

Landowners' liability for remediating contaminated land in the EU: EU or national law?

Part I: EU law

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1 Introduction

European Union (EU) law does not impose liability for remediating contaminated land on a person who owns the land but who did not cause the contamination. Or does it? The Court of Justice of the European Union (CJEU) recently ruled in *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl (Fipa Group)* that the Environmental Liability Directive (ELD),¹ which imposes liability for preventing and remediating contaminated land and other environmental damage, does not preclude Italian law that does not require landowners to remediate the contamination on their land unless they caused it. Italian law requires such landowners only to reimburse a competent authority for the costs incurred by it in remediating the land up to the market value of the remediated land.²

The CJEU did not discuss the potential effect of the Waste Framework Directive (WFD)³ on the liability of the landowners, none of whom had contributed to the contamination. There was no need for the CJEU to do so because, as AG Kokott had indicated in her opinion, in which she had recommended to the CJEU that it should not comment on the WFD,⁴ 'a decision on liability for contaminated soil under [EU] waste legislation would raise difficult and, in part, delicate questions, while the possible significance for the main proceedings is unclear'.⁵ She suggested that Italy may wish to request the CJEU for a

preliminary ruling on the application of EU waste law if such law is relevant in light of the CJEU's ruling.⁶

AG Kokott's comments show that the potential effect of the WFD on the liability of landowners for remediating contamination that they did not cause refuses to disappear. This article examines and analyses those potential effects. Part I examines the effect on the ELD of the WFD, which provides, amongst other things, that a 'waste holder' (which includes the owner of land on which there are waste contaminants) is responsible for the proper disposal of the contaminants.⁷ Part II of the article examines the potential effect of the WFD on the liability systems enacted by Member States to remediate contaminated land in their territories.

The effect of the WFD on these national liability systems could be substantial. The ELD intentionally limits liability for remediating contaminated land because the national law of most of the EU-15 when it was adopted in April 2004 already imposed such liability, as do Member States that have joined the EU since that time. Many national laws include exceptions or defences for owners of contaminated land who did not permit or acquiesce in the pollution incidents that caused the contamination or who, when they acquired the land, did not know and should not have known that the land was contaminated. These exceptions and defences are entirely absent from the WFD.

In examining the effect of the WFD on the ELD, Part I analyses the responsibilities of waste producers and holders under the WFD, the contaminated land provisions of the ELD and the CJEU's ruling in *Fipa Group*. This is followed by an analysis of the applicability of the WFD to liability for remediating contaminated land, including an examination of the exclusion to the WFD for contaminated

1 Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* (CJEU 4 March 2015) not yet reported); see Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (2004) OJ L143/56.

2 Case C-534/13 (n 1) para 24.

3 Directive 2008/98/EC on waste (2008) OJ L312/3.

4 Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* Opinion of AG Kokott (20 November 2014) para 73. AG Kokott acknowledged that neither the Italian Council of State nor the parties that had intervened in the case had examined EU waste law in respect of the case.

5 *ibid* para 74.

6 AG Opinion (n 4) para 78.

7 Directive 2008/98/EC on waste (2008) OJ L312/3 arts 14, 15; see *ibid* art 3(6).

soil, and application of the responsibility and liability provisions in the WFD and the ELD to owners of contaminated land.

Part I concludes that clashes between the WFD and the ELD are virtually inevitable and will lead to legal uncertainty concerning the relationship between the WFD and the ELD. In order to avoid or, at least alleviate some of the clashes, the article suggests that the European Commission may wish to consider revising the WFD so that it does not apply to owners of contaminated land who did not cause the contamination when the ELD ensures that waste contaminants are remediated in accordance with the polluter pays principle. This will not be easy, however, as examined in this article.

Further, Part II of this article suggests that the hierarchy would also need to include national liability systems that ensure the remediation of waste contaminants in accordance with the polluter pays principle. As discussed in Part II, the relationship between the WFD and the national liability systems raises further complex issues that will almost certainly prove difficult to resolve.

2 Relationship between the Waste Framework Directive and the Environmental Liability Directive

The ELD imposes liability for preventing and remediating land damage on an operator whose activities cause the contamination. Member States may impose more stringent provisions that include imposing liability on the owner of contaminated land. The landowner may, however, only be secondarily liable; primary liability is restricted to the operator.

The WFD, meanwhile, appears to impose liability for remediating waste contaminants in land inadvertently at best. It imposes responsibility, not liability, for managing and disposing of waste on the producer and holder of the waste.

2.1 Waste Framework Directive

Article 14 of the WFD, entitled 'Costs', provides that: '[i]n accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders'.⁸ The term 'waste' is very broadly defined to mean 'any substance or object which the holder discards or intends or is required to discard'.⁹ The term 'waste producer' is

defined as 'anyone whose activities produce waste (original waste producer) or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste'.¹⁰ The term 'waste holder' is defined as 'the waste producer or the natural or legal person who is in possession of the waste'.¹¹ The separate definitions of 'waste producer' and 'waste holder' reflect revisions of the original WFD in which the term 'holder' was defined as 'the producer of the waste or the natural or legal person who is in possession of it'.¹²

Article 14 further provides that: 'Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs'.¹³

Article 15 of the WFD, entitled 'Responsibility for waste management', provides that: 'Member States shall take the necessary measures to ensure that any original waste producer or other holder carries out the treatment of waste himself or has the treatment handled by [an authorised person]'.¹⁴ If waste is transferred, the WFD provides that: 'the responsibility for carrying out a complete recovery or disposal operation shall not be discharged as a general rule'.¹⁵

Article 15 also provides that 'Member States may decide, in accordance with Article 8 [on extended producer responsibility], that the responsibility for arranging waste management is to be borne partly or wholly by the producer of the product from which the waste came and that distributors of such product may share this responsibility'.¹⁶ Producers of the product from which the waste originated, therefore, are liable only if a Member State selects this option.¹⁷ Article 15 sets out further details for the allocation of responsibility for recovery or disposal operations when

¹⁰ *ibid* art 3(5).

¹¹ *ibid* art 3(6).

¹² Council Directive 75/442/EEC (1975) OJ L194/39 art 1(c); see Council Directive 91/156/EEC amending Directive 75/442/EEC on waste (1991) OJ L78/32 art 1(b) ('"producer" shall mean anyone whose activities produce waste ("original producer") and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste'); *ibid* art 1(c) ('"holder" shall mean the producer of the waste or the natural or legal person who is in possession of it').

¹³ WFD (n 3) art 14(2).

¹⁴ *ibid* art 15(1).

¹⁵ *ibid* art 15(2).

¹⁶ *ibid* art 15(3).

¹⁷ European Commission 'Guidance on the interpretation of key provisions of Directive 2008/98/EC on waste' s 1.1.3.1 at 13 (June 2012) http://ec.europa.eu/environment/waste/framework/pdf/guidance_doc.pdf The WFD (n 3) changed the requirement to hold a producer of the product from which the waste came liable if the costs is not borne by a waste holder to an option. Cf Directive 2006/12/EC on waste (2006) OJ L 114/9 art 15 and WFD art 15(3).

⁸ *ibid* art 14(1).

⁹ *ibid* art 3(1).

the original waste producer or holder transfers the waste for treatment,¹⁸ as well as the allocation of responsibility between the producer of products from which the waste originates and distributors of the products.¹⁹

Recital 26 of the WFD states that:

The polluter-pays principle is a guiding principle at European and international levels. The waste producer and the waste holder should manage the waste in a way that guarantees a high level of protection of the environment and human health.

In essence, Article 15 'lays down rules governing responsibility for the cost of disposing of waste',²⁰ whilst Article 14 specifies the person(s) responsible for the costs of its disposal. As described by Nicolas de Sadeleer:

the directive draws a dividing line between, on one hand, 'practical recovery or disposal operations, which it makes the responsibility of any "holder of waste", whether producer or possessor', and on the other hand, 'the financial burden of those operations, which, in accordance with the principle of polluter pays, it imposes on the persons who cause the waste, whether they are holders or former holders of the waste or even producers of the product from which the waste came'.²¹

The WFD sets out exclusions from the scope of the directive, either absolutely or to the extent that they are covered by other EU legislation. All the exclusions concern substances and materials that may be classified as 'waste';²²

the WFD contains no exceptions or defences to duties placed on waste producers or waste holders to manage or dispose of waste.

2.2 Environmental Liability Directive

In contrast to the WFD's focus on responsibilities for the management and disposal of waste, the ELD focuses on liability for preventing and remediating environmental damage including land damage.

The existence of 'many contaminated sites in the [EU that pose] significant health risks' was a key reason for the EU's adoption of the ELD.²³ As stated by the ELD, a '[f]ailure to act could result in increased site contamination'.²⁴ In order to reduce the risk of creating further contaminated sites, the ELD imposes liability on an 'operator' to prevent or remediate an imminent threat of, or actual, damage to land from its activities.²⁵ The term 'operator' is defined as:

any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.²⁶

2.2.1 Liability concerning land damage compared to water and biodiversity damage

Liability for preventing and remediating contaminated land under the ELD is limited compared to liability for preventing or remediating an imminent threat of, or actual, damage to the other two types of environmental damage covered by it, that is, damage to species and natural habitats protected by the Birds Directive²⁷ and the Habitats

18 WFD (n 3) art 15(2) ('When the waste is transferred from the original producer or holder to one of the natural or legal persons referred to in paragraph 1 for preliminary treatment, the responsibility for carrying out a complete recovery or disposal operation shall not be discharged as a general rule. Without prejudice to Regulation (EC) No 1013/2006, Member States may specify the conditions of responsibility and decide in which cases the original producer is to retain responsibility for the whole treatment chain or in which cases the responsibility of the producer and the holder can be shared or delegated among the actors of the treatment chain').

19 *ibid* art 15(3); see Case C-188/07 *Commune de Mesquer v Total France SA* [2008] ECR I-4501 Opinion of AG Kokott (13 March 2008) para 122 ('the Commission refers to Directive 2006/66/EC ... on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, Article 8 of which provides that producers of batteries and accumulators are to bear the costs of their disposal as waste. In addition, under Article 15 of European Parliament and Council Directive 94/62/EC ... on packaging and packaging waste the Member States may impose the costs of disposal under the law on waste on the producer of the packaging').

20 Case C-188/07 *Commune de Mesquer v Total France SA* (n 19) Opinion of AG Kokott (n 19) para 105; see also David Hart, Rachel Marcus 'The polluter-pays principle: *Mesquer* and the new Waste Framework Directive' (2008) 16(6) *Environmental Liability* 195, 197.

21 Nicolas de Sadeleer 'The polluter pays principle in EU law: bold case law and poor harmonisation' *Pro Natura: Festschrift til H C Bugge* (Universitetforlaget 2012) 405, 414 (citing Case C-1/03 *Van de Walle v Texaco Belgium SA* [2004] ECR I-7613 para 58) <http://www.tradenvvironment.eu/uploads/papers/de%20Sadeleer.pdf>.

22 WFD (n 3) art 2.

23 ELD (n 1) recital 1. Other legislation such as the Industrial Emissions Directive requires the prevention and remediation of contaminated land by holders of an environmental permit. Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Recast) (2010) OJ L334/17 arts 11, 22. Yet other legislation, such as Directive 2009/28/EC on the promotion of the use of energy from renewable sources, (2009) OJ L140/16, refers to 'heavily contaminated land' (defined as 'unfit for the cultivation of food and feed due to soil contamination'; *ibid* Annex V, point C(9)(b)) and 'severely degraded land' (defined as 'land that, for a significant period of time, has either been significantly salinated or presented significantly low organic matter content and has been severely eroded'; *ibid* Annex V, point C(9)(a)). These terms, however, are used to establish a common framework for the promotion of energy from renewable resources that does not, among other things, result in harm to, or the destruction of, biodiverse lands; they are not used to categorise environmental media and flora and fauna in respect of liability for preventing and remediating environmental damage. See *ibid* arts 17(3), 17(4) Annex V points C(8)-(9).

24 ELD (n 1) recital 1.

25 *ibid* art 3(1)(a).

26 *ibid* art 2(6).

27 Directive 2009/147/EC on the conservation of wild birds (2009) OJ L20/7.

Directive (biodiversity damage)²⁸ and water (water damage).²⁹

First, the thresholds for biodiversity damage and water damage are derived from EU legislation, namely, the Birds and Habitats Directives³⁰ and the Water Framework Directive.³¹ The threshold for land damage, however, is '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'.³² The reason for the absence of a reference to EU legislation is that no such legislation exists; the proposed Soil Framework Directive, which, among other things, would have directed Member States to investigate, assess, and remediate damage to contaminated land in their territories, was withdrawn by the European Commission in 2014.³³

Secondly, liability for remediating land damage applies only to an operator who causes such damage as a result of carrying out activities under EU legislation listed in Annex III of the ELD.³⁴ In contrast, liability for preventing and remediating biodiversity damage also applies to a non-Annex III operator provided the operator was negligent or otherwise at fault.³⁵

Thirdly, whereas the remediation of water and biodiversity damage includes primary, complementary and compensatory remediation as described in detail in the ELD,³⁶ liability for remediating land damage is restricted to removing, controlling,

containing or diminishing contaminants 'so that the contaminated land ... no longer poses any significant risk of adversely affecting human health'.³⁷ The standard for remediation is the current or approved future use of the site when the damage occurred.³⁸ In contrast, damaged water and biodiversity must be remediated to their baseline condition; that is, their condition immediately before the damage occurred³⁹ – a more stringent standard.

Fourthly, land subject to liability under the ELD depends solely on whether human health is affected. If there is not a significant adverse effect on human health, there is no liability for remediating contaminated land under the ELD regardless of the severity of the contamination. The ELD does not, therefore, impose liability for remediating large areas of wetlands⁴⁰ and forests in the EU owing to the absence of human activities in many such areas. There is no limitation on water or biodiversity damage to an effect on human health.

2.2.2 Imposition of more stringent standards

The ELD specifically provides that Member States may impose more stringent provisions than those in the directive itself,⁴¹ including 'the identification of additional

services to, or towards, baseline condition'. *ibid* Annex II, para 1(a). Complementary remediation is 'any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services'. *ibid* Annex II para 1(b). Compensatory remediation is 'any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect'. *ibid* Annex II para 1(c).

³⁷ *ibid* Annex II s 2. Section 2 provides as follows: 'The necessary measures shall be taken to ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health. The presence of such risks shall be assessed through risk-assessment procedures taking into account the characteristic and function of the soil, the type and concentration of the harmful substances, preparations, organisms or micro-organisms, their risk and the possibility of their dispersion. Use shall be ascertained on the basis of the land use regulations, or other relevant regulations, in force, if any, when the damage occurred'.

³⁸ *ibid*.

³⁹ *ibid* Annex II para 1(a).

⁴⁰ See BIO Intelligence Service 'Study on ELD effectiveness: scope and exceptions' s 3.1.5 at 75 (prepared for European Commission, DG Environment, Contract No 07.0307/2013/658873/ETU/D.4, 19 February 2014) <http://ec.europa.eu/environment/legal/liability/>.

⁴¹ ELD (n 1) art 16(1). Article 193 of the TFEU also authorises Member States to adopt more stringent provisions. It provides: 'The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission'. See consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C326/47 art 193.

²⁸ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (1992) OJ L206/7 (consolidated version <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01992L0043-20070101>). The ELD includes an option for Member States to impose liability under it for biodiversity damage to national legislation on nature conservation that is equivalent to the Birds and Habitats Directives. See ELD (n1) art 2(1)(a).

²⁹ ELD (n 1) arts 3(1)(a), 5(1), 6(1), 8(1).

³⁰ *ibid* art 2(1)(a). The threshold for biodiversity damage is 'any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species [with the] significance of such effects ... to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I [of the ELD]'. *ibid*.

³¹ *ibid* art 2(1)(b); see Directive 2000/60/EC establishing a framework for Community action in the field of water policy (2000) OJ L327/1. The threshold for water damage is 'any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in [the Water Framework Directive] of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies'; ELD (n 1) art 2(1)(b).

³² ELD (n 1) art 2(1)(c).

³³ See European Commission 'Withdrawal of the proposal for a Soil Framework Directive' http://ec.europa.eu/environment/soil/process_en.htm.

³⁴ ELD (n 1) art 3(1)(a).

³⁵ *ibid* arts 3(1)(b), 5(1), 6(1), 8(1).

³⁶ *ibid* Annex II. Primary remediation is 'any remedial measure which returns the damaged natural resources and/or impaired

responsible parties'.⁴² However, only an operator may be primarily liable under the ELD; any other person, including an owner of contaminated land, may at most be secondarily liable.⁴³

Only three Member States transposed the ELD to impose liability for preventing and remediating contaminated land and other environmental damage on a landowner who did not cause the damage: Austria, Hungary and Poland.

The transposing legislation in eight of the nine Austrian Länder and the federal legislation imposes liability on the owner of contaminated land (and damaged waters and biodiversity) by broadly defining the term 'operator' in the ELD to include the owner of land from which environmental damage emanates if the activity that caused the damage is no longer being carried out and the former operator can no longer be held liable. In such a case, the current owner(s) is liable in lieu of the former operator, but only if the current owner(s) 'approved or voluntarily tolerated the installations or measures from which the damage emanates' and failed to take any reasonable containment measures.⁴⁴

In effect, the extension of the definition of an 'operator' to include a current owner equates the current owner's approval or voluntary tolerance of the environmental damage to the operation or control of the activity that caused the damage. That is, the current owner is considered to be a former operator, as well as the former operator who can no longer be held liable. Although this is an arguably tenuous interpretation of the term 'operator' in

the ELD, inclusion of the current landowner in the term complies with the ELD's primary imposition of liability on an 'operator' because the current owner is liable only if the former operator no longer exists.

The definition of the term 'operator' differs in Lower Austria, where the owner is liable if the operator who caused the damage 'can no longer be held liable [and the owner] was aware or should have been aware of the damage and has culpably omitted to take reasonable containment measures'.⁴⁵ Again, inclusion of the current owner in the term 'operator' is arguably tenuous but, again, the definition complies with the ELD because the current owner is liable only if the former operator cannot be held liable.

The Hungarian and Polish legislation that transposed the ELD echoes their national environmental liability systems. In effect, both Member States have created a rebuttable presumption that an owner (or occupier) caused damage at land owned (or occupied) by them. Under Hungarian law, the owner and occupier of land on which there is a threat of, or actual, environmental damage, are jointly and severally liable, together with the person who caused the threat of, or actual, damage to the environment (called a 'user of the environment').⁴⁶ The owner or occupier may avoid liability (that is, they may rebut the presumption) by identifying the user of the environment who caused the damage and proving 'beyond any reasonable doubt' that the owner or occupier is not liable for the threat of, or actual, damage.⁴⁷

Under Polish law, a landowner is jointly and severally liable for carrying out preventive and remedial measures, together with the operator who caused the damage, if the owner consented to, or knows about, the polluting activity. A landowner who did not consent to, or know about, the activity may avoid liability (that is, may rebut the presumption of liability) if it notifies the competent authority of the imminent threat of, or actual, environmental damage immediately after becoming aware of its existence and shows that it did not cause the damage.⁴⁸

An issue could arise under Austrian, Hungarian and Polish law as to whether the State must pay to remediate contamination if it identifies an operator who is insolvent or cannot otherwise pay to remediate the contamination.

42 ELD (n 1) art 16(1).

43 See Case C-534/13 (n 1) paras 48-53.

44 55th Federal Act on environmental liability with regard to the prevention and remedying of environmental damage s 4(5); Act of 29 October 2009 on environmental liability with regard to the prevention and remedying of environmental damage s 4(6) (Burgenland); 9th Act of 26 November 2009 amending the Carinthian 2002 Nature Protection Act; and 55th Act of 9 July 2009 amending the Carinthian IPPC Installations Act s 57c(6); 45th Act of 5 May 2010 amending the Environmental Protection and Environmental Information Act s 36(3) (Salzburg); 10th Act of 17 November 2009 on environmental liability with regard to the prevention and remedying of environmental damage s 4(7) (Styria); 5th Act of 18 November 2009 on liability in the event of damage to protected species and natural habitats and for certain land damage s 4(8) (Tyrol); 95th Act on environmental liability with regard to the prevention and remedying of environmental damage, s 4(6) (Upper Austria); 38th Act on environmental liability with regard to the prevention and remedying of environmental damage in Vienna s 4(5); Act amending the IPPC Installations and Seveso II Installations Act, Land Law Gazette for Vorarlberg, No 3/2010 s 3(h). The definition of an 'operator' in the federal and regional legislation also includes the term 'alone or with assistants' or a similar phrase, for example, 'any natural or legal, private or public person who operates or controls the occupational activity - alone or with assistants - including the holder of a permit or authorisation and the person registering or notifying'.

45 Environmental Liability Act of Lower Austria s 4(5).

46 The term 'use of the environment' is defined as 'an activity that involves the use or the loading of the environment or some of its elements'. See Act LIII of 1995 on the General Rules of Environmental Protection, as amended, art 4(9).

47 Act LIII of 1995 on the General Rules of Environmental Protection, as amended s 102(1)-(2).

48 Act of 13 April 2007 on the prevention and remedying of environmental damage, as amended art 12(2)-(3); see *ibid* art 24 (notification criteria).

Arguably, the ELD cannot impose liability on the current owner in such a case because the landowner's secondary liability has not been triggered owing to the continuing existence of the operator. Imprecise language in the Austrian, Hungarian and Polish legislation has, however, avoided this issue arising on the face of the transposing legislation, although the issue may, of course, arise in its application.

All the other Member States transposed the ELD to impose liability only on an operator. As a result, the legislation transposing the ELD contrasts with most Member States' national legislation for remediating contaminated land.

2.2.3 Differences between the ELD and national liability systems

The contrast between the ELD and most Member States' national liability systems for remediating contaminated land can be explained, at least in some Member States, by their focus on the remediation of contamination caused by historic pollution incidents.

The first national law to impose liability for remediating contamination caused by historic pollution incidents was the US Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), which was enacted in December 1980.⁴⁹ The purpose of the liability scheme under CERCLA is to require persons who have been, or are, connected with hazardous substances that are continuing to pose a threat to human health and the environment to pay to clean them up instead of US taxpayers. CERCLA was enacted largely as a result of the discovery in New York State of a long deep trench filled with hazardous waste called Love Canal. The waste had been legally deposited in the trench between 1941 and 1954. Equally lawfully, a school and houses had been built on and next to the trench after it had been filled with the waste. In the 1970s, however, residents surrounding the canal had to be evacuated after they discovered contaminants from the trench seeping into the basements of some houses and the storm sewer system.

The US Congress had enacted the Resource Conservation and Recovery Act (RCRA) in 1976, and had substantially amended it in 1984 to strengthen controls on hazardous and non-hazardous waste from its cradle to its grave.⁵⁰ RCRA did not, however, grant authority to the

US Environmental Protection Agency (US EPA) to clean up or to require anyone to clean up abandoned and unregulated sites containing hazardous waste and other hazardous substances. As a result of Love Canal and the discovery of other hazardous waste sites in the US, Congress recognised the gap in legislation and the nationwide problem that required national, not only State, legislation, and enacted CERCLA.

About the same time as the discovery of Love Canal and other hazardous waste sites in the US, similar sites had begun to be discovered in Europe. For example, in 1978, hazardous waste was discovered under a housing estate in Lekkerkerk in the Netherlands, resulting in the evacuation of 268 families. The discovery of such sites led to the introduction of national liability systems to remediate contaminated land in most European countries including Norway (1981), the Netherlands (1987), Austria (1989), the UK (1995; in force 2000), the then Czechoslovakia (1992), France (1993), Estonia (1995), Belgium (Flemish Region) (1995); Slovenia (1996), Hungary (1997), Spain (Basque County) (1998), Germany (1998, 1999), Switzerland (1998, 2000), Italy (1999), Denmark (2000), Belgium (Brussels-Capital Region) (2004), and Spain (2005).⁵¹

The focus on cleaning up contamination caused by historic pollution events meant that national laws had to impose retroactive liability on persons who had not acted unlawfully when they disposed of waste contaminants; the alternative would have been nationwide public works programmes at taxpayers' expense. The difficulties involved in the introduction of retroactive liability are discussed in Part II of this article.

The focus on remediating historic pollution also led to such laws tending to impose liability for the remediation, but not the prevention, of contaminated land. The remedial nature of such retroactive legislation also means that the national legislation is more likely to include broader categories of liable persons than prospective-only EU legislation such as the ELD and the Industrial Emissions Directive which, like the ELD, channels liability for preventing and remediating contamination and other environmental damage to the operator.⁵² Limiting liability to the operator would have made the legislation a dead letter because many operators no longer existed.

49 Pub L No 96-510, 94 Stat 2767 (1980) (codified at 42 USC 9601 *et seq.*).

50 Resource Conservation and Recovery Act, Pub L No 94-580, 90 Stat 2795 (1976), as amended by Hazardous and Solid Waste Amendments, Pub L No 98-616, 98 Stat 3221 (1984) (codified at 42 USC ss 6901 *et seq.*).

51 See SM Rodrigues, ME Pereira, E Ferreira da Silva, AS Hursthouse, AC Duarte 'A review of regulatory decisions for environmental protection: Part I – Challenges in the implementation of national soil policies' (2009) 35 *Environment International* 202, 206.

52 Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Recast) (2010) OJ L334/17 arts 7, 8, 11.

2.3 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl*

The recent CJEU case, *Fipa Group*, concerns the relationship between Italian national law for remediating contaminated land and the ELD.⁵³ The case arose from requirements to remediate severely contaminated land in the Province of Massa Carrara in Tuscany. The contamination had been caused by two companies in the industrial group, Montedison Srl (now Edison SpA), which had manufactured insecticides and herbicides at the site. The companies had subsequently sold part of the land to TWS Automation Srl, which sells electronic devices, and Ivan Srl, a real estate agency.⁵⁴ In 2011, Fipa Group, a construction and boat repair business, acquired the ownership of another part of the land.⁵⁵

The Montedison companies had ceased the polluting operations in 1988 and had remediated some of the contamination in 1995 although, as AG Kokott remarked in her opinion in *Fipa Group*, 'possibly not completely successfully'.⁵⁶ In 1998, the Italian competent authorities had designated the land as 'sites of national interest' on the basis of the significant risk posed by them to human health and the environment.⁵⁷ On 18 May 2007, 16 September 2011 and 7 November 2011, the authorities had issued decrees requiring the three landowners, as 'guardian[s] of the land',⁵⁸ to carry out 'emergency safety measures' by installing a hydraulic barrier to protect an underlying aquifer,⁵⁹ and had requested them to amend the 1995 remediation plan.

The landowners brought proceedings to challenge the decrees in the Regional Administrative Court of Tuscany. The court annulled the decrees on the basis that the polluter pays principle and national environmental legislation bars a competent authority from requiring landowners to carry out measures to prevent or remediate contamination for which they are not responsible.⁶⁰ The Italian Ministry of

the Environment and the Protection of the Land and Sea appealed the administrative court's decision to the *Consiglio Di Stato* (Council of State), the highest administrative court in Italy.

The applicable Italian legislation is Legislative Decree No 152 of 3 April 2006,⁶¹ which had introduced a new Environmental Code. The code, amongst other things, imposes liability for preventing and remediating contamination on a person who damages soil, surface water or groundwater such that pollutants in them exceed specified concentration threshold levels and result in a significant risk to human health.⁶² If the levels are exceeded, or there is a risk that they will be exceeded, the competent authority must order the person responsible for the contamination to carry out emergency safety or remedial measures,⁶³ with notification of the order to the owner of the site.⁶⁴

The liability of the owner of the contaminated site is limited. If the owner discovers an imminent threat of, or actual, contamination, it must notify the competent authority and carry out measures to prevent or minimise the contamination within 24 hours of the discovery.⁶⁵ The owner is not, however, required to carry out emergency safety or remedial measures unless it caused the contamination.⁶⁶

61 Legislative Decree No 152 also includes provisions that transposed the ELD. They are at Part VI (arts 299–318 and Annexes 1–5). Part VI has been amended by Decree No 135/2009 of 25 September 2009 art 5 bis and art 25 of Law No 97 of 6 August 2013.

62 Legislative Decree No 152 art 242. The threshold levels are risk-based. Ministerial Decree 471/1999 sets out the applicable thresholds for concentrations of contaminants as well as procedures for remediating the contamination. That is, if pollutants in soil or groundwater exceed an established concentration threshold level, a site-specific risk analysis is carried out to identify remediation targets. See Legislative Decree No 152 art 240(1)(c).

63 Legislative Decree No 152 arts 244(1) and (2).

64 *ibid* art 244(3). A former owner of a contaminated site is not liable for remediating historic contamination unless the former owner is responsible for it.

65 Legislative Decree No 152 art 245(2). The 'preventive measures' that must be carried out are defined as 'any measures taken in response of an event, act or commission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage'. Translation from Cleary Gottlieb (26 March 2015) 'Alert memorandum, remediation of contaminated sites: obligations of innocent landowners under Italian law in light of a recent EU Court of Justice judgment' 2 n 4 (Cleary Gottlieb Alert) <http://www.cgsh.com/files/News/97a1a151-eede-498b-b694-9cccfed9eb31/Presentation/NewsAttachment/724600a4-645b-4f14-9328-9e14b3faeed1/Remediation%20of%20Contaminated%20Sites-%20a%20Recent%20EU%20Court%20of%20Justice%20Judgment.pdf>.

66 See Case C–534/13 (n 1) para 24. The owner may carry out the preventive and remedial measures voluntarily and seek reimbursement of its costs from the person who is responsible for the pollution. See *ibid*.

53 Case C–534/13 (n 1).

54 See *ibid* paras 25–26.

55 See *ibid* para 27.

56 See AG Opinion (n 4) para 28.

57 See Case C–534/13 (n 1) para 25; see also Directorate General for Health Information, Communication Technology and Statistics 'The determinants of health' 1.8 Remediation Sites of National Interest – SNI <http://www.salute.gov.it/rssp/paginaParaGrafoRssp.jsp?sezione=determinanti&capitolo=ambiente&lingua=english&id=2801>. Following entry onto the inventory of sites of national interest, a site is prioritised for remediation. The Ministry of the Environment, and the Protection of the Land and Sea, and the Environmental Protection Agency have responsibility for the most seriously contaminated sites in co-operation with regional authorities.

58 Case C–534/13 (n 1) para 28.

59 *ibid*.

60 *ibid* para 29.

If neither the person who caused the contamination nor the owner of the site (nor any other person) carries out emergency safety and remedial measures, the competent authority must carry them out itself.⁶⁷ The person who caused the contamination is primarily liable for reimbursing the competent authority. The owner is liable only if the authority shows that the person who caused the contamination could not be found or that it was not possible to recover its costs from that person because, for example, it was insolvent.⁶⁸ The maximum amount for which a landowner who did not cause the contamination is liable is the market value of the site after its remediation.⁶⁹

Implementation of Legislative Decree No 152 led to conflicting judicial decisions. A minority of administrative courts interpreted the polluter pays principle, on which the decree is based, broadly to impose strict liability on the owner of contaminated land. If the person responsible for the contamination could not be identified or could not pay the costs of remediating the land, the courts considered that the owner has a duty under the polluter pays principle to carry out such measures.⁷⁰ The reasons given by these courts for requiring an owner who did not cause the contamination to remediate contaminated land are that:

- doing so implements the polluter pays, preventive and precautionary principles adopted by the EU and avoids externalising the cost of remediation to the public after a polluter has sold a contaminated site
- according to the Italian Civil Code, the landowner has a duty of care and protection for the land regardless of its involvement in the contamination and
- the liability of a landowner should not depend on whether it has been negligent.⁷¹

The majority of administrative courts, however, reached the opposite conclusion by interpreting the polluter pays principle narrowly to impose liability on a landowner only if the competent authority shows that the owner had caused the contamination.⁷² The reasons provided by these courts

for not requiring an owner who did not cause the contamination to remediate contaminated land are:

- the polluter pays principle does not include a presumption that a landowner is liable for remediating contamination it did not cause, or for imposing strict liability
- Legislative Decree No 152 differentiates between the duties of a polluter and those of the owner of contaminated land who did not cause its contamination
- neither the precautionary principle nor the polluter pays principle in the Treaty on the Functioning of the European Union (TFEU)⁷³ imply that the owner of contaminated land is liable for remediating it as a result of such ownership
- the argument that the Italian Civil Code mandates that a landowner has a duty of care and protection for the land regardless of its involvement in its contamination could not apply if the land was already contaminated when the current owner acquired it and
- the principle of strict liability for remediating contamination in other Italian legislation should not be extended to a landowner who did not cause the contamination.⁷⁴

As a result of the conflicting decisions, the Italian Council of State requested the CJEU to issue a preliminary ruling on the following question:

Do the European Union principles relating to the environment, laid down in Article 191(2) TFEU and in [the ELD] – specifically, the ‘polluter pays’ principle, the precautionary principle and the principles that preventive action should be taken and that environmental damage should be rectified at source as a matter of priority – preclude national legislation, such as the rules set out in Articles 244, 245 and 253 of [the Italian Environmental Code], which, in circumstances in which it is established

67 Legislative Decree No 152 art 244(4).

68 *ibid* art 253(3). The competent authority may place a charge on the land; such a charge has priority over all other charges on the land. *ibid* art 253(2); see Case C-534/13 (n 1) para 24.

69 Legislative Decree No 152 art 253(4).

70 See Case C-534/13 (n 1) para 35; see also Germana Cassar, Andrea Leonforte ‘Contaminated land in Italy’ (referring to Opinion No 2038 of 30 April 2012 of the Italian Council of State) <http://uk.practicallaw.com/3-522-0477>.

71 See Cleary Gottlieb Alert (n 65) 3.

72 See Case C-534/13 (n 1) para 35; see also Cassar and Leonforte ‘Contaminated land in Italy’ (n 70) Practical Law (referring to Opinion No 2038 of 30 April 2012 of the Italian Council of State; Decision No 56 of 9 January 2013, and Decision No 2376 of 18 April 2011, of the Italian Council of State)

<http://uk.practicallaw.com/3-522-0477>; Fabrizio Arossa, Miriam Di Traglia, ‘Italy: environment and climate change law 2014’ (referring to Lombardy Administrative Court, Milan, 13 February 2001 No 987) <http://www.iclg.co.uk/practice-areas/environment-and-climate-change-law/environment-and-climate-change-law-2014/italy>.

73 TFEU art 191(2) provides, in pertinent part, that: ‘Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay’. Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C326/47 art 191(2).

74 See Cleary Gottlieb Alert (n 65) 3.

that a site is contaminated and in which it is impossible to identify the polluter or to have that person adopt remedial measures, do not permit the administrative authority to require the owner (who is not responsible for the pollution) to implement emergency safety and rehabilitation measures, merely attributing to that person financial liability limited to the value of the site once the rehabilitation measures have been carried out.⁷⁵

On 4 March 2015, the CJEU issued its preliminary ruling in which it concluded that the polluter pays principle in Article 191(2) of the TFEU is directed at EU institutions and cannot, therefore, be relied on by individuals or national competent authorities.⁷⁶ The court reiterated that only an operator may be primarily liable under the ELD,⁷⁷ whilst commenting that Member States may adopt more stringent rules 'including the identification of additional responsible parties'.⁷⁸ The court concluded that the ELD does not preclude Italian law that limits the liability of a landowner for contamination it did not cause to reimbursing the competent authority that carries out preventive and remedial measures up to the market value of the site after it has been remediated.⁷⁹

The CJEU stated that it was unlikely that the ELD applied to the case.⁸⁰ As AG Kokott had commented, the polluting activities at the sites had ceased in 1988, and remedial measures had been completed by 1995,⁸¹ whereas, the court stated, the ELD:

applies only to damage caused by an emission, event or incident which took place on or after 30 April 2007, where the damage derives from activities which took place on or after that date or from activities which took place before that date, but were not brought to completion before that date.⁸²

75 Case C-534/13 (n 1) para 37. The Italian administrative courts continued to issue decisions reflecting the minority as well as the majority view after the Council of State had referred the question to the CJEU. See Cleary Gottlieb Alert (n 65) 4 n 9 (citing judgment of chamber No V of Council of State, 4 February 2015 No 533; TAR Puglia, Lecce, sezione I, 6 February 2014, No 339; TAR Campania, Napoli, sezione V, 3 February 2015, No 679; TAR Lazio, sezione I, 12 February 2015 No. 2509 (minority view); TAR Friuli Venezia Giulia, Trieste, sezione I, 5 May 2014 No 183; TAR Abruzzo, l'Aquila, sezione I, 3 July 2014 No 577; and TAR Lombardia, Milano, sezione IV, 8 July 2014 No 1768 (majority view).

76 Case C-534/13 (n 1) para 40.

77 *ibid* paras 48–53.

78 *ibid* para 61.

79 *ibid* para 63.

80 *ibid* paras 43–47.

81 AG Opinion (n 4) para 28.

82 Case C-534/13 (n 1) para 44; see Valerie Fogleman 'The temporal provisions of the Environmental Liability Directive: the start date, direct effect and retrospectivity' (2014) 22(4) *Environmental Liability* 137, 144–55.

A similar issue had arisen in *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico*.⁸³ Operations by a succession of oil and chemical companies at the Priolo-Augusta-Melilli petrochemical complex in Sicily had caused serious environmental damage to an anchorage in the nearby port of Augusta. As in the current case, the Italian authorities had declared the area to be a site of national interest. The authorities had ordered some of the petrochemical companies to submit proposals to remediate the pollution. When the operators delayed in implementing the proposals, the authorities notified them that they would carry out the measures themselves and seek reimbursement from them if the delay continued. Following appeals of the orders by some operators, the authorities decided that the remedial measures that they had already approved – and which, by then, were being implemented – were inadequate. Without consulting the operators, they decided that it was also necessary to construct a physical barrier on third-party land between the operators' facilities and the coast next to the port in order to prevent further polluted water entering it. The authorities then ordered the operators to construct the barrier as a condition for the continued use of their facilities.

The CJEU stated, among other things, that:

In exceptional circumstances, [the ELD] must be interpreted as allowing the competent authority to require the operators on the land adjacent to the whole shoreline at which the remedial measures are directed to implement those measures themselves.⁸⁴

In discussing the above statement in *Fipa Group*, AG Kokott considered the argument that application of the polluter pays principle negates the need to prove that the owner of a site caused pollution at it in order to hold the owner liable for its remediation. According to this argument, a landowner should be responsible for risks arising from its land because the landowner has 'extracted the economic benefits from [it]'.⁸⁵ AG Kokott rejected the argument, stating that the CJEU had based its findings in *Raffinerie* on the obligations imposed by the ELD on operators who had caused environmental damage.⁸⁶ She commented that an

83 Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-1919; Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-2007; Case C-478/08 *Buzzi Unicem SpA v Ministero dello Sviluppo economico* and Case C-479/08 *Dow Italia Divisione Commerciale Srl v Ministero Ambiente e Tutela del Territorio e del Mare* [2010] ECR I-31.

84 Joined Cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (n 83) para 78.

85 *ibid* para 43.

86 *ibid* para 44.

argument that an owner who had not caused pollution could be primarily liable under the ELD is counter to, and contradicts, the other ELD case of the same date, in which the CJEU had concluded that the liability of an operator depends on it having caused the damage at issue,⁸⁷ or a presumption that it caused the damage.⁸⁸ She emphasised, as reiterated by the CJEU in *Fipa Group*,⁸⁹ that the polluter pays principle obliges operators to carry out remedial measures only in respect of 'their contribution to the creation of pollution or the risk of pollution';⁹⁰ it does not require them to remediate pollution to which they have not contributed.⁹¹

As indicated above, the CJEU did not discuss the application of the WFD in *Fipa Group*.

2.4 Application of the Waste Framework Directive to liability for remediating contaminated land

The issue of the application of the WFD to liability for remediating contaminated land first arose in 2004 in *Van de Walle v Texaco Belgium SA*, when the CJEU had concluded that hydrocarbons that had been accidentally spilled on land at a service station, causing soil and groundwater contamination, were waste, as was the soil polluted by them.⁹² The ruling meant that the oil company that supplied petrol to the service station as well as the manager/operator of the service station, could be liable if the oil company

had contributed to the leak by breaching contractual provisions between it and the service station manager.⁹³ The ruling also raised the potential for the owner of contaminated land to be liable as the current 'holder' of waste pollutants in the land.

The issue of pollutants in land as waste arose next, albeit briefly, in *R (ThamesWater Utilities Ltd) v Bromley Magistrates' Court*, when the CJEU concluded that waste water (untreated sewerage) that accidentally escaped from a sewerage network onto land was waste.⁹⁴ The case did not concern whether the land onto which the waste water had escaped was waste but whether, among other things, the escaped waste water itself was waste.

In her opinion in *ThamesWater*, AG Kokott stated that:

In future, the question will probably be asked as to how general waste law operates in relation to water damage and land damage as defined in [the ELD]. Such damage triggers remedial obligations under [the ELD], which might be of a more specific nature as compared with the obligation to recover or dispose of waste.⁹⁵

The issue of waste pollutants in land as waste arose a third time in *Commune de Mesquer v Total France SA*, in which the CJEU concluded that hydrocarbons that had been accidentally spilled at sea from a wrecked oil tanker and which were then mixed with water and sediment, eventually being washed up on the French coast, were also waste.⁹⁶ The court had further concluded that the company that produced the oil could be liable as an original producer or former holder if it 'contributed by [its] conduct to the risk that the pollution caused by the shipwreck will occur'.⁹⁷ The case resulted in a lowering of the threshold for responsibility for managing and disposing of waste. Whereas in *Van de Walle*, the CJEU had stated that a "direct causal link or the negligent behaviour of the operator" was required, the court stated, in *Commune de Mesquer*, that the threshold for responsibility is a company's or other person's "contribution to the risk that the pollution might occur".⁹⁸

87 *ibid* para 45; see Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (n 83) paras 52-59 and 64-67.

88 AG Opinion (n 4) para 46. The CJEU had concluded, in *Raffinerie Mediterranee*, that a Member State may provide a rebuttable presumption in its legislation transposing the ELD that provides that a competent authority can impose liability for carrying out remedial measures on an operator if the authority has plausible evidence of a causal link between the pollution and the operator's activities such as the close proximity of the operator's installation to the pollution and a correlation between the identified pollutants and substances used by the operator. The operator may rebut the presumption by showing that its pollutants are not at the polluted site. Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (n 83) paras 56-58.

89 Case C-534/13 (n 1) paras 48-53.

90 AG Opinion (n 4) para 45; see also *ibid* para 36 (referring to Case C-293/97 R (*Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte Standley*)) [1999] ECR I-2603 para 51 ('As regards the polluter pays principle, suffice it to state that [Council Directive 91/676] does not mean that farmers must take on burdens for the elimination of pollution to which they have not contributed'); Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* [2009] ECR I-6995 para 45 ('financial obligation is imposed on those holders because of their contribution to the production of the waste').

91 AG Opinion (n 4) para 45.

92 Case C-1/03 *Van de Walle v Texaco Belgium SA* (n 21) paras 47-50. The CJEU noted, in particular, that: 'the hydrocarbons cannot be separated from the land which they have contaminated and cannot be recovered or disposed of unless that land is also subject to the necessary decontamination'. *ibid* para 52.

93 *ibid* para 60.

94 Case C-252/05 R (*ThamesWater Utilities Ltd) v Bromley Magistrates' Court* [2007] ECR I-3883 para 29.

95 *ibid* Opinion of AG Kokott (8 February 2007) para 60. AG Kokott also stated that: 'For the sake of completeness, it should be pointed out, finally, that [the ELD] does not contain other legislation within the meaning of Article 2(1)(b)(iv) of the [WFD] in respect of waste water located outside collecting systems, since it does not specifically deal with waste water as waste'. *ibid* para 61. Article 2(1)(b)(iv) of Directive 2006/12/EC (n17) excluded 'waste waters, with the exception of waste in liquid form' from its scope.

96 Case C-188/07 *Commune de Mesquer v Total France SA* (n 19) paras 57-59.

97 *ibid* para 82.

98 *de Sadeleer* (n 21), 416 and n 39.

2.5 Exclusion for contaminated soil

The CJEU's judgment in *Van de Walle* raised concerns throughout the EU concerning the application of the WFD to the remediation of contaminated land and the potential for clashes with the ELD.⁹⁹ The judgment resulted in the European Commission considering the relationship between EU waste legislation and soil protection legislation that was being proposed at that time, albeit subject to a blocking minority in the Council.¹⁰⁰ The discussions led to the adoption of an exclusion to the WFD for 'land (in situ) including unexcavated contaminated soil and buildings permanently connected with land'.¹⁰¹ The Commission explained the scope of the exclusion in its guidance on key provisions in the WFD as follows: "*In situ*" essentially means in the original position; the exclusion relates to land, soil and buildings that are in their original position and have not been disturbed, for example through excavation or demolition'.¹⁰²

The Commission described the term 'contaminated soil' as follows:

The term 'contaminated soil' is not defined in the WFD or in other legal acts at Community level. A minimum criterion to be applied by competent authorities to determine whether soil is considered to be contaminated is whether it exhibits any of the 'properties of waste which render it hazardous' as per Annex III to the WFD. Furthermore, the term 'contaminated' can be clarified by comparing it to its opposite, the term 'uncontaminated soil' in Article 2(1)(c) WFD. From the wording of that provision 'uncontaminated soil and other naturally occurring material' it can be derived that uncontaminated soil essentially relates to virgin soil or soil that is equivalent to virgin soil. In the absence of EU standards, national soil legislation (where it exists) can be consulted to determine the type and level of trace contamination at which a soil might be considered equivalent to virgin soil.¹⁰³

The explanation does not identify the 'soil' that is, or is not, contaminated and thus outside the scope of the WFD. Due to the Commission discussing the relationship between the WFD and the proposed Soil Framework Directive, it seems that the term 'soil' refers to 'soil' covered by the

proposed directive, that is, 'soil forming the top layer of the earth's crust situated between the bedrock and the surface, excluding groundwater as defined in [the Water Framework Directive]'.¹⁰⁴

If the intention of the exclusion is to limit contaminated soil to the above definition of soil, the exclusion is limited and does not include many contaminated sites. Waste contaminants are not only present in soil, they are present in groundwater, underground streams and substrata, including fractures in chalk and other bedrock. They are also present in excavated pits and lagoons that have long since been covered by a layer of clay or hard standing. Waste contaminants were often also deposited in land en masse or in containers such as tanks subject to corrosion, former quarries, voids created by coal mining, and even an aborted canal (Love Canal). The contaminants have not, therefore, necessarily mixed with soil to form 'contaminated soil'. In addition, the exclusion does not cover contaminated sediments in surface and coastal water; neither does it cover sand, sludge or biodegradable waste that is generating methane and carbon dioxide.

The exclusion itself lacks clarity. That is, it is unclear whether the term 'land (in situ) including unexcavated contaminated soil' includes land that is not unexcavated contaminated soil? If it does, the meaning of the word 'land' is unclear. The term cannot, for example, be intended to exclude land at which there is contaminated soil but which also includes an abandoned corroded tank or other deteriorated container that is slowly leaking hazardous waste. Nor can it exclude an unauthorised landfill of hazardous waste or hazardous waste discarded on the surface of the land if the land also includes unexcavated contaminated soil. The contents of the tank or container as well as the unlawfully discarded hazardous waste are necessarily within the definition of 'waste'.

Importantly, AG Kokott has questioned the scope of the exclusion and has also questioned whether EU waste legislation may establish more extensive liability on the owner of polluted land for its remediation than the ELD, provided that claims are made primarily against the person who caused the damage.¹⁰⁵ She commented that 'it does not appear to be impossible to make subordinate claims against otherwise uninvolved owners of polluted sites as holders of waste'.¹⁰⁶

99 See eg Ludwig Krämer 'Decontamination of soil and EU waste legislation' (2004) 12(6) *Environmental Liability* 263; Lucas Bergkamp 'A new court-made environmental liability regime for Europe Texaco Belgium SA' (2004) 12(4) *Environmental Liability* 171.

100 See European Commission 'Withdrawal of the proposal for a Soil Framework Directive' (n 33); see European Commission (June 2012) Guidance (n 17) s 2.2.1 at 41 (*Van de Walle* 'has led to discussions on how to coordinate waste legislation with soil protection legislation') http://ec.europa.eu/environment/waste/framework/pdf/guidance_doc.pdf.

101 See WFD (n 3) art 2(1)(b).

102 European Commission (June 2012) Guidance (n 17).

103 *ibid* s 2.2.2 at 41.

104 Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil COM(2006) 232 final art 1(2); see Directive 2000/60/EC establishing a framework for Community action in the field of water policy (2000) OJ L327/1.

105 AG Opinion (n 4) para 72 (referring to Joined Cases C-378/08, C-379/08 and C-380/08 *Raffinerie Mediterranée (ERG) SpA v Ministero dello Sviluppo economico* (n 83) Opinion of AG Kokott (22 October 2009) paras 130–38).

106 AG Opinion (n 4) para 72.

AG Kokott further stated that:

it remains doubtful whether this rule actually excludes polluted soils from the application of waste legislation. If a polluting substance becomes waste as a result of the pollution, this property can hardly lapse just because it is mixed with the soil. In practice, however, it should not make any difference whether the polluted soil as a whole is treated as waste or only the substances polluting it.¹⁰⁷

AG Kokott's reasoning is impeccable. How can a polluting substance cease to become waste simply by mixing it with soil? Reverse logic, for example, is applied in the Landfill Directive in which waste does not become non-waste if it is diluted.¹⁰⁸

AG Kokott further stated, in *Commission v Italy* and *Commission v Greece* that, despite the revision of the WFD,

illegally dumped waste is not land and nor is it found *in situ*, that is in its original location. If this were the case, the door would be opened to the circumvention of the law on waste through the illegal dumping of waste. The removal of such waste can therefore still be required under waste legislation.¹⁰⁹

Thus, not only is it unclear whether the exclusion for contaminated soil from the WFD covers waste contaminants in soil; the exclusion of contaminated soil would not remove many contaminated sites from the application of the WFD.

2.6 Responsibility and liability in the WFD and the ELD

A review of the ELD and the WFD and their legislative histories indicates that the EU intended the ELD, not the WFD, to impose liability for remediating contaminated land. An examination of the polluter pays principle reinforces the intended applicability of the ELD rather than the WFD.

2.6.1 History of the directives

There is nothing in the history of the WFD to indicate that the EU intended that it should impose liability for remediating contamination on the owner of contaminated land who did not cause the contamination or even that it should impose liability on anyone for remediating contaminated land. Neither the WFD nor its predecessors

concern or concerned liability.¹¹⁰ Indeed, none of them even includes the words 'liability' or 'liable' except for a reference to the name of the ELD in the WFD, which necessarily includes the word 'liability'.¹¹¹

The intent that the WFD should not impose liability for remediating contamination is illustrated, not simply by the absence of any liability provisions in it, but also by the European Commission having considered whether to include liability provisions in proposed and adopted EU waste legislation. For example, in 1976 the European Commission included a provision in the proposal for a directive on toxic and dangerous wastes to impose liability jointly on the person who caused the disposal of waste by an unauthorised disposal facility and the facility itself;¹¹² the provision was deleted from the final version adopted by the Council in 1978.¹¹³

In 1989, the Commission included a provision in an amended directive on civil liability for damage caused by waste to impose liability on a waste producer for damage caused by waste and, if the producer could not be found, the person in control of the waste when the incident occurred.¹¹⁴ The Commission abandoned the proposed directive, however, and consequently the proposal to impose liability on a waste producer or waste holder. Instead, the Commission switched its approach from focusing solely on waste to an approach that included the prevention and remediation of damage caused by substances and materials that are not necessarily waste.¹¹⁵

The Commission's proposals to impose liability for remediating contaminated land regardless of whether the contamination is caused by waste eventually culminated in the EU's adoption of the ELD, which specifically imposes liability for preventing and remediating contaminated land as well as damage to water and biodiversity. In contrast to the WFD, not only does the word 'liability' appear in the name of the ELD itself; the words 'liability' and 'liable'

¹¹⁰ Ludwig Krämer (n 99), 267 ('Directive 75/442 [the former waste management Directive] does not deal with liability issues').

¹¹¹ WFD (n 3) recital 45 (referring to 'Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage' (emphasis added)).

¹¹² [1976] OJ C194/2.

¹¹³ See Council Directive 78/319/EEC on toxic and dangerous waste (1978) OJ L84/43.

¹¹⁴ COM(89) 282 (1989) OJ C251/3.

¹¹⁵ See European Commission 'Communication on the Review of the Community Strategy for Waste Management COM(96) 399 final' para 79 ('[in] view of [the] broader approach [adopted by the Commission in issuing the green paper on environmental liability, the Commission does not intend, at present, to pursue its efforts in the waste sector alone, though it remains convinced that liability provisions are of paramount importance for an effective protection of the environment'). The Communication was issued as a formality to the abandonment of the proposed amended directive.

¹⁰⁷ *ibid* para 76.

¹⁰⁸ See Council Directive 1999/31/EC on the landfill of waste (1999) OJ L182/1 art 5(4).

¹⁰⁹ Case C-196/13 *Commission v Italy* (EU:C:2007:250) Judgment of the Court (Grand Chamber) of 2 December 2014 and Case C-378/13 *Commission v Greece* (EU:C:2014:2405) Judgment of the Court (Grand Chamber) of 2 December 2014, Opinion of AG Kokott (4 September 2014) para 99.

appear repeatedly throughout it. Further, nowhere in the history of the ELD is there any discussion by the European Commission, the Council or the European Parliament that the liability imposed by the ELD would, or does, supplement any liability/responsibility provisions in the WFD or any of its predecessors.

2.6.2 Responsibility versus liability

Instead of imposing liability for remediating contaminated land, the WFD establishes responsibilities, that is, duties, for the management and disposal of waste. Council Directive 75/442/EEC provided that:

Member States shall take the necessary measures to ensure that any holder of waste:

- has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or
- recovers or disposes of it himself in accordance with the provisions of this Directive.¹¹⁶

This language refers to responsibility for the recovery or disposal of waste; it does not refer to liability for them. The WFD is even more explicit in its reference to responsibilities rather than liabilities; Article 15 is entitled 'Responsibility for waste management'.

In contrast, under the ELD, an operator is responsible and liable for remediating damage to land (and other environmental damage). That is, the operator must remediate environmental damage if its activities caused the damage. The 'defences' in the ELD¹¹⁷ are defences to costs, not defences to liability. That is, an operator whose activities caused environmental damage must remediate the damage. The operator may seek to recover the costs of the remedial measures from a third party if the third party, not the operator, caused the damage.¹¹⁸

Further, if a Member State adopted the permit and/or state-of-the-art defences,¹¹⁹ the operator must still remediate the damage before asserting them. A delay in remediating the damage until the operator's liability is eventually decided by a court or tribunal would not ensure 'a high level of protection' of the environment¹²⁰ because, for example, the pollutants may have migrated and caused further damage.

This principle accords with the nature of the polluter pays principle in the ELD as a costs, not a liability, principle. That is, the ELD allocates the costs of preventing or

remediating environmental damage without regard to ultimate liability. The permit and state-of-the-art defences do not provide a defence against carrying out remedial actions; the operator remains the 'polluter' who must carry them out but who may then claim reimbursement if the defences apply.¹²¹

'Responsibility' is a different concept than 'liability', as illustrated by the split between the two concepts in the ELD. The split is also illustrated in the Flemish legislation on remediating contaminated land.¹²² Under the Flemish Soil Decree, as amended, a hierarchy of three categories of persons – the operator, the user of land and the owner – are responsible for remediating any contamination at land that exceeds specified concentration levels. They are not, however, liable for the costs of remediation but may claim reimbursement of those costs from the person(s) who is liable under Belgian civil liability and tort law.¹²³

There are similarities between responsibilities and liabilities. The ELD and the Flemish legislation include exceptions and defences, respectively, to the responsibility for remediating contaminated land. Under the ELD, an operator is not obliged to prevent or remediate environmental damage caused, among other things, by 'an act of armed conflict, hostilities, civil war or insurrection' or 'a natural phenomenon of exceptional, inevitable and irresistible character'.¹²⁴

The exception applies both to the operator's responsibility for remediating the environmental damage and its liability for the costs of the remedial measures. Under the Flemish Soil Decree, as amended, the owner of land has a defence to its obligation to remediate contaminated soil if, among other things, the owner was not and should not have been aware when it acquired the land that it was contaminated.¹²⁵ The defence applies only to the owner's responsibility for remediating contaminated land; it does not apply to liability for the costs of remediating the contamination because the owner is not

121 See BIO Intelligence Service (n 40) s 5.1.2 at 133–34.

122 See Flemish Soil Clean-up Statute, as amended. The legislation in the Walloon and the Brussels-Capital Regions also differentiates between responsibility and liability for remediating contaminated land. See Pieter De Bock 'Q&A on environmental law in Belgium (Clifford Chance)' <http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/2013%20Q%26A%20on%20Environmental%20Law%20in%20Belgium.pdf>.

123 See Marijke Cardon, Eddy Van Dyck 'International Committee on Contaminated Land: Questionnaire about legal framework for soil/site contamination management' (30 October 2013) http://www.iccl.ch/download/durban_2013/2013_Survey/Belgium_Flanders_ICCL_Questionnaire_on_CLM_framework_2013_Flanders.pdf; Pieter De Bock (n 122).

124 ELD (n 1) art 4(1).

125 See OVAM 'Soil remediation in Flanders; New policies and strategies' (June 1998) <http://toep.ovam.be/jahia/Jahia/pid/991?lang=en>.

116 Council Directive 75/442/EEC (n 12) art 8.

117 ELD (n 1) arts 8(3), 8(4).

118 *ibid* art 8(3)(a).

119 *ibid* art 8(3).

120 See TFEU (n 73) art 191(2).

liable for those costs unless it caused the contamination.

In effect, the concept of liability includes both responsibility for remediating environmental damage and ultimate liability for its costs. The concept of responsibility does not include ultimate liability for the cost of remedial measures although the person who is responsible for remediating the contamination may be unable to claim reimbursement of those costs from the liable person if that person cannot be found or is insolvent.

2.6.3 Comparison of provisions in the Waste Framework Directive and the Environmental Liability Directive

The absence in intent in the WFD to impose liability for preventing or remediating contaminated land or other environmental damage is further illustrated by comparing between provisions of the ELD and the WFD. As indicated above, the ELD contains exceptions to responsibility and liability for carrying out preventive and remedial measures and defences to liability for the costs of such measures; no exceptions or defences to the responsibility for managing and disposing of waste are included in the WFD. The ELD describes how land, water and biodiversity should be remediated; no such provisions are included in the WFD. Instead, the WFD establishes a hierarchy for waste prevention and management measures.¹²⁶

The WFD focuses on the substances and objects that are waste, and are thus subject to the directive, as well as when they cease to be waste and are no longer subject to the directive. In contrast, the ELD focuses on damage to land, water and biodiversity; it does not define the substances and objects that can cause such damage in any detail. In respect of land damage, it simply uses the broad terms 'substances, preparations, organisms or micro-organisms'.¹²⁷ Further, the aim of the WFD is not the remediation of contaminated land. The reason why contaminated land was considered to be waste was 'the mere fact of its accidental contamination by [pollutants]'.¹²⁸

Crucially, Annex III of the ELD specifically lists waste management operations as an activity for which an operator is strictly liable.¹²⁹ There would be no need for this provision if the WFD already imposed such liability.

2.6.4 Clashes between the WFD and the ELD

The different approaches of the WFD and the ELD could lead to clashes if both are applied to liability for the remediation of contaminated land. For example, assume that an Annex III operator is collecting waste acid for treatment from an installation and accidentally spills it at the installation, causing land damage under the ELD. In such a case, the operator would be liable under the ELD, subject to any defences, because its activity caused the contamination. The operator would also be responsible under the WFD for remediating the contamination as the original waste producer or holder. The landowner could also be responsible under the WFD for the remediation of the waste contaminants as the current or former holder of the waste but would not be liable under the ELD because the ELD does not impose liability for remediating land damage on a non-Annex III operator.

The situation would be further complicated if the spilled acid polluted ground or surface water or destroyed a protected natural habitat at or near the installation; liability for remediating water and biodiversity damage arises under the ELD but not the WFD. In such a case, the operator would be strictly liable for primary, complementary and compensatory remediation under the ELD. The landowner would not be liable because its operations did not cause the damage. The operator and landowner would be responsible for remediating waste contaminants under the WFD, but not for complementary or compensatory remediation.

2.6.5 Application of the polluter pays principle

The polluter pays principle applies in different ways to the ELD and the WFD, with the different application resulting in potentially different categories of persons bearing responsibility for the costs of remediating waste pollutants. As indicated, operators are liable for remediating waste contaminants under the ELD, whereas the producer and former and current waste holders are responsible under the WFD.

The ELD established 'a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage'.¹³⁰ As AG Kokott explained in *Raffinerie*:

The [ELD] seeks to implement the 'polluter pays' principle in a certain form. In essence, operators are to bear the costs of environmental damage which they cause. This allocation of costs creates an incentive for operators to prevent environmental damage. This is fair in so far as the operators carry on an activity involving risk, particularly in the case of strict liability, and

¹²⁶ WFD (n 3) art 4(1).

¹²⁷ ELD (n 1) art 2(1)(c).

¹²⁸ Case C-1/03 *Van de Walle v Texaco Belgium SA* (n 21) para 53.

¹²⁹ ELD (n 1) Annex III(2). Paragraph 2 of Annex III reads: 'Waste management operations, including the collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after-care of disposal sites, subject to permit or registration in pursuance of Council Directive 75/442/EEC of 15 July 1975 on waste and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste'. As indicated above, the WFD is the successor legislation to Council Directive 75/442/EEC and Council Directive 91/689/EEC.

¹³⁰ ELD (n 1) art 1.

generally also benefit from an economic return on that activity.¹³¹

The WFD, meanwhile, provides that: '[i]n accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders'.¹³² The concept of the original waste producer bearing the costs of managing waste reflects the extended producer responsibility principle,¹³³ as evidenced in EU legislation such as the End-of-life Vehicles Directive,¹³⁴ the Waste Electrical and Electronic Directive¹³⁵ and the Batteries Directive,¹³⁶ which place responsibility for waste products on their producers.

The differing application of the polluter pays principle in the ELD and the WFD is due to the nature of the principle as a costs allocation principle. That is, the purpose of the polluter pays principle is to allocate the cost of pollution to the person responsible for it; it is not a liability principle.

131 Joined Cases C-378/08, C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* Opinion of AG Kokott (n 83) para 94; see generally Valerie Fogleman 'The polluter pays principle for accidental environmental damage: its implementation in the Environmental Liability Directive' in Alessandro D'Adda, Ida Angela Nicotra and Ugo Salanitro (eds) *Principi Europei e Illecito Ambientale* (G Giappichelli Editore 2013) 114, 129-45.

132 WFD (n 3) art 14(1).

133 See OECD 'Extended producer responsibility'. Extended producer responsibility (EPR) is 'an environmental policy approach in which a producer's responsibility for a product is extended to the post-consumer stage of a product's life cycle. An EPR policy is characterised by: (1) the shifting of responsibility (physically and/or economically; fully or partially) upstream toward the producer and away from municipalities; and (2) the provision of incentives to producers to take into account environmental considerations when designing their products. While other policy instruments tend to target a single point in the chain, EPR seeks to integrate signals related to the environmental characteristics of products and production processes throughout the product chain' <http://www.oecd.org/env/tools-evaluation/extendedproducerresponsibility.htm>; AG Opinion (n 4) para 122.

134 Directive 2000/53/EC on end-of-life vehicles (2000) OJ L269/34 (consolidated version <http://ec.europa.eu/environment/waste/elv/>; see also Ludwig Krämer (n 99) 269 (system by which professionals in the car business must set up and finance take-back systems for cars 'means, *de facto*, that under the directive the professionals of the car business are, under the polluter pays principle, considered to be the "polluters" who had to bear the cost of the take-back schemes. ... what is relevant is that this system is considered to be in line with the polluter pays principle, although obviously there are also other ways to organize the recovery and disposal of end-of-life vehicles').

135 Directive 2012/19/EU on waste electrical and electronic equipment (WEEE) (recast) (2012) OJ L197/38 http://ec.europa.eu/environment/waste/weee/index_en.htm.

136 Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators (2006) OJ L266/1 (consolidated version) <http://ec.europa.eu/environment/waste/batteries/>; see BIO Intelligence Service in collaboration with Arcadis, Ecologic, Institute for European Environmental Policy (IEEP), Umweltbundesamt (UBA) 'Development of guidance on extended producer responsibility (EPR), Final report' (prepared for European Commission, DG Environment, No 07.0307/2012/63260/ETU/C2 2014).

The Organisation for Economic Co-operation and Development (OECD), which introduced the principle in 1972¹³⁷ in the context of international trade, stated that:¹³⁸

[t]he Polluter-Pays Principle does not deal with liability since it does not point to the person 'liable' for the pollution in the legal sense. When a polluter is identified he does have to bear certain costs and compensate the victims, but he may pass the costs on to the actual party liable for the pollution, whoever it may be. The polluter accordingly acts as a guarantor of compensation but not as the party liable for the pollution.¹³⁹

Thus, when waste is produced during the process of manufacturing goods, the polluter pays principle operates 'to put an end to the cost-free use of the environment as a receptacle for pollution' so as to incorporate 'environmental costs ... in the decision-making process and hence arrive at sustainable development that is environment-friendly'.¹⁴⁰ The original producer or the holder of the waste is able to include the environmental costs in the price of the goods.¹⁴¹

The situation differs, however, when a substance becomes waste due to spillage or other accidental pollution. In such a case, the producer or holder of the waste cannot realistically include the costs of its remediation in the price of goods because other producers do not have to bear the same costs in their production of the same type of goods. The polluter pays principle thus has a different application. In this context, as stated by the OECD when it extended the principle to accidental pollution, the operator of an activity that caused pollution should, as a general rule, be regarded as the 'polluter' because 'the operator is usually in the best position to prevent and to limit [the] consequences [of the accident] in a cost-effective way'.¹⁴²

In other words, the polluter pays principle is flexible. In the context of managing non-accidental waste, the producer or holder of the waste can internalise

137 See OECD 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies' (C(72)128 1972).

138 OECD, Joint Working Party on Trade and Environment 'The polluter pays principle as it relates to international trade' (COM/ENV/TD(2001)44/final 23 December 2002).

139 OECD 'Analyses and recommendations, Environment Directorate' (OCDE/GD(92)81 1992) Foreword s 1.2.

140 OECD 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies' (n 137) cl 2-4; see OECD 'Analyses and Recommendations, Environment Directorate' (n 139) Foreword s 3.

141 OECD 'The polluter pays principle: definition, analysis, implementation' (1975) Note on the implementation of the polluter-pays principle 6.

142 OECD 'Analyses and recommendations' Environment Directorate' (n 139) Explanatory Reports, Application of the Polluter-Pays Principle to Accidental Pollution s III, para 19.

environmental costs by including them in the price of the goods being produced. Under the WFD, therefore, the polluter pays principle is not 'a prohibition on behaviour which pollutes the environment, but ... a cost regime' that enables the polluter to decide whether to 'cease or reduce the pollution or whether instead [it] will bear the cost of removing it'.¹⁴³

In the context of accidental waste pollutants, the principle operates as a system of allocating costs to the person best able to prevent the creation of the waste. This allocation of costs is at the core of the ELD, which provides that:

[t]he fundamental principle of this Directive should ... 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.¹⁴⁴

In the creation of both non-accidental and accidental waste, the application of the polluter pays principle is based on the existence of a causal link between the waste to be remediated and the person who is determined to be responsible for the remedial costs. As stated by AG Kokott, 'the "polluter pays" principle might ... be construed as a precise system of cost allocation, similar, for example, to the criterion of causality in the law on non-contractual liability'.¹⁴⁵ The causal link may be actual¹⁴⁶ or, if plausible evidence exists, presumed.¹⁴⁷

The identification of the operator as the person whose immediate activity causes pollution does not necessarily mean that the causal link between the original producer and/or former or current holder of waste is broken by a pollution incident. Such a link must exist in order for responsibility for the costs of remediating the pollution to attach to them. The CJEU made this clear in *Commune de Mesquer*, when it stated that:

'previous holders' or the 'producer of the product from which the waste came', may, in accordance with the 'polluter pays' principle, be responsible for bearing the cost of disposing of waste. That financial obligation is ... imposed on them because of their contribution to the creation of the waste and, in certain cases, to the consequent risk of pollution.¹⁴⁸

Thus, the application of the polluter pays principle to the remediation of accidental waste contaminants shows that the operator whose activities caused the waste should be the person who is responsible for remediating them as well as the person who is ultimately liable for the remedial costs because the operator is in the best position to prevent and limit the consequences of the accident. The owner of the contaminated land is not the best person to whom to allocate the costs because that person cannot pass the costs on through the production of goods. Importantly, placing the costs on such an owner is at odds with the rationale of imposing the 'financial obligation [of disposing of the waste] on [waste] holders because of their contribution to the production of the waste'.¹⁴⁹

3 Potential hierarchy of liability and responsibility

The problem in the application of the WFD to waste contaminants in respect of the ELD arises, not because the operator may be liable for remediating land damage under the ELD and the original producer and/or former and current holder of the waste contaminants may be responsible for their remediation under the WFD. Rather, the problem arises because:

- the ELD provides that the operator is liable for remediating contamination and other environmental damage; thus, the owner of contaminated land may, at most, be secondarily liable;
- the absence of any hierarchy of liability/responsibility for remediating waste in the WFD; and
- the absence of any provision in the ELD or the WFD stating whether either Directive has priority over the other Directive concerning the duty to remediate waste contaminants.

One way partially to resolve the conflict between the two directives would be an exclusion from the scope of the WFD for the remediation of waste contaminants provided

143 Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* (n 90) Opinion of AG Kokott (23 April 2009) para 31.

144 ELD (n 1) recital 2.

145 See Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* (n 90) Opinion of AG Kokott (n 143) para 36; see also Ludwig Krämer (n 99), 268 (referring to the 'polluter pays principle' in the German version of then art 174 of the EC Treaty as "the causation principle" (*Verursacherprinzip*)).

146 See Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* (n 90) para 45 ('financial obligation is imposed on ... holders [of waste] because of their contribution to the production of the waste').

147 See Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* (n 83) para 57.

148 Case C-188/07 *Commune de Mesquer v Total France SA* (n 19) para 77.

149 Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* (n 90) para 45.

that the remediation is covered by the ELD as transposed into the national legislation of a Member State. The creation of this hierarchy is not unprecedented; the WFD already includes exclusions, albeit exclusions to the scope of waste covered by the directive.¹⁵⁰ In addition, the hierarchy would promote the polluter pays principle.

As discussed in Part II of this article, however, the exclusion would not completely remedy the legal uncertainty due to the virtual inevitability of clashes between the WFD and the national liability systems of Member States. The relationship of the WFD to these liability systems poses further, and even more complex, issues than those that arise from the relationship between the WFD and the ELD.

150 See WFD (n 3) art 2.