The Environmental Liability Directive: a harmonised liability regime?

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Introduction

The passing on 21 April 2004 by the European Parliament and the Council of the European Union of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (the Environmental Liability Directive or ELD) concluded a lengthy process which started much earlier than 23 January 2002 when the Commission adopted its legislative proposal. It was preceded by the publication of a Green Paper and a White Paper respectively, to mention just the last steps thereof.

The completion of the co-decision procedure in 27 months was not particularly long, given the complex and politically sensitive character of the subject. However, agreement implied a certain amount of compromise, which is reflected in the final version of the ELD.

This article explores the question whether the ELD sets out a ‘harmonised liability regime’ throughout the European Community. The main features of the ELD are briefly presented as necessary background to make the discussion on the achieved degree of harmonisation fully meaningful.

I. The liability regimes set out by the ELD

The purpose of the ELD is to establish a ‘framework of environmental liability based on the “polluter-pays” principle, to prevent and remedy environmental damage’ (Article 1). Words can be misleading and it may be worth stating clearly at the outset what the ELD is not about. Contrary to what might be assumed from its title, the ELD does not purport to bestow on private persons a right of action before courts of law to obtain the award of damages. Such effects are, on the contrary, expressly excluded.

In a more positive manner, Recital 2 of its Preamble defines the ‘fundamental principle’ of the ELD as:

‘fundamental principle’ , as well as Article 1, leads to the conclusion clearly at the outset what the ELD is not about.

Setting aside its last part – which clearly reflects environmental economics concerns about the use of liability as a market based economic instrument contributing to internalising external costs – that ‘fundamental principle’, as well as Article 1, leads to the consideration of three main issues:
For instance, see Art 4(2) ELD: ‘This Directive shall not apply to any environmental damage or to any imminent threat of such damage occurring by reason of any of those activities;’

(a) environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities;

(b) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

These provisions raise three questions:

(1) Who can be held financially responsible (or liable)?
(2) In respect of which adverse effects on the environment?
(3) Under which conditions?

Article 3(1) shows, however, that these issues are to be considered twice since it makes it clear that there are two liability regimes under the ELD, not just one.

(1) The potentially responsible party: the operator

It results from a combined reading of Article 2(6) and (7) that the ELD only applies to ‘operators’, that is:

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.

An ‘occupational activity’ is ‘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’. Private persons acting in their personal capacity, in their everyday life, are not covered. Not all occupational activities are covered, either because of their intrinsic nature, or because of the regulatory framework that applies to them, or simply further to a policy choice. Those exceptions from the scope of the ELD are to be found in Article 4.

Article 3(1) makes a distinction between the operators of certain activities – which are more precisely identified in Annex III thereto (Annex III operators) – and all other operators (non-Annex III operators). Activities listed in Annex III are not described in factual terms, but are identified on the basis of the relevant Community regulatory framework. The circumstance that those activities, or some crucial elements thereof, are subject to Community provisions was considered as prima facie good evidence of their potential adversely to affect the environment.

Among the activities concerned, one finds large industrial installations; waste management operations; certain installations releasing polluting substances into air; installations discharging polluting substances into water; manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances and preparations; contained use of genetically modified micro-organisms and deliberate release into the environment, transport and placing on the market of genetically modified organisms.

The distinction between Annex III and non-Annex III operators is instrumental in defining the liability regimes under the ELD both in terms of types of adverse effects covered and with respect to the conditions in which one may be held liable.

For instance, see Art 4(5) ELD: ‘This Directive 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.’

13 For instance, see Art 4(5) ELD: ‘This Directive 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.’

14 For instance, see Art 4(2) ELD: ‘This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned (the only international liability regime referred to in Annex IV is that resulting from the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage) and Art 4(4) ELD: ‘This Directive 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 the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V, including any future amendments thereof.’

15 Article 4(6) ELD: ‘This Directive 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.’ See also Art 4(3) ELD.


17 See Point (7) of Annex III which concerns the [manufacture, use, storage, processing, filling, release into the environment and onsite transport] of dangerous substances and preparations, as well as of plant protection products and biocidal products. These activities are identified not by reference to a substantive regulatory framework which would comprehensively govern their operation but by reference to the presence of the dangerous chemicals defined in the relevant Community Directives listed under this point.
(2) The potential adverse effects on the environment

The ELD does not cover all types of adverse effects on the environment. First, any such adverse effects, to qualify as 'damage', must constitute a 'measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly'. Secondly, three categories of natural resources (and associated services) are singled out under the ELD so that the overall concept of 'environmental damage' is actually to be seen as the sum of the following elements:

(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;\(^\text{19}\)

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC,\(^\text{20}\) of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;\(^\text{21}\)

(c) land damage, which 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.\(^\text{22}\)

The concept of 'damage to protected species and natural habitats' is supplemented by specific definitions on 'protected species and natural habitats'\(^\text{23}\) and 'favourable conservation status'.\(^\text{24}\)

As is apparent from its text itself, the ELD draws to a certain extent on pre-existing Community legislation and concepts in the fields of water policy and nature conservation. No such Community acquis was available with respect to land damage when the ELD was prepared and negotiated, although it was expected that new developments would take place in the wake of the 6th Environmental Action Programme (EAP),\(^\text{25}\) which foresaw the adoption of a thematic strategy on soil protection.\(^\text{26}\)

The ELD goes, however, beyond providing for measures when environmental damage occurs. As its title shows, it also has a prevention component, whose pivotal concept is that of 'imminent threat of damage', that is, any 'sufficient likelihood that environmental damage will occur in the near future'.\(^\text{27}\)

(3) The conditions in which liability attaches to one's action and inaction

The ELD introduces two types of liability: 'strict' and 'fault-based'. As is apparent from a comparison of their respective texts, the liability regime provided for under Article 3(1)(a) of the ELD is not made conditional upon the prior establishment of fault or negligence on the part of the operator concerned, while this prerequisite is expressly mentioned in Article 3(1)(b). It results therefore

(c) where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives.'

24 Article 2(4) ELD: "conservation status" means:

(a) in respect of a natural habitat, the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat;

The conservation status of a natural habitat will be taken as "favourable" when:

- its natural range and areas it covers within that range are stable or increasing,
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable, as defined in (b);

(b) in respect of a species, the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that species;

The conservation status of a species will be taken as "favourable" when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitat,
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.'


27 Article 2(9) ELD.
that the liability regimes respectively provided for under the first and second subpara of Article 3(1) differ in all three of their constituent elements. The first tier of liability applies only to Annex III operators but in respect of all types of environmental damage (and related imminent threat), while the second tier potentially concerns all operators (other than those listed in Annex III) but only with regard to one type of environmental damage – damage to protected species and natural habitats. Last but not least, it is irrelevant that the Annex III operator be at fault or negligent while liability may only be attached to a non-Annex III operator if he has been at fault or negligent.

As far as the scope of the ELD in terms of temporal and geographical application is concerned, it results from Article 17 that it has no retrospective effect and will only become subject to time-limitation 30 years after the emission, event or incident, resulting in the damage, occurred while Article 15 provides for some specific rules to be applied in the event of transboundary damage.

The prevention and remedying provisions

As is more and more the case in modern liability regimes, provisions aiming at preventing the occurrence of damage when such occurrence may be plausibly feared have found their way into the ELD, in supplement and complement to those on remedying environmental damage. However, beyond this common sense-based approach of 'it is better to prevent than cure,' the preventive and remedial action provisions of the ELD echo the fundamental concern of the Community lawmaker that monetary damages do not constitute the most adequate solution in terms of environmental policy. What the ELD strives for is to ensure that the environment will be physically reinstated, restored or otherwise enhanced in such a manner that the environmental damage will be made good from a natural resources viewpoint.

This focus of the Community lawmaker explains why the ELD is not a classical tort law/civil liability instrument in which whether – and the extent to which – environmental damage is made good is left to the goodwill of some party (since courts may only act upon being seized by a claimant). Even though such an approach may be seen by some as predicated on an old-fashioned conception of public authorities as guardians (or trustees) of the general interest, the Community lawmaker relies to a great extent on those authorities which Member States must designate for fulfilling the duties provided for in the ELD – the so-called 'competent authorities.' That said, the ELD contains provisions acknowledging that competent authorities may not be enough alone to assure the latter's successful implementation.

Preventive action

The ELD prevention provisions do not purport to act as a substitute to whole tracts of Community environmental law whose main objectives and effects are precisely to regulate the risks and hazards associated with the operation of certain activities and try to limit or minimise them insofar as possible. The IPPC and SEVESO Directives are two relevant examples. The ELD in that respect only aims at providing for a last 'safeguard' mechanism. In the specific situation where there is an imminent threat of environmental damage occurring, the operator has to take, without delay, the necessary preventive measures, as well as in, certain cases, inform the competent authority of all relevant aspects of the situation.

Once apprised of the situation, the competent authority is expected actively to follow up the imminent threat; to that effect, Article 5 also contains empowering provisions allowing the competent authority to act swiftly and effectively in its dealings with the operator. If this is necessary, the competent authority must use enforcement powers to make sure that the operator complies with his duties.

In those cases where the occurrence of environmental damage could not have been prevented, the remediating provisions of the ELD come into play.

28 This Directive shall not apply to:
(a) damage caused by an emission, event or incident that took place before the date referred to in Article 19(1),
(b) damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said date,
(c) damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred.

29 Comparable, for instance, with the conventions and instruments listed in its Annexes IV and V. Note, however, that Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty Liability Arising From Environmental Emergencies (http://www.ats.aq/uploaded/ANNEKVI.pdf) contemplates a more proactive approach of public authorities to make sure environmental damage is made good.

30 Article 11(1) ELD.
33 For the definition of 'imminent threat,' see above.
34 Article 5(1) ELD.
35 Article 5(2) ELD.
36 Article 5(3) ELD:
(c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or
(d) itself take the necessary preventive measures’.
37 Article 5(4) first sentence ELD: ‘The competent authority shall require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat;
(b) require the operator to take the necessary preventive measures;
(c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or
(d) itself take the necessary preventive measures.’
38 Article 5(4) first sentence ELD: ‘The competent authority shall require that the preventive measures are taken by the operator.’
Remedial action

Article 6(1) states:

Where environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services and
(b) the necessary remedial measures, in accordance with Article 7.

Like Article 5, Article 6 ELD also contains empowering and enforcement provisions. 38

Unlike Article 5, which left total discretion to the operator concerned and the competent authority as to the specifics of the preventive action to be taken, Articles 6(1)(b) and 7 instruct the operator as to how remedial measures should be designed and adopted: operators shall identify, in accordance with Annex II, potential remedial measures and submit them to the competent authority, which shall decide which remedial measures shall be implemented. 39 In so doing, the authority must invite the persons on whose land remedial measures would be carried out to submit their observations and take them into account. 40

Annex II sets out a common framework to be followed in order to choose the most appropriate measures to ensure the remediying of environmental damage:

1. Remediation of damage to water or protected species or natural habitats

Remediying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment

‘Primary’ remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition, which 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 best information available’. 41

Where primary remediation does not result in the restoration of the environment to its baseline condition, then ‘complementary’ remediation will be undertaken. The purpose of complementary remediation is to provide a similar level of natural resources and/or services, including, as appropriate, at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition.

In addition, ‘compensatory’ remediation will be undertaken to compensate for the interim losses, which are ‘losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect’. 42 This compensation consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site. It does not consist of financial compensation to members of the public. Remediying of environmental damage, in terms of damage to water or protected species or natural habitats, also implies that any significant risk of human health being adversely affected be removed.

Annex II also sets out rules concerning the identification and choice of remedial measures as follows. 43

2. Remediation of land damage

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 …

This section of Annex II also contains some rules as to the manner in which the use of the land is to be ascertained (according to whether there are land use regulations or not, and whether the use has changed over time).

38 Article 6(2) and (3) first sentence ELD: ‘The competent authority may, at any time:
(a) require the operator to provide supplementary information on any damage that has occurred;
(b) take, require the operator to take or give instructions to the operator concerning, all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effect on human health, or further impairment of services;
(c) require the operator to take the necessary remedial measures;
(d) give instructions to the operator to be followed on the necessary remedial measures to be taken; or
(e) itself take the necessary remedial measures. 3

39 The competent authority shall require that the remedial measures are taken by the operator.

39 Article 7(1) and (2) ELD. Art 7(1) ELD deals with the situation where there would be several instances of environmental damage and empowers the competent authority to decide which instance must be remedied first.

40 Article 7(4) ELD. This right of being heard extends to the ‘persons referred to in Article 12(1)’ – see below.

41 Article 2(14) ELD.
42 Annex II(1)(d) ELD.
43 Points 1.2 and 1.3 of Annex II ELD.
Quis custodiet ipsos custodes?44

Even though competent authorities are expected to fulfil a predominant role in the implementation of the ELD, the directive acknowledges the role to be played by civil society in that respect. Article 12(1) entitles natural or legal persons:

(a) affected or likely to be affected by environmental damage or
(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,
(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and request it to take action.

What constitutes a ‘sufficient interest’ and ‘impairment of a right’ is to be determined by the Member States. The ELD specifies, however, that, to this end, the interest of any non-governmental organisation promoting the protection of the environment and meeting any requirements under national law shall be deemed sufficient for the purpose of subpara (b) and that such organisations shall also be deemed to have rights capable of being impaired for the purpose of subpara (c).

Where the request for action and the accompanying observations show in a plausible manner that environmental damage exists,45 the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.46 The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the persons which lodged the request for action, his views known with respect to the request for action. In such circumstances the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall consider any such observations and requests for action.

The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under the ELD.49

The cost related provisions

Article 8(1) makes it clear that ‘the operator shall bear the costs for the preventive and remedial actions taken pursuant to [it].’50 The operator’s financial responsibility is carried out automatically when he has taken the measures himself or has subcontracted their implementation to a specialised undertaking.

It may also be that the competent authority has taken the measures itself51 or has instructed or contracted a specialised undertaking to that effect.52 In addition to Article 8(1), Article 8(2) specifies that, in such cases, ‘the competent authority shall recover, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred.’53 Cost recovery proceedings to that effect may be initiated by the competent authority within five years from the date on which the preventive or remedial measures have been completed or the liable operator has been identified, whichever is the later.54

There are, however, situations where an operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to the ELD. Article 8(3) provides that the operator is relieved of his financial responsibility when he can prove that the environmental damage or imminent threat of such damage:

(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or
(b) 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.

In such cases Member States shall take the appropriate measures to enable the operator to recover the costs incurred.

While the above-mentioned grounds for exoneration of the operator’s financial responsibility are not controversial, the issues whether an operator could rely on his complying with the laws and regulations applicable to his activity (regulatory compliance) and/or rely on the absence of scientific and technical knowledge (at the relevant time)

50 The point is even strengthened in Art 8(5) ELD which states that ‘Measures taken by the competent authority in pursuance of Art 5(3) and (4) and Art 6(2) and (3) shall be without prejudice to the liability of the relevant operator under this Directive and without prejudice to Articles 87 and 88 of the Treaty’. Arts 87 and 88 of the EC Treaty deal with State aid.
51 Compare Arts 5(3)(d) and 6(2)(e).
52 Compare Art 11(3) ELD: ‘Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or remedial measures’.
53 However, the competent authority may decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum [Art 8(2) 2nd subpara ELD].
54 Article 10 ELD.
of the possible noxious or harmful effects of a product have been intensely debated over the years.

Article 8(4) ELD is the legal vehicle of the final political outcome:

The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event;

(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.

Strikingly, Article 8(4) is of an optional nature: the discretion is left to the Member States as to whether they will retain those provisions in their national implementing measures. In any case, those willing to do so will have to make the use of those provisions conditional upon the respect of all the terms and conditions set out therein. The introductory sentence of Article 8(4) already makes it clear that it could only benefit non-negligent operators and only in relation to remedial actions (and not preventive actions). 55

On the face of it, Article 8(4)(a) falls short of being a full-fledged ‘regulatory compliance defence’ since it only refers to permits and not laws and regulations in general. Moreover, not all types of permits but only those issued to implement certain Community legislative acts are relevant; finally, the causing event of the environmental damage must have been ‘expressly’ authorised. As to Article 8(4)(b), it is inspired to a large extent from Article 7(e) of the Product Liability Directive, 56 which reads:

The producer shall not be liable as a result of this Directive if he proves:

…

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

This so-called ‘development risk defence’ has been interpreted by the European Court of Justice as follows:

26 First, as the Advocate General rightly observes in paragraph 20 of his Opinion, since that provision refers to ‘scientific and technical knowledge at the time when [the producer] put the product into circulation’, Article 7(e) is not specifically directed at the practices and safety standards in use in the industrial sector in which the producer is operating, but, unreservedly, at the state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation.

27 Second, the clause providing for the defence in question does not contemplate the state of knowledge of which the producer in question actually or subjectively was or could have been apprised, but the objective state of scientific and technical knowledge of which the producer is presumed to have been informed.

28 However, it is implicit in the wording of Article 7(e) that the relevant scientific and technical knowledge must have been accessible at the time when the product in question was put into circulation. 29 It follows that, in order to have a defence under Article 7(e) of the Directive, the producer of a defective product must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered. Further, in order for the relevant scientific and technical knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation. 57

It seems likely that the same approach will be followed in the ELD context. 58

The issue of cost allocation in cases of multiple party causation – in other words, whether liability will be joint or several or apportioned on a proportional basis – is left to be decided by Member States’ domestic law. 59

55 Article 8(4) ELD also makes it clear that the operator is to bear the burden of proof. This may be seen, in many legal orders, more as a clarification than anything else since it is usually up to the party willing to rely on an exonerating ground to establish that the conditions to do so are fulfilled.


58 On Article 7(e), see also the relevant parts of the Commission reports on the application of the Product Liability Directive: COM(2006) 496 final; COM(2000) 893 final; COM(95) 617 final.

59 Article 9 ELD: ‘This Directive is without prejudice to any provisions of national regulations concerning cost allocation in cases of multiple party causation especially concerning the apportionment of liability between the producer and the user of a product.’
As to how the risk of insolvency of the liable operator is to be handled, the ELD gives no definitive solution. It acknowledges the right of competent authorities to take action in such cases but it falls short of mandating the underwriting by operators of financial security. It does, however, require Member States to take measures to encourage the development of financial security instruments and markets, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the directive.

II. Some comments on the harmonised nature of the liability regimes set out by the ELD

By its very nature, harmonisation in the environmental field may only be minimal since Article 176 of the EC Treaty makes it clear that ‘[t]he protective measures adopted pursuant to Article 175 shall not prevent any member State from maintaining or introducing more stringent protective measures.’ There is therefore a marked difference from the type of harmonisation one may find in the field of the internal market. There Community legislation will, in principle, set requirements from which Member States may not deviate, unless there are express provisions to that effect in the legislation itself or a Member State is able to rely on Article 95(4) or (5) of the EC Treaty to obtain from the Commission a decision allowing it to derogate from the common rules.

60 Insofar as situations going beyond those covered by Art 8(2) ELD are concerned.
61 Compare the last sentence of Arts 5(4) and 6(3).
62 Article 14(1) ELD Art 14(2) ELD calls upon the Commission to present, before 30 April 2010, a report on the effectiveness of the Directive ‘in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III. The report shall also consider in relation to financial security the following aspects: a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission shall, if appropriate, submit proposals for a system of harmonised mandatory financial security.’
63 Such measures must be compatible with the Treaty and be notified to the Commission (Art 176 EC).
65 Article 95(4) EC: ‘If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.’
66 Article 95(5) EC: ‘Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.’
67 Article 95(6) EC: ‘The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject Article 176 EC is echoed by Article 16(1) ELD, which specifies that the directive:

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 the prevention and remediation requirements of this Directive and the identification of additional responsible parties.

One may go a step further. The presentation of the ELD in the first part of this article has shown that the latter leaves open certain issues and entrusts Member States with the task of determining how certain aspects of the liability regimes must look in national law. In certain cases, a distinction may even be made as to the ‘opt-in’ or ‘opt-out’ nature of the discretion left to national authorities:

(1) Article 2(3)(c) leaves to Member States to decide whether they will extend the scope of the ELD to habitat or species of national importance (‘opt-in’).
(2) Article 2(6) leaves to national legislation to determine whether the definition of ‘operator’ will include those persons ‘to whom decisive economic power over the technical functioning of such an activity has been delegated’ (‘opt-in’).
(3) Article 5(2) requires Member States to specify the circumstances in which it is ‘appropriate’ for operators to inform the competent authority of all relevant aspects of the imminent threat situation, it being understood that such action must ‘in any case [occur] whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator’.
(4) Article 8(4) leaves to Member States to determine whether they will allow the operator not to bear the cost of remedial actions taken pursuant to the ELD in the circumstances more specifically set out therein (‘opt-in’).
(5) Article 9 makes it clear that the rules governing cost allocation in cases of multiple party causation are to be found in national law.
(6) Article 12(5) allows Member States to decide not to apply the request for action procedure to cases of imminent threat of damage (‘opt-out’).
(7) Annex III(2) third subpara allows Member States to decide that the waste management operations covered under this point do not include the ‘spreading of sewage sludge from urban waste water treatment
plants, treated to an approved standard, for agricultural purposes’ (‘opt-out’).

Conclusion

The above list shows that there are a certain number of points on which national laws may differ from one Member State to the other, or even within one Member State insofar as the State concerned has a federal or quasi-federal structure. Whether any such legal differences will actually have a noticeable impact on the ground is subject to a large degree of speculation. What may otherwise appear as potentially most disruptive of any harmonisation attempt may not even prove to be so. The case of Article 8(4) is of particular relevance: one might think that whether that provision is retained in national law or left outside will make a significant difference. And it could, be it simply in terms of transactions costs for the operators who will at least try to argue their case on that basis. On the other hand, it may also well be that case-law will be so strict in terms of application and interpretation thereof that, in practice, operators may only in a (very) limited manner rely successfully on it. However, this depends in turn on the development of case-law, which may take more or less time depending on the number of cases litigated before the courts.

In any case, Member States must report to the Commission on the experience gained in the application of the ELD by 30 April 2013 at the latest. On that basis, the Commission will submit a report to the European parliament and to the Council before 30 April 2014, which ‘shall include any appropriate proposals for amendment’. It will be interesting to see whether the degree of harmonisation achieved by the ELD – as eventually transposed by, and within, Member States – will feature in this reporting process as an important point for discussions or otherwise.

In the meantime, operators, competent authorities, civil society and courts alike have to do their best to make the ELD a success on the ground.

68 It is important to bear in mind in that respect that national courts may – and, in certain cases, must – refer issues of interpretation of Community law to the European Court of Justice under Art 234 EC.

69 For instance, some believe that Art 8(4)(a) will almost never be relevant when damage is caused by an incident resulting from a malfunction or any other unpredicted uncontrolled developments in the operation of the activities on the account that permits do not ‘expressly authorise’ malfunctions or any other type of (potentially) damaging event.

70 Article 18(1) ELD. The national reports must include the information and data set out in Annex VI to the ELD.

71 Article 18(2) ELD.

72 Member States had to transpose the ELD by 30 April 2007 at the latest.