrative Court Claim No CO/14846/2013, 14 February 2014) paras 11–12.

62 *Seiont, Gwryfai and Llyfni Anglers' Society v Natural Resources for Wales* Detailed Grounds of Resistance on behalf of the Second Interested Party (Cardiff Administrative Court Claim No CO/14846/2013, 14 February 2014) para 4.

63 See Fish Legal (n 11). The new assessment may consider whether other operators also caused environmental damage since that time. *ibid*. Only operators who carry out activities listed in Schedule 2 of the Regulations are liable for biodiversity and water damage as well as biodiversity damage. Regulations reg 5. Non-Schedule 2 operators are liable for biodiversity damage only if they are negligent or otherwise at fault.

It is [NRW's] interpretation, which should not be taken to be the interpretation of [DCWW], that Damage caused by an emission, event or incident which took place after 30 April 2007, where such damage derives from an activity taking place before 30 April 2007 but which is not within the second indent of Article 17(2), is not excluded from the scope of the Directive.

IV. The start date for liability under the Environmental Liability Directive

NRW and Welsh Ministers thus conceded that the start date for liability under the ELD is not 6 May 2009, as stated by the Regulations, but rather 30 April 2007, as provided by Article 19(1) of the ELD. Article 19(1) states, in pertinent part, that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2007'.⁶⁴

The Cardiff Administrative Court is not the first court to consider the temporal provisions of the ELD. They were considered by the Court of Justice of the European Union (CJEU) in *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico (Raffinerie Mediterranee)*.⁶⁵ The case concerned environmental damage from a large petrochemical complex to a roadstead (sheltered anchorage), off the coast of Augusta, Sicily, next to the complex. Although the issues referred to the CJEU did not include the date on which liability under the ELD applied to the facts of the case,⁶⁶ the CJEU referred to the date because contaminants from the complex had polluted the roadstead since the 1960s. The CJEU stated that the start date for considering whether liability for environmental damage under the ELD has occurred is 30 April 2007.⁶⁷ The CJEU referred the case to the referring court to determine whether the environmental damage which the authorities had required operators at the complex to remediate fell after that date, stating that if the ELD was not applicable, national law applied.⁶⁸

64 See Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* [1997] ECR I-7411 para 44 ('during the transposition period ... the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period').

65 Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-1919.

66 Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Sicilia (Italy) lodged on 21 August 2008 in Case C-378/08 *ERG Raffinerie Mediterranee SpA and Others v Ministero dello Sviluppo Economico and Others* (2008) OJ C301/14.

67 Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-1919 para 38. The CJEU stated that it did not have jurisdiction under TFEU article 267 to rule on the interpretation or validity of the temporal provisions in respect of the facts of the case because the referring court had not submitted the facts to it. *ibid* para 42.

68 *ibid* paras 43-44.

A. Direct effect

The Cardiff Administrative Court thus had indisputable authority on which to approve the consent order stating that the ELD has direct effect in respect of the start date for liability for environmental damage. Although a directive provides broad discretion to Member States as to the form in which they adopt it and the measures by which they implement it,⁶⁹ a Member State's discretion is limited. The legislation transposing the directive must, among other things, 'ensure the full and complete application of the directive'.⁷⁰ Further, 'the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'.⁷¹

It is settled law that the provisions of a directive are supreme to the legislation that transposes it into national law.⁷² A Member State cannot, therefore, transpose a provision of a directive in a manner that is not compatible with the directive itself. If the national law is not in compliance with the directive, it is invalid and the relevant provision of the directive has direct effect⁷³ provided that the provision is clear, precise and unconditional.⁷⁴

69 See TFEU art 288, which provides, in pertinent part, 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'.

70 Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017 para 27; see Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV ea v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403 para 55 ('obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation').

71 Case C-415/01 *Commission v Belgium* [2003] ECR I-2081 para 21.

72 Ludwig Krämer notes that this principle of law has applied, uncontested, for 50 years. He further notes that the acceptance of the principle is despite article 10 of the 'draft "Treaty establishing a Constitution for Europe" of 2003', which provided that: '[T]he Constitution and law adopted by the Union's institutions in exercising competences conferred on it, shall have primacy over the law of the Member States' being withdrawn from incorporation into the Lisbon Treaties due to 'fears that the citizens in Europe would not understand or not accept this provision'. Ludwig Krämer 'Direct effect and consistent interpretation: strengths and weaknesses of the concepts' in J H Jans, R Macrory and A-M Moreno Molina (eds) *National Courts and EU Environmental Law* (Europa Law Publishing 2013) 51 at 61.

73 See Jan H Jans and Hans H B Vedder *European Environmental Law after Lisbon* 185-86 (Europa Law Publishing 4th edn 2012); Ludwig Krämer 'The implementation of Community environmental directives within Member States: some implications of the direct effect doctrine' (1991) 3(1) *Journal of Environmental Law* 39 at 49.

74 See Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201 para 42 ('[i]t is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive'); see David Edwards, Robert Lane *Edward and Lane on European Union Law* (Edward Elgar 2013) 295. As Dr Krämer stated: 'the issue is not whether a directive as a whole is precise and unambiguous. Each individual article, and possibly each subparagraph or single sentence, must be looked at separately in relation to the issue of immediate effect'. See Ludwig Krämer (n 73) 41.

National law cannot set aside the EU legislation transposed by it.⁷⁵ Further, when a national court interprets the transposing provision of national law, it must do so to achieve the purpose of the directive.⁷⁶

As indicated above, the Welsh Government transposed the ELD on 6 May 2009 instead of by 30 April 2007, the deadline for transposition. A Member State is not, however, permitted to take advantage of its failure to transpose a directive by the deadline for transposition to limit its effect.⁷⁷ If a Member State does so, and the conditions applicable to direct effect are satisfied, ‘the national provision [is] set aside and the EU provision [is] applied’.⁷⁸

If DCWW had not been an ‘emanation of the state’, the Welsh Government’s failure to transpose the ELD until 6 May 2009 would have meant that the ELD did not apply to DCWW before that date.⁷⁹ Directives are addressed to Member States, not companies or other persons. As an emanation of the state, however, DCWW was required to prevent or remedy environmental damage since 30 April 2007.⁸⁰

75 See Case C–213/89 *Queen v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I–2433 para 23.

76 Case C–106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I–4135 para 8.

77 See Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 00053 para 24; see Ludwig Krämer (n 72) 55–56; see also Agustín García-Ureta and Angel-Manuel Moreno Molina ‘Spain’ in J H Jans, R Macrory and A-M Moreno Molina (eds) *National Courts and EU Environmental Law* (Europa Law Publishing 2013) 363 at 370–71 (Spanish administrative courts have ruled that Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (2001) OJ L197/30, had direct effect between the date for its transposition and the date on which the transposing legislation entered into effect).

78 See Ludwig Krämer (n 72) 61.

79 The duty to transpose directives is on the UK as a whole. The Welsh Government enacted the Welsh Regulations pursuant to its delegated powers under the Government of Wales Act 2006. See Jan H Jans and Hans H B Vedder *European Environmental Law after Lisbon 2008* (Europa Law Publishing 4th edn 2012) (‘[i]ndividuals do not ... act unlawfully when they act in breach of standards set by environmental directives, if these standards have not been transposed into national legislation’).

80 See Jan H Jans and Hans H B Vedder (n 79) 208 (water and other utility companies may be an ‘emanation of the state’, which term should be interpreted broadly); see also *ibid* (quoting Case C–188/89 *Foster v British Gas plc* [1990] ECR I–3313 paras 20–22 (‘provisions of a directive having direct effect “may, in any event”, be relied on against a body, whatever its legal form, “which has been made responsible, pursuant to a measure adopted by the State for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals”’); *ibid* 210–11 (discussing linkage between obligations of administrative authorities and those of individuals in duty of operators to take preventive measures under article 5(1) of the ELD); Case C–279/12 *Fish Legal v Information Commissioner* (CJEU 19 December 2013) (not yet published) para 73 (water companies that provide public services relating to the environment are classified as “public authorities’ [under Directive 2003/41 on public access to environmental information], if they do not determine in a genuinely autonomous manner the way in which they provide those services”).

Further, the Welsh Government’s failure to adopt enabling legislation to delegate the necessary powers to the (now) NRW to implement and enforce the ELD from 30 April 2007 does not mean that the NRW does not have such powers, as evidenced by the consent order that applies to the 30 April 2007 date. Under the *Fratelli Costanzo* doctrine,⁸¹ national administrative agencies, as well as the judiciary, are bound by the direct effect doctrine. That is, the authorities must apply a provision of a directive that is ‘unconditional and sufficiently precise’,⁸² and not the provision of national transposing legislation when the latter is not in conformity with the directive.⁸³ Although this power is rarely used because the authority must be assured that the transposing legislation does not conform to the directive,⁸⁴ the doctrine would seem to apply to Article 19(1) owing to its specificity, precision and clarity, as well as its absence of any conditions.

B. Implications of the Llyn Padarn litigation

The Welsh Government was not the only jurisdiction in the UK to transpose and bring the ELD into effect after 30 April 2007. The other governments in the UK issued regulations transposing the ELD on 1 March 2009 (England),⁸⁵ 24 June 2009 (Scotland)⁸⁶ and 24 July 2009 (Northern Ireland),⁸⁷ with the respective regulations entering into force on those dates.⁸⁸

The UK was not alone. Only Hungary, Italy, Latvia and Lithuania transposed the ELD by 30 April 2007.⁸⁹ Following

81 See Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839 para 31.

82 *ibid* paras 29, 31.

83 See Angel-Manuel Moreno Molina ‘Direct effect and state liability’ in J H Jans, R Macrory and A-M Moreno Molina (eds) *National Courts and EU Environmental Law* (Europa Law Publishing 2013) 73 at 97.

84 See *ibid*. Professor Moreno Molina noted that although the doctrine is rarely used, an administrative circular in the Flemish Region of Belgium requests authorities to apply the Environmental Impact Assessment Directive directly for Annex II projects due to the transposing legislation failing to comply with EU law. *ibid*.

85 Environmental Damage (Prevention and Remediation) Regulations 2009/153, as amended reg 8(1).

86 Environmental Liability (Scotland) Regulations SSR 2009/266, as amended regs 5(f), (g).

87 Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) SRNI 2009/252, as amended regs 6(a), (b).

88 Gibraltar issued the transposing legislation on 11 December 2008, bringing it into effect on the same day. Environmental Liability Regulations 2008 LN 2008/100 *Gibraltar Gazette* No 3689 (11 December 2008), as amended reg 1.

89 See ‘Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Under Article 14(2) of Directive 2004/35/CE on the environmental liability with regard to the prevention and remedying of environmental damage’ 3 COM(2010) 581 final (12 October 2010) <http://ec.europa.eu/environment/legal/liability/>. Italy transposed the ELD on 29 April 2006; full transposition, however, did not occur until 6 August 2013.

infraction proceedings by the European Commission, the CJEU subsequently issued rulings against Austria,⁹⁰ Finland,⁹¹ France,⁹² Greece,⁹³ Luxembourg,⁹⁴ Slovenia⁹⁵ and the UK⁹⁶ owing to their failure to transpose the ELD by the deadline.

Some of the Member States that failed to transpose the ELD by 30 April 2007 applied their transposing legislation retrospectively to that date.⁹⁷ Seventeen Member States including the UK, however, applied a later effective date.⁹⁸ Whilst the Llyn Padarn litigation cannot, of course, have any effect on the implementation and enforcement of the legislation transposing the ELD in England, Scotland, Northern Ireland or the other 16 Member States that brought the ELD into effect after 30 April 2007, the litigation, and the acceptance by the Welsh Ministers and NRW that the ELD has direct effect in respect of its effective date illustrates the tenuous nature of similar legislative provisions in the other jurisdictions.

90 Case C-422/08 *Commission v Austria* [2009] ECR I-107.

91 Case C-328/08 *Commission v Finland* [2008] ECR I-200.

92 Case C-330/08 *Commission v France* [2008] ECR I-191.

93 Case C-368/08 *Commission v Greece* [2009] ECR I-89.

94 Case C-331/08 *Commission v Luxembourg* [2009] ECR I-45.

95 Case C-402/08 *Commission v Slovenia* [2009] ECR I-34.

96 Case C-417/08 *Commission v United Kingdom* [2009] ECR I-106.

97 The Member States with national legislation that transposed the ELD with retrospective application to 30 April 2007 are as follows (the dates of the transposing legislation are in brackets): Belgium (Walloon Region, 29 December 2007; Flemish Region, 12 February 2008; Brussels-Capital Region, 14 November 2008); Germany (15 October 2007); Greece (29 September 2009); Malta (29 April 2008); Poland (primary legislation entered into effect on 30 April 2007; Executive Regulations entered into effect on 26 February 2008 and 4 June 2008); Romania (29 June 2007); Spain (23 October 2007). See Stevens & Bolton LLP 'Legal analysis of integrating the ELD into 11 national frameworks' 32-33' (16 December 2013, DG Environment, Negotiated Procedure ENV.A.1/ETU/2013Ares No 1258127) <http://ec.europa.eu/environment/legal/liability/>.

98 The other Member States that transposed the ELD after 30 April 2007 and that brought it into force after that date are as follows (dates of the entry into force of the transposing legislation are in brackets): Austria (Burgenland, 12 January 2010; Carinthia, 1 October 2009 and 20 February 2010; Lower Austria, 6 August 2009; Salzburg, 1 July 2010; Styria, 11 February 2010; Tyrol, 22 January 2010; Upper Austria, 5 September 2009; Vienna, 2 September 2009; Vorarlberg, 3 February 2010); Belgium (Federal: Royal Order of 3 August 2007, with regard to the prevention and remedying of environmental damage when placing on the market GMOs or GMO containing products, 20 September 2007; Law of 21 April 2007 modifying Law of 20 January 1999 concerning the protection of the marine environment; 19 November 2007; Royal Order of 8 November 2007 on the prevention and remedying of environmental damage resulting from road, rail, water or air transportation, alien plant species and alien animal species, as well as wastes during their transit, published 9 November 2007; applies retroactively to 1 November 2007); Bulgaria (29 April 2008); Cyprus (31 December 2007); Czech Republic (17 August 2008); Denmark (1 July 2008); Estonia (16 December 2007); Finland (1 July 2009); France (27 April 2009); Ireland (1 April 2009); Luxembourg (1 May 2009); Netherlands (1 June 2008); Portugal (1 August 2008); Slovakia (1 September 2007); Slovenia (26 July 2008); Sweden (1 August 2007). See *ibid.*

As the Fish Legal litigation illustrates, the issue is not purely academic. For example, persons wishing to submit comments and observations to competent authorities on an alleged imminent threat of, or actual, environmental damage⁹⁹ must consider whether to base them on the effective date specified in the transposing legislation or 30 April 2007. Competent authorities that require operators to remediate environmental damage caused by them must consider whether to require them to remediate damage that occurred from 30 April 2007 or the later date specified in national law. The existence of a post-30 April 2007 effective date for the ELD in national law deters public participation in the first instance, as well as being contrary to the polluter pays principle in the second instance. Such national law is thus in breach of two key concepts inherent in the ELD.

Further, as a practical matter, the existence of a post-30 April 2007 start date for application of liability under the ELD complicates environmental due diligence in share and asset transactions because lawyers must base their advice on potential liability for preventing and remediating environmental damage under the ELD on 30 April 2007, with the consequent need to explain to clients why this is the applicable date when it varies from the date in the transposing legislation.

V. Retroactive or retrospective effect of the Environmental Liability Directive

The application of liability from 30 April 2007 leads to another issue concerning the temporal effect of the ELD; whether it has retroactive or retrospective effect.

A. Prospective, retroactive and retrospective laws

Legislation can be prospective, prospective and retroactive, prospective and retrospective, or prospective, retroactive and retrospective. It is not always easy to differentiate between the various types because:

... in one sense almost all legislation can be characterized as retroactive, if by that notion we mean a law that may surprise people who have made decisions in reliance on the existing legal regime. The technical reason for this verity is that the operation of almost all legislation depends on antecedent facts. As a result, legislation inevitably has the potential to upset settled, investment-backed expectations.¹⁰⁰

99 See Regulations, reg 29(1); ELD art 12(1).

100 Daniel E Troy 'Toward a definition and critique of retroactivity' (2000) 51 *Alabama Law Review* 1329 at 1330. The common law is, as a general rule, retroactive as well as prospective because it applies new law to pre-existing facts. See Jill E Fisch 'Retroactivity and legal change: an equilibrium approach' (1997) 110 *Harvard Law Review* 1055 at 1057.

Another commentator stated this concept more forcefully, commenting that: '[t]here is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for'.¹⁰¹

The words 'retrospective' and 'retroactive' are occasionally used interchangeably, usually with qualifications to distinguish them.¹⁰² Their meanings are more often stated by distinguishing between them. As described by Professor Driedger, the leading Canadian authority on statutory interpretation:¹⁰³

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards* but it looks backwards in that it attaches new consequences for *the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.¹⁰⁴

Or, to describe the difference another way:

... a retroactive statute changes pre-existing legal rules, statutory or common law, that were operative prior to the enactment of new legislation. The result is that the legal rules in existence before the statute are either voided, affirmed, or modified by the new statute as of its effective date. ... An exclusively retrospective statute operates forward, in that it gives new legal significance from its effective date to pre-enactment events or facts. A retrospective statute, like a retroactive one, operates backwards, but unlike a retroactive statute, it attaches new future legal consequences to an event that occurred before the statute was passed.¹⁰⁵

The test for determining whether legislation is retrospective

is whether it contains language that 'indicates that the legal consequences of a prior event are not only changed as of the date of its occurrence but also from the statute's time of its commencement if that is later'.¹⁰⁶ The determination is not always easy to make. For example, legislation that adds 'new regulatory burdens ... as a condition of continuing [an] enterprise'¹⁰⁷ is not 'truly retroactive'.¹⁰⁸ Examples in EU environmental law include the Landfill Directive¹⁰⁹ and the Integrated Pollution Prevention and Control Directive (now Industrial Emissions Directive (IED)),¹¹⁰ both of which increased the cost of continuing existing operations. Such regulatory changes are common.¹¹¹

In order to mitigate the effect of new regulatory burdens for existing businesses, environmental (and non-environmental) laws frequently include so-called 'grandfathering' provisions, usually adopted to phase in the new legislation gradually. Grandfathering exempts existing operations or facilities from the immediate impact of policy changes by disapplying the new legislation to them;¹¹² a process that also benefits competent authorities which could be overwhelmed if the legislation applied to all operators at the same time. A phase in approach provides effective dates for the application of the new legislation to existing activities on the basis of the degree of risk or other criteria.¹¹³ In essence, the existence of grandfathering and phasing in confirms the retroactive effect of legislation because neither would be necessary if legislation did not have a retroactive effect.¹¹⁴

The adoption of retroactive legislation that imposes liability for remediating historic contamination is particularly common. For example, the regime to

101 Bryant Smith 'Retroactive laws and vested rights' (1927) 5(3) *Texas Law Review* 231 at 233.

102 See *Landgraf v USI Film Products*, 511 US 244, 277 (1994) ('Although [specified] language suggests a categorical presumption in favor of application of all new rules of law, we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely "retroactive" effect'; 'nor have we cast doubt on the traditional presumption against truly "retrospective" application of a statute'); Kaneshwar Nath Chaturvedi 'Legislative retrospectivity and rule of law' (2013) 34(3) *Statute Law Review* 207 at 207 ('terms "retrospective" and "retroactive" are used interchangeably').

103 See Elizabeth Edinger 'Retrospectivity in law' (1995) 29 *University of British Columbia Law Review* 5 at 10.

104 E A Driedger 'Statutes: retroactive retrospective reflections' (1978) 56 *Canadian Bar Review* 269 (cited by Edinger (n 103) 10–11 (emphasis original)); see also Michael McDonald 'An inquiry into the ethics of retrospective liability: The case of British Columbia's Bill 26' (1995) 29 *University of British Columbia Law Review* 63 at 68 (agreeing with Elizabeth Edinger that retroactive and retrospective laws have different temporal applications).

105 Gregory J DeMars 'Retrospectivity and retroactivity of civil legislation reconsidered' (1983) 10 *Ohio Northern University Law*

Review 253 at 255.

106 *ibid* 256.

107 Alfred R Light 'New federalism, old due process, and retroactive revival: constitutional problems with CERCLA's amendment of state law' (1992) 40 *University of Kansas Law Review* 365 at 391 (referring to *Chicago & Alton Railroad Company v Tranbarger*, 238 US 67, 73 (1915)).

108 *ibid*.

109 See Council Directive 1999/31 on the landfill of waste (1999) OJ L182/1 recital 26 ('[w]hereas the future conditions of operation of existing landfills should be regulated in order to take the necessary measures, within a specified period of time, for their adaptation to this directive on the basis of a site-conditioning plan').

110 See Directive 2008/1 concerning integrated pollution prevention and control (codified version) (2008) OJ L24/8 recital 13 ('[s]ome of the provisions adopted pursuant to this directive must be applied to existing installations after 30 October 2007 and others had to be applied as from 30 October 1999').

111 See Louis Kaplow 'An economic analysis of legal transitions' (1986) 99 *Harvard Law Review* 509 at 522 (not unreasonable to anticipate that laws will, and do, change 'quite frequently, and often in predictable ways').

112 See *ibid* 584.

113 Fisch (n 100) 1067–68.

remediate contaminated land in the UK is retroactive,¹¹⁵ as are regimes in Belgium,¹¹⁶ Italy,¹¹⁷ the Netherlands,¹¹⁸ Poland,¹¹⁹ Sweden¹²⁰ and many other Member States and other jurisdictions throughout the world.¹²¹ In contrast, retroactive legislation is explicitly barred in some jurisdictions not only for criminal legislation but also civil legislation.¹²² For example, the Irish Constitution provides that '[t]he Oireachtas [Parliament] shall not declare acts to be infringements of the law which were not so at the date of their commission'.¹²³

Some jurisdictions have rejected the implied adoption of retroactive liability. For example, the Swedish Supreme Administrative Court concluded that a company that had manufactured paper and pulp between 1965 and 1975 was not liable for remediating environmental damage caused by its discharges of pentachlorophenol fibres into Lake Järnsjön.¹²⁴ The company, which had had a permit to

discharge the fibres, had transferred the business to another company in 1975. The court concluded that a 1989 law, which provided that a company remained liable for remediating damage caused by it after it had been sold or closed, could not be applied retroactively.¹²⁵ The court stated that:

It does not appear ... reasonable to apply a statute of the type actualized in the case retroactively to the disadvantage of the individual, in any case not unless this is stated in special transitional regulations or can be clearly deduced by the legal system in general that such an application is implied.¹²⁶

B. Temporal provisions in the Environmental Liability Directive

Unlike the Swedish legislation, the temporal provisions of the ELD specifically refer to damage from an activity that began before its effective date, provided that the activity continues after that date. The first two indents of Article 17 provide that the ELD does not apply to:

... damage caused by an emission, event or incident that took place before [30 April 2007], [or] damage caused by an emission, event or incident which takes place subsequent to [30 April 2007] when it derives from a specific activity that took place and finished before [30 April 2007].¹²⁷

The word 'damage' is defined as 'a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly'.¹²⁸

The meaning of Article 17 is significant because any retroactivity or retrospectivity could result in additional costs to an operator who carried out an activity that caused environmental damage prior to and after 30 April 2007. The ELD does not only impose liability on an operator who has caused damage to waters (water damage) or protected species and natural habitats (biodiversity damage) to remediate them to their baseline condition;¹²⁹ it also imposes liability on an operator to carry out

114 See *ibid.*

115 See Valerie Fogleman 'The contaminated land regime: Time for a regime that is fit for purpose (Part 2)' (2014) 6(2) *International Journal of Law in the Built Environment* 129 at 140 (describing target of remediating sites that were contaminated before Part 2A entered into force).

116 See BIO Intelligence Service 'Implementation challenges and obstacles of the Environmental Liability Directive (ELD) Annex – Part A: Legal analysis of the national transposing legislation' Belgium s 2, 7–10 (describing legislation in the Flemish Region, Brussels-Capital Region and Walloon Region) <http://ec.europa.eu/environment/legal/liability/>.

117 See *ibid* Italy s 2, 198–99.

118 See *ibid* Netherlands s 2, 215–17.

119 See *ibid* Poland s 2, 237–38.

120 See *ibid* Sweden s 2, 335–37.

121 See Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 USC s 9607(a); *United States v Olin Corporation*, 107 F.3d 1506, 1513–14 (11th Cir. 1997) ('[a]n analysis of CERCLA's purpose, as evinced by the statute's structure and legislative history, also supports the view that Congress intended the statute to impose retroactive liability for cleanup'); *ibid* 1515 ('we find clear congressional intent favoring retroactive application of CERCLA's cleanup liability provisions'); see also *United States v Alcan Aluminum Corporation*, 315 F.3d 179, 188 (2d Cir. 2003) (agreeing that challenge to CERCLA's retroactivity is not a 'winning argument'); *Franklin County Convention Facilities Authority v American Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) ('Congress intended CERCLA to function retroactively. CERCLA's chief liability provision uses the past tense').

122 Article 7(1) of the European Convention on Human Rights provides that: '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'.

123 Constitution of Ireland art 15.5; see Aoife Shields 'The last piece of the jigsaw puzzle in EC regulation of contaminated land — an Irish perspective' (2008) 16(6) *Environmental Liability* 206 at 213. In a somewhat similar manner to Ireland, article 97 of the Norwegian Constitution provides that 'no law may be given retroactive effect'. See Ulf Bernitz 'Retroactive legislation in a European perspective — on the importance of General Principles of Law, Stockholm Institute for Scandinavian Law' 43 at 45 <http://www.scandinavianlaw.se/pdf/39-3.pdf> Article 97 is regarded as a general rule from which it is possible to make some exceptions.

ibid.

124 See Bernitz (n 123) 55–56 (citing RÅ 1996: 57) <http://www.scandinavianlaw.se/pdf/39-3.pdf>; see also Staffan Magnusson 'Application of the General Principles of Community law' s 4.2 (September 2000) http://www.courdecassation.fr/venements_23/colloques_activites_formation_4/2000_2038/the_general_9439.html.

125 See Bernitz (n 123) 56–57 (citing RÅ 1996: 57).

126 *ibid* 57 (translation by Bernitz).

127 ELD art 17.

128 *ibid* art 2(2).

129 *ibid* annex II para 1.1.1; see *ibid* art 2(14) ('baseline condition' is defined as 'the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the

complementary¹³⁰ and compensatory remediation¹³¹ for water and biodiversity damage. The cost of such measures is higher, in some cases much higher, than the cost of remediating environmental damage under national liability systems¹³² that do not impose liability for complementary or compensatory remediation.¹³³

In her opinion in *Raffinerie Mediterranee*, AG Kokott emphasised that the intent of the first two indents of Article 17 is to bar the retroactive application of the ELD on the basis of the ‘principle of legal certainty, which in general precludes a Community measure from taking effect from a point in time before its publication’.¹³⁴ She commented that the Commission had rejected retroactive application in preparatory work for the ELD,¹³⁵ and that ‘the legislature expressly stated that it did not intend to give the [ELD] any such retroactive effect’.¹³⁶ She referred to recital 30 of the ELD, which provides that ‘[d]amage caused before the expiry of the deadline for implementation of this Directive should not be covered by its provisions’.¹³⁷ She concluded that ‘the [ELD] does not therefore apply to environmental damage which was caused by activities which were carried out before 30 April 2007’.¹³⁸

AG Kokott’s conclusion that the ELD does not have retroactive effect does not mean that it does not have retrospective effect. The distinction between retroactive and retrospective legislation discussed above applies to EU law. As explained by Nina Póltorak:

[CJEU] case law reflects theories which divide temporal effects of new law into retroactive and retrospective ones. ‘True’ retroactivity means influencing past situations which have completely exhausted their legal effects. Retrospectivity (immediate effect), on the other hand, means influencing present results of past situations or events. EU law may not be applied retroactively, but as a rule, it has an immediate effect (retrospectivity). It means that the ‘new rules apply immediately to the future effects of a situation which arose under the old rule’.¹³⁹

Whilst the Commission, as stated by AG Kokott, had rejected the imposition of retroactive liability in the ELD,¹⁴⁰ it did not reject the imposition of retrospective liability.¹⁴¹ As AG Kokott stated in *Raffinerie Mediterranee*, it is settled EU law that:

best information available’).

130 Complementary remediation consists of measures to compensate for the net loss of natural resources when the primary remedial measures have not fully restored the natural resource and its impaired services to the state that would have existed if the damage had not occurred. *ibid* annex II para 1.1.2; see Regulations sched 4 part 1 para 4(3).

131 Compensatory remediation is compensation for the interim loss of the natural resource and the services provided by it from the time that it was damaged until its full restoration. ELD annex II para 1.1.3; see Regulations sched 4 part 1 para 5(1).

132 See Commissariat Général au Développement Durable ‘La directive “Responsabilité environnementale” et ses méthodes d’équivalence’ 3 (No 19, April 2010) (one incident in 1996 involving the release of herbicides, insecticides and fungicides after a fire at a manufacturing facility cost just over €10,000, but following the ELD would have cost €4 million; in an incident involving the leakage of bleach from a paper manufacturer in 1997, the cost of remediating the environmental damage would have increased from €42,700 to between €140,000 and €400,000) <http://www.developpement-durable.gouv.fr/IMG/pdf/ED19c.pdf>.

133 Only Germany imposed liability for complementary remediation prior to the ELD; no Member State imposed compensatory remediation. See ELD effectiveness (n 44) s 3.1.2, 69.

134 Cases C–378/08, C–379/08 and C–380/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* Opinion of AG Kokott (22 October 2009) para 63.

135 *ibid* para 62 and n 21 (referring to European Commission ‘White Paper on environmental liability’ COM(2000) 66 final (9 February 2000) s 4.1, 14 (referring twice to ‘retroactivity’ and once to ‘retroactive’); and European Commission ‘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 Explanatory Memorandum’ COM(2002) 17 final (23 January 2002) s 30.6.19, 17 and 24).

136 AG Opinion (n 134) para 63.

137 *ibid* para 62.

138 *ibid* para 76. AG Kokott stated that the EU legislature may impose retroactive liability in exceptional circumstances provided that the purpose to be attained demands such liability and the legitimate expectations of the persons concerned are properly respected. *ibid* para 63 (referring to Case 98/78 *Racke v Hauptzollamt Mainz* [1979] ECR 69 para 20; Case C–110/97 *Netherlands v Council* [2001] ECR I–8763 para 151; and Case C–17/01 *Finanzamt Sulingen v Sudholz* [2004] ECR I–4243 para 33).

139 Nina Póltorak ‘Ratione temporis application of the preliminary rulings procedure’ (2008) 45 *Common Market Law Review* 1357 at 1359 (quoting Case 270/84 *Licata v Economic and Social Committee* [1986] ECR 2305 para 31).

140 See eg European Commission ‘Questions and answers Environmental Liability Directive’ (MEMO/07/157, 27 April 2007) ([t]he Directive will not apply retroactively, which means that operators will not be held responsible for damage they caused before the Directive enters into force’) http://europa.eu/rapid/press-release_MEMO-07-157_en.htm?locale=en.

141 The Commission occasionally used the word ‘retrospective’ in the sense of ‘retroactive’. See ‘European Commission 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 Explanatory Memorandum’ COM(2002) 17 final (23 January 2002) s 6.19, 23 (‘proposed regime should have no retrospective effect’). The explanatory memorandum, which is not printed in the Official Journal, further stated that ‘CERCLA is a retrospective programme, i.e. it also creates liability for waste legally disposed of before its entry into force’. *ibid* s 24, 11. Liability under CERCLA is, however, retroactive not retrospective. See *Franklin County Convention Facilities Authority v American Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) (‘Congress intended CERCLA to function retroactively. CERCLA’s chief liability provision uses the past tense. ... Moreover, CERCLA reaches conduct that occurred prior to its passage because it authorizes government and private parties to clean up abandoned waste sites and then seek recovery of the costs from responsible parties’); see also other cases cited in n 121

... new rules can apply immediately to the future effects of a situation which arose under the old rules. The scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose earlier.¹⁴²

The CJEU did not discuss the temporal provisions of the ELD in any depth in its judgment in *Raffinerie Mediterranee*.¹⁴³ The court stated, however, that, because the ELD describes situations that fall outside it in negative terms, 'any other temporal situation is, in principle, covered by the liability mechanism established by [the ELD]'.¹⁴⁴ The CJEU thus concluded that the ELD: '... applies to damage caused by an emission, event or incident which took place after 30 April 2007 where such damage derives either from activities carried out after that date or activities which were carried out but had not finished before that date'.¹⁴⁵

This statement differs from AG Kokott's conclusion that 'the [ELD] does not ... apply to environmental damage which was caused by activities which were carried out before 30 April 2007'.¹⁴⁶ The question thus arises as to whether the statements can be reconciled or whether the CJEU implicitly rejected AG Kokott's conclusion.¹⁴⁷ The answer depends, in part, on the nature of the causal connection required by the

ELD between an operator's activity that was carried out before 30 April 2007 and environmental damage that occurs after that date.¹⁴⁸ As discussed below, the causal connection may be narrow so that it applies only to damage immediately and directly caused by an operator's activity, or broad so that it also applies to passive damage indirectly caused by the activity.

In analysing the point at which liability applies to environmental damage under the ELD, AG Kokott agreed with the Commission that the ELD 'must apply where continued activity results in new damage',¹⁴⁹ stating that this interpretation of Article 17 'is necessary in particular if the obligation under Article 5 [of the ELD] to prevent environmental damage is to be discharged'.¹⁵⁰ (Article 5 provides that, when 'environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures'.¹⁵¹)

She explained that: '[t]he fact that an activity was begun before the entry into force of the [ELD] cannot render

above.

142 AG Opinion (n 134) para 64. AG Kokott cited seven cases in which the CJEU had applied the principle. *ibid* nn 23 and 24, citing Case 143/73 *SOPAD SA* [1973] ECR 1433 para 8; Case 270/84 *Licata v ESC* [1986] ECR 2305 para 31; Case C-122/96 *Saldanha and MTS Securities Corporation v Hiross Holding AG* [1997] ECR I-5325 para 14; Case C-162/00 *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer* [2002] ECR I-1049 paras 50 and 55; Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465 para 43; Case 84/78 *Tomadini v Amministrazione delle Finanze dello Stato* [1979] ECR 1801 para 21; Case 278/84 *Germany v Commission* [1987] ECR I para 36; Case C-60/98 *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED)* [1999] ECR I-3939 para 25. None of the cases involved environmental issues.

143 Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-1919.

144 *ibid* para 39.

145 *ibid* para 41.

146 See *Seiont, Gwyrfai and Llyfni Anglers' Society v Natural Resources Wales* Claimant's Supplementary Skeleton Argument for hearing 1 May 2014 (Cardiff Administrative Court Case No CO/14846/2013) para 23 fn 6.

147 Defining the point at which liability for remediating natural resources arises is notoriously difficult, as illustrated by judicial interpretation of the applicable date for natural resource damages under CERCLA. The example is pertinent because, although the scope of natural resources to which CERCLA applies differs substantially from those to which the ELD applies, primary, complementary and compensatory remediation under the ELD is based, in large part, on CERCLA. See European Commission '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 Explanatory Memorandum' COM(2002) 17 final (23 January 2002) s 23 ('CERCLA is sufficiently similar in terms of objectives and means to this proposal to make it a good reference model for the purposes of cost extrapolation'). Restoration costs under CERCLA include restoring the damaged natural resource to its baseline condition or replacing it with an equivalent natural resource, plus the lost use of the

natural resource from the time it is damaged until its full restoration. 43 CFR s 11.15. It is sufficient to state, for purposes of this article, that courts have disagreed on the meaning of the temporal provision in CERCLA that provides that liability does not attach 'where such damages and the release of a hazardous substance from which [natural resource] damages resulted have occurred wholly before [CERCLA's enactment date of] December 11, 1980'. 42 USC s 9607(f)(1); see *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 716 F. Supp. 676, 681 (D. Mass. 1989) ('[a]lthough circular ... fairly read, [definition] appears to define damages as monetary quantification stemming from an injury'); *Coeur d'Alene Tribe v ASARCO Inc.*, 280 F. Supp. 2d 1094, 1114 (D. Idaho 2003) (damages "occur" as a general rule when the property owner ... or some entity ... incurs expenses due to the injury to natural resources"); and *State of Montana v Atlantic Richfield Company*, 266 F. Supp. 2d 1238, 1243-44 (D. Mt. 2003) (concluding that damages 'occurred' at the time of the 'injuries to, or destruction or loss of natural resources').

148 The test for causation at English law, for example, differs according to 'the rule by which responsibility is being attributed'. *Environment Agency (formerly National Rivers Authority) v Empress Car Company (Abertillery) Ltd* [1999] 2 AC 22, 29, [1998] 2 WLR 350 (HL); see also *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, 73 (if causal requirements are not expressly stated in a statute, 'courts will construe the statute as requiring the causal connection which best gives effect to its policy').

149 AG Opinion (n 134) para 67.

150 *ibid*.

151 ELD art 5(1). NRW had contended that it had a power but not a duty to order an operator, who was not doing so, to carry out preventive measures. See *Seiont, Gwyrfai and Llyfni Anglers' Society v Natural Resources Wales* Background and Grounds of Claim (Cardiff Administrative Court Case No CO/14846/2013, 4 October 2013) paras 114-15. This contention is incorrect. As indicated above, article 5(1) of the ELD provides that an operator 'shall, without delay, take the necessary preventive measures' in the event of an imminent threat of damage. Whilst article 5(3) provides that '[t]he competent authority may, at any time ... require the operator to take the necessary preventive measures', the use of the word 'may' reflects that there is no need for a competent authority to require an operator to do so if the operator has already carried them out or is doing so. Further, the ELD uses the word 'may' in the same context in respect of remedial measures. *ibid* art 6(2). The Regulations clearly provide that there is a duty on the enforcing authority to order an operator who has caused

worthless the obligation to take preventive action. If, for example, an installation has caused environmental damage for a long time in the course of its normal operation, such damage must be prevented in principle under the Directive as of 30 April 2007'.¹⁵² She stated, however, that: '[a]t the same time, the application of the obligation to take preventive action implies that damage which should have been prevented, but nevertheless occurred, must be remedied'.¹⁵³ She concluded that whilst 'damage caused since [30 April 2007] as a result of continued activities must be remedied under the [ELD]',¹⁵⁴ the remediation of damage caused prior to that date would indirectly extend the ELD to activities carried out before it entered into force, a situation which 'is precisely what the provisions on the temporal application of the Directive are intended to prevent'.¹⁵⁵ She further stated that '[p]reventive action against environmental damage in the exercise of an activity is totally different from the prevention of propagation of old damage',¹⁵⁶ to which the ELD does not apply.¹⁵⁷

AG Kokott explained that she was using the word 'propagation' to mean 'old pollution which causes new damage, such as when harmful substances escape from a waste dump and contaminate adjacent waters'.¹⁵⁸ She stated that measures to prevent an escape of old damage could not be regarded as preventive action or as rectifying environmental damage at source under the ELD. Instead, such measures often equate to measures to remedy old damage, which are not imposed by the ELD¹⁵⁹ and which the ELD does not require an operator to prevent or remediate.¹⁶⁰

VI. Extent of retrospectivity of the Environmental Liability Directive

As AG Kokott noted, and as reiterated by the CJEU in a later case: '[i]n order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from the terms, the objectives or the general scheme of those rules that such effect must be given to them'.¹⁶¹

environmental damage to carry them out. Regulations reg 18(1).

152 AG Opinion (n 134) para 68.

153 *ibid* para 70.

154 *ibid*.

155 *ibid* para 74.

156 *ibid* para 75.

157 *ibid* para 59.

158 *ibid* para 61. AG Kokott stated that the term 'Weiterfressen' is used in Germany for this type of damage. *ibid* (citing Bundesgerichtshof (Federal Court of Justice) of 24 November 1976 (VIII ZR 137/75 *Neue Juristische Wochenschrift* 1977 at 379 [381])).

159 *ibid* para 75.

160 *ibid*.

161 See Case C-614/11 *Niederösterreichische Landes-Landwirtschaftskammer v Kuso* (CJEU, 12 September 2013) (not yet

A. Interpretation of the temporal provisions

The first two indents of Article 17 provide that the thing that is capable of causing an 'emission', 'event' or 'incident', which in turn causes 'damage', is an 'activity'.¹⁶² An activity must necessarily be capable of taking place over an extended period of time because Article 17 provides that the same activity can occur before and after 30 April 2007. Further, the activity must necessarily be something other than an emission, event or incident because these terms are used in the same indents.

The word 'activity' appears in many provisions of the ELD as a synonym for 'occupational activity',¹⁶³ which is defined as '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'.¹⁶⁴ Although three provisions use the term

published) para 24.

162 See ELD (all with emphasis added) art 4(4) (ELD shall not apply to 'environmental damage or imminent threat of such damage as may be caused by the *activities* covered by [EURATOM] or caused by an ... activity in respect of which liability or compensation falls within the scope of [specified nuclear conventions]'; *ibid* art 8(3) (referring to an imminent threat of, or actual, environmental damage 'caused by the operator's own *activities*'); *ibid* art 8(4)(b) (referring to environmental damage caused by an '*activity*').

163 See (all with emphasis added) *ibid* recital 2 ('fundamental principle of this Directive should therefore be 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') (emphasis added); *ibid* recital 21 ('[o]perators should bear the costs relating to preventive measures when those measures should have been taken as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their *activities* or the terms of any permit or authorisation'); *ibid* art 3(2) (ELD 'shall apply without prejudice to more stringent Community legislation regulating the operation of any of the *activities* falling within [its] scope'); *ibid* art 4(5) (ELD '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'); *ibid* art 4(6) (ELD 'shall not apply to *activities* the main purpose of which is to serve national defence or international security nor to *activities* the sole purpose of which is to protect from natural disasters'); *ibid* recital 10 (ELD 'should not apply to *activities* the main purpose of which is to serve national defence or international security'); *ibid* art 8(3) ('operator shall not be required to bear the cost of preventive or remedial actions [on proof that the imminent, or actual, environmental damage] resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own *activities*'); *ibid* art 14(2) ('financial security for the *activities* covered by Annex III'); *ibid* (potential 'exclusion of low-risk *activities*' from requirements for financial security); *ibid* art 16(1) (ELD 'shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional *activities* to be subject to [its] prevention and remediation requirements'); *ibid* art 18(3)(a) ('Commission shall take into account experience gained ... taking account of all relevant instances of environmental damage resulting from such *activities*').

‘activity’ or ‘activities’ in a manner that could potentially refer to non-occupational activities,¹⁶⁵ it is arguably beyond doubt that the term ‘activity’ in Article 17 means an occupational activity. This conclusion is reinforced by Annex III, which lists ‘activities’ to which strict liability under the ELD applies.¹⁶⁶

The word ‘emission’, which is one of the three things that may be derived from an activity, is defined by the ELD to mean ‘the release in the environment, as a result of human activities, of substances, preparations, organisms or micro-organisms’.¹⁶⁷ The ‘human activities’ to which the definition refers include an occupational activity¹⁶⁸ but are not limited to it. AG Kokott considered that the escape of pollutants from a waste dump into adjacent waters ‘can also be regarded as an emission’.¹⁶⁹ That is, an emission includes a passive release of a substance, preparation, organism or micro-organism in the environment as well as its direct and immediate release by an activity. In addition, an active and a passive release may be intermittent or continuous, as well as occurring over a short, or long period of time.

The reference to ‘substances, preparations, organisms or micro-organisms’ in the definition echoes the definition of land damage.¹⁷⁰ The term ‘substance’ is broad and is used

in several directives listed in Annex III.¹⁷¹ The term ‘preparations’ is also broad and appears to be derived from the Classification, Packaging and Labelling (CPL) Directive (now CPL Regulation) to mean ‘mixtures or solutions composed of two or more substances’.¹⁷² The term ‘organisms or micro-organisms’ appears to be derived from the Deliberate Release¹⁷³ and Contained Use¹⁷⁴ Directives to mean genetically modified organisms (GMOs) and genetically modified micro-organisms (GMMs), respectively.

The word ‘event’ is not defined by the ELD. As with an emission, an event may be caused by an occupational activity¹⁷⁵ but does not appear to be limited to such an activity, although this is not entirely clear. The plain and ordinary meaning of an event indicates that it is limited in time and place.¹⁷⁶

The word ‘incident’ is not defined in the ELD. Its plain and ordinary meaning indicates that an incident occurs over a shorter period and that it is less significant than an event. For example, the *Oxford Essential English Dictionary* defines

164 *ibid* art 2(7).

165 See (all with emphasis added) *ibid* art 4(4) (ELD ‘shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by [Euratom] or caused by an incident or activity in respect of which liability or compensation falls within the scope of [conventions to which the exception applies]’); *ibid* art 8(4)(b) (‘an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place’); *ibid* recital 10 (‘[e]xpress account should be taken of the Euratom Treaty and relevant international conventions and of Community legislation regulating more comprehensively and more stringently the operation of any of the activities falling under the scope of [ELD]’).

166 Annex III is entitled ‘Activities referred to in Article 3(1)’.

Article 3(1)(a) provides that the ELD ‘shall apply to ... environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities’ (emphasis added).

167 *ibid* art 2(8); see also *ibid* art 8(4)(b) (referring to an ‘emission ... or any manner of using a product in the course of an activity’, when the operator can show that it did not know that environmental damage was likely to occur ‘when the emission was released’) (emphasis added).

168 See *ibid* art 8(3) (referring to ‘an emission or incident caused by the operator’s own activities’) (emphasis added); see also *ibid* recital 20: (‘in situations where the damage in question is the result of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place’).

169 AG Opinion (n 134) para 61.

170 ELD art 2(1)(c) (defining ‘land damage’ as ‘any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms’).

171 See Council Directive 76/464 on pollution caused by certain dangerous substances, discharged into the aquatic environment of the Community (1976) OJ L129/23, as amended (now Directive 2006/11); Council Directive 80/68 on the protection of groundwater against pollution caused by certain dangerous substances (1980) OJ L20/43 (now Directive 2006/118); Council Directive 67/548 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (1967) OJ 1961/1 (now Regulation (EC) No 1272/2008); Council Directive 84/360 on the combating of air pollution from industrial plants (1984) OJ L188/20 (now Directive 2008/50).

172 See Directive 1999/45 concerning the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous preparations (1999) OJ L200/1. Directive 1999/45 is listed in Annex III. Article 2(1)(b) defines ‘preparations’ as ‘mixtures or solutions composed of two or more substances’. The word ‘preparations’ has been superseded by the word ‘mixtures’. See Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (2008) OJ L353/1 recital 14 (‘term “mixture” as defined in this Regulation should have the same meaning as the term “preparation” previously used in Community legislation’).

173 Directive 2001/18 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (2001) OJ L106/1.

174 Directive 2009/41 on the contained use of genetically modified micro-organisms (2009) OJ L125/75. The Contained Use Directive uses the word ‘emission’ in the context of applying ‘[a]ppropriate containment measures ... at the various stages of an operation to control emissions and the disposal of material from contained uses of GMMs, and to prevent accidents’. *ibid* recital 13.

175 ELD art 4(1); see also *ibid* recital 20 (‘damage in question or imminent threat therefor is the result of certain events beyond the operator’s control’) (emphasis added).

176 See *Axa Reinsurance (UK) Plc v Field* [1996] 1 WLR 1026, 1035 (HL) (‘[i]n ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way’); see also *Oxford Essential English Dictionary* (defining ‘event’ as ‘something that happens, especially something important’).

an incident, among other things, as ‘an event or happening, especially something short or relatively minor’. *Black’s Law Dictionary* defines the word as ‘[s]omething that is connected to or dependent on another thing or event’ and ‘[a] happening or an event’. As indicated below, however, the ELD uses the word ‘incident’ in the context of a nuclear incident and a marine incident, neither of which is necessarily minor. The word ‘incident’ thus appears to be used in the ELD to have the same – or a similar – meaning as the word ‘event’ rather than something that is necessarily less significant or that necessarily has a shorter duration than an ‘event’.

The word ‘incident’ appears to have been included in the ELD owing to its use during the lengthy history of the ELD in early related documents such as the proposed Council Directive on civil liability for damage caused by waste¹⁷⁷ and the Convention on damage resulting from activities dangerous to the environment (Lugano Convention).¹⁷⁸ The Lugano Convention defines an ‘incident’ as ‘any sudden occurrence or continuous occurrence or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage’.¹⁷⁹ The word ‘incident’ also appears in the ELD in the exclusions for specified nuclear conventions¹⁸⁰

as well as specified marine conventions¹⁸¹ in which the word is defined as ‘any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage’.¹⁸²

There is nothing in the ELD, however, to indicate that the word ‘incident’ refers to a series of incidents. Instead, the word appears to refer to a single incident. The use of the word ‘incident’ in the IED in the context of the ELD reinforces this conclusion. Article 7 of the IED provides that:

Without prejudice to [the ELD], in the event of any *incident* or accident significantly affecting the environment, Member States shall take the necessary measures to ensure that ... the operator immediately takes the measures to limit the environmental consequences and to prevent further possible *incidents* or accidents; [and] the competent authority requires the operator to take any appropriate complementary measures that the competent authority considers necessary to limit the environmental consequences and to prevent further possible *incidents* or accidents.¹⁸³

Further, there is nothing in the ELD to indicate that the ELD applies the definition of an ‘incident’ in the Lugano Convention so as to include a ‘continuous occurrence’ in the word ‘incident’ in the ELD.

In summary, a reasonable reading of the defined term ‘emission’ in the ELD includes an intermittent or continuous release of substances, preparations, organisms or micro-organisms in the environment over an indeterminate length of time. In contrast, the undefined terms ‘incident’ and ‘event’, which appear to be terms for anything else derived from an activity,¹⁸⁴ appear to be limited in time and place. The ELD does not state or infer that the meaning of an emission, event or incident is limited to those that result immediately and directly from an activity carried out by an operator; they also appear to include a subsequent passive emission, event or incident, that is, a secondary, tertiary or further emission, event or incident.

The CJEU’s statement that the ELD ‘applies to damage

177 See ‘Proposal for a Council Directive on civil liability for damage caused by waste’ COM(89) 282 final art 2(2)(b) (15 September 1989) (producer of waste is ‘person who had actual control of the waste when the *incident* giving rise to the damage or injury to the environment occurred’) (emphasis added); see also ibid art 10 (‘right to take legal action under this Directive shall be extinguished upon the expiry of a period of thirty years from the date on which the *incident* giving rise to the damage or injury to the environment occurred ...’) (emphasis added) <http://aei.pitt.edu/3774/>.

178 See Council of Europe Convention on damage resulting from activities dangerous to the environment art 17(2) (‘[w]here the *incident* consists of a continuous occurrence the thirty years’ period shall run from the end of that occurrence. Where the *incident* consists of a series of occurrences having the same origin the thirty years’ period shall run from the date of the last of such occurrences’). The Convention, which has not entered into force, and is highly unlikely to do so, was opened for signature at Lugano on 21 June 1993. The text of the Convention is available at <http://conventions.coe.int/Treaty/en/Treaties/Html/150.htm>.

179 ibid art 2(11). The Convention, as the ELD, includes the term ‘nuclear incident’ to refer to the exclusion from liability for specified nuclear Conventions. ibid art 4(2)(a).

180 ELD art 4(4). The nuclear conventions use the term ‘nuclear incident’. See Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy, as amended art 1(a)(i) (defined as ‘any occurrence or succession of occurrences having the same origin which causes damage, provided that such occurrence or succession of occurrences, or any of the damage caused, arises out of or results either from the radioactive properties, or a combination of radioactive properties with toxic, explosive, or other hazardous properties of nuclear fuel or radioactive products or waste or with any of them, or from ionizing radiations emitted by any source of radiation inside a nuclear installation’); Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, as amended art I(1) (defined as ‘any occurrence or series of occurrences having the same origin which causes nuclear damage’).

181 ELD art 4(2); see ELD effectiveness (n 44) s 6.1.3.7, 175–76.

182 See ELD effectiveness (n 44) s 6.2.3.4, 222.

183 Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (Recast) (2010) OJ L334/17 art 7 (emphasis added). Directive 2008/1 on integrated pollution prevention and control included only one mention of the word ‘incident’ in the provision that directed Member States to ‘take the necessary measures to ensure that: ... the operator regularly informs the competent authority of the results of the monitoring of releases and without delay of any incident or accident significantly affecting the environment’ (2008) OJ L24/8 art 14 (emphasis added).

184 Although the term ‘preventive measures’ in article 2(1) of the ELD refers to ‘any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage ...’, the words ‘release’, ‘event’ and ‘incident’ appear to be intended to subsume terms such as ‘act’ and ‘omission’.

caused by an emission, event or incident which takes place after 30 April 2007 where such damage derives ... from activities ... which were carried out but had not finished by that date' supports this conclusion. The sequence necessarily entails an extended period of time from the date(s) on which an activity was carried out prior to 30 April 2007 and an emission, event or incident derived from that activity which occurred after 30 April 2007. Further, nothing in Article 17 states or implies that an activity can result in only one emission, event or incident. More crucially, nothing in Article 17 states or implies that an emission, event or incident can result in only a single occurrence of damage.

B. Types of damage

The following two scenarios involving damage to the same natural resource and damage to more than one natural resource illustrate the various types of damage that may occur.

Damage to the same natural resource

An emission, event or incident from an activity carried out before 30 April 2007 (and continued after that date) may damage a natural resource before 30 April 2007, and subsequently cause further damage to the same natural resource as a result of the continued movement of a pollutant in the environment. Examples include the continued migration of a pollutant in groundwater, the release of a pollutant from sediments in a river or lake into the water, or the continued movement of a pollutant across land by the wind or gravity.¹⁸⁵ In some instances, the continued movement of the pollutant results in distinct incidents (rereleases).¹⁸⁶ In other instances, the pollutant causes progressive and, in some cases, indivisible, damage, particularly if the occupational activity continues to result in further continuous or intermittent releases of the pollutant into the same natural resource.

It is irrefutable that the ELD envisages the potential for lengthy periods of time between an activity and environmental damage from it. For example, some Member States, including the UK, consider that water damage occurs only when the damage results in a deterioration of

the status of an entire surface water or groundwater body to a lower status.¹⁸⁷ Owing to the large size of some water bodies, it necessarily takes a considerable amount of time from the emission, event or incident that results in the entry of a pollutant into the water body until its effect on the entire water body, particularly when an entire river is designated as a surface water body or a groundwater body exceeds 1500m².¹⁸⁸

The Member State reports on the ELD confirm the lengthy periods of time that may occur between an activity and environmental damage. Examples include the following:¹⁸⁹

- biodiversity damage to 117 hectares of protected boreal natural forest by numerous unauthorised soil and rock samples and excavation in Finland
- land damage caused by the dumping of 80,000m³ of asbestos-containing materials and mineral oil residues at a former asbestos production facility in Greece and
- damage to agricultural areas by oil-derived substances from suspected corroded and perforated areas of a pipeline discovered during its decommissioning in Poland.

Damage to more than one natural resource

An emission, event or incident from an activity carried out before 30 April 2007 (and continued after that date) may cause damage to land or water at a protected natural habitat that, say, contains breeding or resting places for migratory birds before 30 April 2007 and damage to the birds after that date. Damage to land or water and biodiversity tends to be capable of division into an emission, event or incident for each natural resource rather than causing progressive indivisible damage. For example, damage to migratory birds by oil or poisoning would almost always require the initial pollution of land or water before the damage to the birds.

It is irrefutable that damage from a single activity may affect more than one natural resource. The definition of 'damage', for example, refers to indirect, as well as direct, damage. In addition, the provision concerning co-operation between Member States refers to environmental damage that 'affects or is likely to affect several Member States',¹⁹⁰ that is, damage to a natural resource in one Member State

185 See *Coeur d'Alene Tribe v ASARCO Inc.*, 280 F. Supp. 2d 1094, 1112–13 (D. Idaho 2003) ('re-releases of [mining waste] via the passive form of seepage, leaching and migration due to flowing water' had occurred; '[t]he defendants or their predecessors [who] knowingly dumped hazardous substances into the waterways ... were aware that water runs downhill and that the hazardous substances dumped would not stay in the location they were dumped').

186 See George Clemon Freeman, Jr and Kyle E McSarrow 'The proposed European Community Directive on Civil Liability for Waste – The implications for U.S. Superfund reauthorization in 1991' (November 1990) 46 *Business Lawyer* 1 at 8–9.

187 See ELD effectiveness (n 44) s 4.1.3.1, 100–03; see also Regulations regs 4(3)–(4).

188 It is not unusual for Member States to have designated groundwater bodies that exceed 1500m² or entire rivers as surface water bodies. See ELD effectiveness (n 44) s 4.1.3.1, 102.

189 The examples are taken from the Member State reports on the experience gained under the ELD, as required by ELD art 18(1) <http://ec.europa.eu/environment/legal/liability/>.

190 ELD art 15(1).

that spreads and subsequently damages a natural resource (either the same type of natural resource or another type) in another Member State.¹⁹¹

The Member State reports on the ELD confirm the existence of emissions, events and incidents that have damaged more than one natural resource, sometimes with lengthy periods of time between an activity and environmental damage. Examples include the following:¹⁹²

- land and biodiversity damage caused by the installation of drainage pipes constructed to discharge into the sea in Cyprus
- damage to a protected natural habitat caused by the placement of a thick layer of clayey soil resulting in deterioration to the condition of the habitat and its functions in Poland and
- damage to slopes, soil and water caused by a leak of fuel oil from a storage tank at an abandoned facility in Greece.

C. Application of the temporal provisions

The application of the first two indents of Article 17 to an activity that results in an emission, event or incident that, in turn, causes progressive damage or affects more than one natural resource indicates the following in respect of liability under the ELD.

Emissions, events and incidents from an activity that finished by 30 April 2007

If a pre-30 April 2007 activity resulted in an initial emission, event or incident that caused environmental damage, followed by one or more further emissions, events or incidents and environmental damage when, say, the pollutant that caused the initial damage was rereleased into the environment, the ELD would not apply to the rereleases or further damage provided the activity finished before 30 April 2007.

Emissions, events and incidents from an activity that continued after 30 April 2007

If a pre-30 April 2007 activity resulted in an initial emission, event or incident that caused environmental damage before 30 April 2007, followed by one or more further emissions, events or incidents and damage when the pollutant that caused the initial damage was rereleased in the environment after 30 April 2007, the ELD may arguably apply to the further emissions, events or incidents (rereleases) and

further damage if the activity continued to occur after 30 April 2007. In such a case, the rereleases would not have been derived from a specific activity that took place and finished before that date.

The intent of the ELD in such a case appears to be that liability does not apply to the rereleases because the continuance of the activity after 30 April 2007 would not have changed the nature or character of the damage from the nature or character of the damage in the above scenario. More crucially, the application of liability under the ELD would require an operator to remediate the initial damage that had occurred before 30 April 2007, or to prevent further damage from it, both of which are barred by the first indent of Article 17 of the ELD because they apply to damage caused by an emission, event or incident that occurred before 30 April 2007.

Emission from an activity that continued after 30 April 2007 and caused progressive damage

If a pre-30 April 2007 activity resulted in an emission that caused environmental damage before 30 April 2007, followed by the continuance of both the activity and the emission after 30 April 2007, the environmental damage caused by the emission may well be progressive rather than distinct. That is, the pollutant would not be rereleased into the environment; there would be a single continuous or intermittent release into the environment. Further, the progressive damage may be indivisible or, at least, difficult to divide into distinct segments.¹⁹³ In such a case, the ELD would not require an operator to remediate only the initial damage or to prevent further damage from it. Instead, the ELD would require the operator also to remediate post-30 April 2007 damage and to prevent further post-30 April 2007 damage, especially if the same operator was carrying out the pre- and post- 30 April 2007 activity.¹⁹⁴

193 See *United States v Montrose Chemical Corporation*, 835 F. Supp. 534, 542 (C.D. Cal. 1993) (owners and operators of facilities that released hazardous substances including DDT and PCBs through a wastewater treatment system were liable for 'pre-enactment releases and injuries ... if damages stemming from those releases and injuries occur after 1980 or begin pre-1980 but continue post-1980 and are indivisible' (referring to *Aetna Casualty & Surety Company, Inc. v Pintlar Corporation*, 948 F.2d 1507, 1515 (9th Cir. 1991)); see also *In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676, 686 (D. Mass. 1989); *United States v. Reilly Tar & Chemical Corporation*, 546 F. Supp. 1100, 1120 (D. Minn. 1982) (question is one of fact).

194 See Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-1919 para 36 ('Commission suggests that the directive could be applicable in so far as concerns damage occurring after 30 April 2007 as a result of the current activities of the operators in question. It cannot be applicable, however, to any pollution occurring before that date caused by operators other than operators currently active in the Augusta roadstead but which is being attributed to the latter operators').

191 *ibid* art 15(2).

192 The examples are taken from the Member State reports on the experience gained under the ELD, as required by ELD art 18(1) <http://ec.europa.eu/environment/legal/liability/>.

The operator could avoid liability for pre-30 April 2007 damage by proving that such damage did, in fact, occur before 30 April 2007. Although the ELD does not specifically place the burden of proof on the operator, Article 17 is written in the same negative terms as four of the six exceptions to the ELD, of which three exceptions use precisely the same term, 'The Directive shall not apply to',¹⁹⁵ as stated in Article 17. The ELD thus appears to place the burden of proving that environmental damage occurred before 30 April 2007 on the operator, rather than requiring a competent authority to prove that damage occurred after 30 April 2007.

This interpretation is supported by the preparatory history of the ELD. For example, the Working Paper provides that '[i]n case of doubt, the operator would have to establish that the cause of the damage occurred before the entry into force of the regime'.¹⁹⁶ Further, the proposal for a directive included a rebuttable presumption, stating that:

... [w]here the competent authority is able to establish with a sufficient degree of plausibility and probability that the environmental damage has been caused by an activity which has taken place after the date referred to in [now Article 19(1)], this Directive shall apply unless the operator can establish that the activity that caused the damage in question took place before that date.¹⁹⁷

Although the presumption was deleted, it indicates the continued intent of the ELD to place the burden of proof on the operator.

Still further, several Member States (Austria (Lower Austria),¹⁹⁸ Belgium (Brussels Capital Region,¹⁹⁹ Flemish Region,²⁰⁰ Walloon Region²⁰¹), Italy,²⁰² the Netherlands,²⁰³

Romania²⁰⁴), including Wales²⁰⁵ and other jurisdictions in the UK²⁰⁶, specifically include the temporal provisions as exclusions/exceptions in their transposing legislation.

The application of liability to carry out preventive and remedial measures in respect of the pre- and post-30 April 2007 emission would not breach the principle of the protection of legitimate expectations because the operator would have continued to carry out the activity that resulted in the emission after the ELD had come into force despite the fact that it was causing environmental damage in breach of the ELD.²⁰⁷ Further, the ELD has a very long history during which potential liability for preventing and remediating environmental damage was discussed, and subsequently proposed.²⁰⁸ For example, the Commission had issued a Green Paper on remedying environmental damage in 1993,²⁰⁹ changed the focus from civil liability for harm to individuals to the prevention and remediation of environmental damage in 2001,²¹⁰ and had proposed the directive that became the ELD in 2002.²¹¹ The temporal provisions took their final form in the Common Position in 2003.²¹² Finally, the ELD

204 Emergency Ordinance on environmental liability with regard to preventing and remedying environmental damage arts 4(2)(e), (f) (listing temporal provisions with other exceptions set out in ELD art 4).

205 Regulations reg 8(1).

206 The English and Scots transposing legislation specifies that the temporal provisions are exemptions. Environmental Damage (Prevention and Remediation) Regulations 2009/153, as amended reg 8(1); Environmental Liability (Scotland) Regulations SSR 2009/266, as amended regs 5(f), (g). The Northern Ireland transposing legislation does not expressly state that the temporal provisions are an exception but uses the negative context.

Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) SRNI 2009/252, as amended regs 6(a), (b).

207 See Jan Darpö 'Key-issues in regulating contaminated land in Europe' (2005) http://www.jandarpö.se/upload/Rome_JD.doc.

208 See European Commission 'Proposal for a Directive on toxic and dangerous wastes' (1976) OJ C194/2 (proposing strict liability for damage to individuals by toxic and dangerous waste); European Commission 'Amended proposal for a Directive on the supervision and control of transfrontier shipment of hazardous wastes within the European Community' (1983) OJ C186/3 para 15, C186/9 (proposing strict liability for remediating damage caused by waste)

209 European Commission 'Green paper on remedying environmental damage' (COM(93) 47 final, 14 May 1993) (discussing civil liability for harm to individuals and liability for remediating environmental damage).

210 European Commission 'Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability)' (30 July 2001).

211 European Commission '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' COM(2002) 17 final (23 January 2002).

212 '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' (2003) OJ C277 E/10; see 'Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2)

195 See ELD arts 4(2), (4) and (6). Article 4(1) provides that 'This Directive shall not cover environmental damage or an imminent threat of such damage caused by ... an act of armed conflict, hostilities, civil war or insurrection; ... a natural phenomenon of exceptional, inevitable and irresistible character'.

196 European Commission 'Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage (Environmental Liability)' (30 July 2001) para 4.

197 European Commission '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' COM(2002) 17 final (23 January 2002) art 19 (2002) OJ C151 E/132, E/140.

198 Environmental Liability Act ss 3(1)–(2).

199 Ordinance of 13 November 2008 art 6 ss 6(a), (b).

200 Decree of 21 December 2007, title XV Environmental Damage art 15.1.6, ss 4(1), (2).

201 Environment Code part VII, Environmental liability with regard to the prevention and remedying of environmental damage arts D.103(1), (2).

202 Decree 152 of the President of the Republic of 3 April 2006 part VI art 303(1)(f).

203 Act of 24 April 2008 amending the Environmental Management Act in connection with the implementation of Directive 2004/35/EC (environmental liability) arts 17.8(c)(i), (ii) (listing temporal provisions with other exceptions set out in ELD art 4).

entered into force on 30 April 2004.²¹³

In brief, since at least 2002 if not before, and certainly since 30 April 2004, an operator cannot legitimately have expected to continue carrying out an occupational activity that resulted in an imminent threat of, or actual, environmental damage without also having expected to be liable for its prevention or remediation, respectively.

VII. Conclusion

Concern by the society and Fish Legal for the potential extinction of a small fish in Wales has resulted in NRW and Welsh Ministers agreeing that temporal provisions of the ELD have direct effect and, thus, prevail over Regulations that transposed the ELD with a later date for its implementation and enforcement. The recognition by them of the direct effect of the ELD does not affect legislation in the rest of the UK or the 16 other Member States that also adopted implementation and enforcement dates for liability under the ELD after the deadline for its transposition. In Wales, however, the competent authority no longer faces the quandary of whether to apply the effective date for liability in the ELD or the date in the transposing legislation. Nor do interested parties face the same dilemma in deciding whether to submit comments and observations to the competent authority about alleged environmental damage.

The other temporal provisions of the ELD raise a further issue, namely, whether the ELD has retrospective or

retroactive effect. This article concludes that the ELD does not have retroactive effect, but that it does have retrospective effect. The ELD is not entirely clear, on its face, on the extent of retrospective liability imposed by it. An analysis of relevant provisions, the CJEU's judgment in *Raffinerie Mediterranee*, and AG Kokott's opinion in that case, however, indicates that the ELD imposes liability on a responsible operator for preventing and remediating progressive environmental damage from an emission by an occupational activity that began before 30 April 2007 and continued after that date unless the operator can prove that damage occurred before 30 April 2007.

The case brought by Fish Legal has raised important issues about the extent of liability under the ELD. It has also shown how concern for a small endangered fish, the Arctic charr, can help protect biodiversity by imposing liability from the date specified in the ELD in lieu of a later date in the transposing national legislation. The concern raises echoes of how concern for another small endangered fish, the snail darter, in the Little Tennessee River in the US nearly 40 years ago resulted, in 1978, in a landmark decision by the US Supreme Court²¹⁴ that enhanced the protection of biodiversity in the US. The less significant but, nevertheless, important litigation in Wales about another small endangered fish has enhanced the protection of biodiversity in Wales, with the potential to enhance it in the UK and also, perhaps, 16 other Member States of the EU.

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' SEC(2003) 1027 final (19 September 2003) 9 (Article 17 – Temporal application).

²¹³ Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, as amended (2004) OJ L143/56.

²¹⁴ *Tennessee Valley Authority v Hill*, 437 US 153 (1978). The court concluded that 'the plain language of the [Endangered Species] Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable"; the court thus enjoined completion and operation of the virtually completed Tellico Dam, a multi-million dollar project. *ibid* at 187–95; see Zygmunt, J B Plater 'Endangered Species Act lessons over 30 Years, and the legacy of the snail darter, a small fish in a pork barrel' (2004) 34 *Environmental Law* 289 (describing the case and its implications).