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Abstract
The Environmental Liability Directive aims to harmonise throughout the EU, rules on liability for environmental damage to include damage to land, water, protected species and natural habitat. The aim of this work is to consider the impact of the Directive’s land damage provisions on regulating contaminated land in Ireland. By way of introduction, this work starts with a brief overview of the Directive. The main body of the work analyses the legal and operational elements of its land damage provisions. It discusses some issues and come to a number of conclusions on the impact of these provisions for Ireland. Reference is also made throughout the work, to the recently adopted Environmental Liability Regulations, which purports to transpose the Directive in Ireland.

1. Introduction

1.1. Overview of ELD
The Environmental Liability Directive (“ELD”) is a product of approximately a 10-year gestation period and can be traced to the 5th European Environmental Action Programme 1993-2000. The ELD’s aim is to establish a common European environmental liability framework for the prevention and remediation of environmental damage “at a reasonable cost to society”, based on the polluter pays’ principle. It aims also to enhance market integration across the EU. The ELD is largely a public law administrative tool, which focuses on the ability of regulatory authorities to ensure the prevention and remediation of environmental damage. The ELD does not regulate private parties’ ability to seek damages for injury to the person or property as a result of environmental damage. Private law claims for environmental damage is left to the laws of the Member States.

Environmental damage under the ELD is defined as “damage to protected species and natural habitats, water damage and land damage”.

Soil contamination may give rise to each of these three categories of damage.

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1 The author is currently conducting and EPA Ireland research project on contaminated land. Acknowledgements are due to EPA Ireland, University College Cork, and Ronan Daly Jermyn Solicitors Cork. The opinions expressed in this article are the author’s own.
3 [1993] OJ C138 at p.68 provides that “an integrated Community approach to environmental liability will be established... making sure that, if damage to the environment does occur, it is properly remedied through restoration. Liability will be an essential tool of last resort to punish despoliation of the environment. In addition – and in line with the objective of prevention at source- it will provide a very clear economic incentive for the management and control of risk, pollution and waste.”
4 ELD, Recital 3.
5 ELD, Article 1.
6 European Commission White Paper on Environmental Liability Com (2000) 66 final 9 February 2000,para. 3.5, which discuss improving the functioning of the internal market, and a level playing field across the EU.
7 See Recital 14. See also Article 3.3 of the ELD provides that “without prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage”. See also Lee M., EU Environmental Law, Challenges, Changes, and Decision Making (Modern Studies in European Law, 2005) at p. 205.
8 ELD, Article 2.1; ELR Regulation 2.1.
environmental damage. For instance, contaminated soil may come within the scope of the land damage provisions of the ELD. Contaminated soil may also be situated in a Special Area of Conservation and/or adversely affect water quality, making the ELD rules on liability for biodiversity (habitat & species) and water damage applicable. It may therefore be the case that the ELD requires clean up of a contaminated site pursuant to the land damage rules, as well as restoration of habitat and species and remediation of damage to water. This work however is confined to consideration of the land damage provisions of the ELD.

1.2. TRANSPONsITION IN IRELAND

As a Member State of the European Union, Ireland is under an obligation to comply with the ELD. Although Ireland was required to transpose the Directive by 30 April 2007, the transposition instrument, namely the 2008 EC (Environmental Liability) Regulations, only came into force this month, 1 April 2009. The ELR transposes the main provisions of the ELD and appoints the EPA as competent authority. The Environmental Liability Bill, (which is due to be enacted this month), proposes to implement the discretionary provisions of the ELD, such as the permit and state of art defences. These transposition instruments do not appear to go beyond the minimum requirements of the Directive.

The land damage provisions of the ELD will be implemented against a backdrop of a rather fragmented approach to the regulation of contaminated land in Ireland. Unlike many other EU Member States, Ireland lacks a dedicated regulatory regime for managing (including remediation) contaminated land. Existing domestic rules can deal with the prevention and remediation of contaminated land where for instance, land affects other environmental media, such as air or water, where development is planned.
or where the land comes under the waste management\textsuperscript{15} or IPPC regime.\textsuperscript{16} Liability for clean up may also lie at common law.\textsuperscript{17} However, these existing rules primarily address associated issues and are not specifically designed to deal with actual or imminent contaminated land per se. Once fully transposed and implemented into Irish law, the ELD will have the effect of supplementing the array of existing domestic rules dealing with liability for land damage.

2. **THRESHOLD LAND DAMAGE**

2.1. **LAND DAMAGE**

Article 2.2 to the ELD defines ‘land damage’ as

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“any land contamination that creates a significant risk to human health being adversely affected as a result of the direct or indirect introduction, in, on or under land of substances, preparations, organisms or microorganisms”.\textsuperscript{18}
\end{quote}

This definition is mirrored in the ELR 2008.\textsuperscript{19} Before the ELD was transposed into Irish Law via the ELR, land damage/contaminated land was not legally defined. The definition of “land damage” is important as it maps out when ELD rules on liability can be imposed and when clean up must be carried out. In order to explore this further, it is useful to look at similar legal definitions of ‘contaminated land’ in the various Member States and further afield, as well as the definition of “environmental pollution” under Irish law. For ease of analysis, the concept of contaminated land or land damage is broken down into a number of component parts, namely ‘soil/land’, ‘substances’, and

\textsuperscript{15} For example, under the Waste Management Act 1996 the authorities can take administrative action under section 55 to require clean up. Under section, 57 and 58 the regulatory authority or any person can seek a court order to require remediation of a contaminated site. Under section, 48.7 of the Waste Management Act the operator of a waste facility must apply to the EPA to surrender a waste licence. The EPA will only accept the surrender if the condition of the facility is not causing or likely to cause environmental pollution. Under the Waste Management (Certification of Historic Unlicenced Waste Disposal and Recovery Activity) Regulations 2008 (SI No. 524 of 2008), the local authorities are required to carry out risk assessment and determine remediation measures for clean up of these historic unlicensed landfills, i.e. those dating from 1977 to 1997.

\textsuperscript{16} Under Part IV of the EPA Act 1992 (as amended), the EPA can impose a condition on an IPPC licence holder to avoid any risk of environmental pollution and to return the IPPC site to a satisfactory state when surrendering the licence. (Section 83(5)(a)(ix) Guidance on Environmental Liability Risk Assessment, Residuals Management Plans and Financial Provision (EPA, 2006) at p.5 gives example of a standard condition of IPPC licence “Condition 14.1 following termination, or planned cessation for a period greater than six months of use or involvement of all or part of the site in the licensed activity, the licensee shall, to the satisfaction of the Agency, decommission, render safe or remove for disposal/recovery any soil, subsoil’s buildings, plant or equipment, or any waste, materials or substances or other matter contained therein or thereon, that may result in environmental pollution.” See also powers of local authority under the Derelict Site Act 1990, to require clean up of land which is in ‘objectionable condition” and recover the costs. See also section 12 of the Building Control Act enables local authorities to apply to high court to remedy a problem if there is a risk to human health and safety due to construction of building. Owner and those carrying out works on building may be liable. Building Regulations 1997 (SI No. 497 of 1997), Part C, at Sched. 2 require precaution to be taken to avoid danger to health and safety by substances (including contaminants) found in the ground covered by buildings. See also Energy (Miscellaneous Provisions) Act 2006 Part 9, facilitates rehabilitation of abandoned mining sites. Rehabilitation includes treatment of land affected by the main to restore the land to a satisfactory state. Upon direction of the Minister for Marine, Communications, and Natural Resources, a local authority can devise and implement a mine rehabilitation plan. The Department can give advances for the rehabilitation in form of a loan or a grant.

\textsuperscript{17} For example, under nuisance or negligence.

\textsuperscript{18} ELD, Article 2.1 (c)

\textsuperscript{19} ELR, Regulation 2
‘significant risk’.

Land
Neither the ELD nor the Irish ELR 2008 defines “land” for the purposes of the ELD regime. Many national contaminated land regimes define soil/land as including groundwater, gaseous components, and organisms. Others include within their definition riverbanks or beds, lake sediment or coastal areas, as well as types of ownership and structures on land.

Ireland does not have in place a dedicated legislative regime on contaminated land, which define soil/land. The definition of land/soil in existing environmental legislation could inform the scope of “land” for the purposes of the ELD regime in Ireland. Section 3 of the Protection of Environment Act 2003 defines land as “the top layer of the land surface” and includes disintegrated rock particles, humus, water, and air. Another rather broad definition of land can be found at Section 2 Water Service Act 2007, which provides that land:

“Includes any structure and any land covered with water (whether inland or coastal) any substratum of land, and in relation to the acquisition of land, any pipe running through, under or over land, or any interest or right in or over land including an interest or right granted by or held from the person acquiring the land.”

20 European Commission White Paper on Environmental Liability, (COM 2000, 66) 9.2.2000, at paragraph 4.5.2 refers to contaminated site as including “soil, surface water and ground water”

21 Certain commentators are of the view that the concept of ‘land’ is broader than the concept of ‘soil’ and should be distinguished .Vanheusden, B ‘ Towards a Legal Framework in the EU for Brownfield Redevelopment’ [2003] European Environmental Law Review 178 at 180 in which he states that “the concept of land is much wider and includes territorial and spatial dimensions”

22 For example, Netherlands: Soil Protection Act 2006, section 1: defines soil as “the firm part of the earth with the liquid and gaseous components and organisms contained therein”. See Flemish Decree on Soil Remediation and Soil Protection, Article 2.9: soil is defined as including “the solid part of the earth surface, including the groundwater and other components and organisms that are present in it” See also, New South Wales, Contaminated Land Management Act 1997, part 1 defines land as including “ water on or below the surface of land and the bed of such water.”

23 For example, Netherlands: Soil Protection Act 2006, section 1: defines soil as “the firm part of the earth with the liquid and gaseous components and organisms contained therein”. See also Flemish Decree on Soil Remediation and Soil Protection, Article 2.9: soil is defined as including “the solid part of the earth surface, including the groundwater and other components and organisms that are present in it”. Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, COM (2006) 232 final, Brussels 22.9.2006 (“SFD”) at Article 1.2 explicitly excludes groundwater from its definition of soil, provides “This Directive shall apply to soil forming the top layer of the earth’s crust situated between the bedrock and the surface, excluding groundwater as defined in Article 2(2) of Directive 2000/60/EC of the European Parliament and of the Council.”

24 See for example: Contaminated Land Management Act 1997 (New South Wales, Australia), part 1 defines land as including “ water on or below the surface of land and the bed of such water.”

25 See Tromans S, Turrall-Clarke R., Contaminated Land (2nd Edition, Sweet & Maxwell, 2008, London) at para. 3.14. states that the contaminated land regime in England does not define land. It indicates however that the scope of ‘land’ for the purposes of the regime can be informed by reference to Sch. 1 to the Interpretation Act 1978 (England). Sch. 1 defines land as including “building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land”.

26 Protection Environment Act 2003, Section 3.

27 Section 2 of the Planning and Development Act 2000 defines land as including “any structure and any land covered with water (whether inland or coastal)”
These definitions taken together are quite broad and include soil (whether coastal or inland), together with water, air, structures in, on, or under land and any rights of persons in the land. It is unclear whether such a broad understanding of ‘land’ is envisaged for an Irish ELD regime.

Substances & Organisms
Under the ELD regime, contaminants causing actual or imminent land damage is broadly defined and largely reflects the approach in many EU Member States. It would appear to include organisms, substances whether in natural or artificial, dangerous or non-dangerous in solid, liquid or gas form and accords somewhat with the definition of “environmental pollution” under the Irish EPA Act 1992.

Significant adverse risk
This is a risk-based definition of land damage. For land to be considered damaged, substances or organisms in, on, or under land, regardless of their concentration levels, must also pose a significant adverse risk to human health. The ELD does not cover sites posing risk to the environment only. Exclusion of risk to the environment from the definition of land damage does not correspond with the definition of “environmental pollution” under the EPA Act 1992 (Ireland), nor the definition of contaminated land under the SFD proposal or the contaminated land regime in England. The latter

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28 The Flemish Soil Decree 2006 Article 2.4 defines soil contamination as “the presence as a result of human activity, of substances or of organisms, whether in or on the soil or the buildings and structures erected on it, which adversely affect or may affect the quality of the soil, either directly or indirectly” Land contamination or contaminated site is defined in Article 2.9 as “land where the soil contamination originated and land where contaminating substances or organisms have spread to or where the soil contamination has harmful effects”. Section 78A(2) Part IIA of the Environmental Protection Act 1990(England) defines contaminated land as that which appears to the local authority to be: “In such a condition, by reason of substances in, on or under the land, that: (a) Significant harm is being caused or there is a significant possibility of such harm being caused, or (b) Pollution of controlled waters is being or is likely to be caused; and in determining whether any land appears to be such land, a local authority shall... act in accordance with guidance issued by the Secretary of State. with respect to the manner in which that determination is to be made.” Section 78A(9) defines substance as “any natural or artificial substance, whether in solid or liquid form or in any for of gas or vapour”

29 The corresponding definition of contaminated site under the SFD proposal is more limited and is confines contamination by way of dangerous substances only. SFD, Article 10 defines contaminated site as “sites... where there is a confirmed presence, caused by man, of dangerous substances of such a level that Member States consider they pose a significant risk to human health or the environment”

30 EPA Act 1992 (Ireland) (as amended), section 4 “environmental pollution means the direct or indirect introduction to an environmental medium [including land], as a result of human activity, of substances, heat or noise which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment, and includes.”

31 A pollution linkage is necessary – contaminants must have a pathway to a receptor S-P-R linkage.

32 EPA Act 1992 (as amended), section 4 “environmental pollution means the direct or indirect introduction to an environmental medium, as a result of human activity, of substances, heat or noise which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment, and includes.”

33 Article 10.1 SFD proposal, “a confirmed presence, caused by man, of dangerous substances of such a level that Member States consider they pose a significant risk to human health or the environment, hereinafter “contaminated sites”

34 Part IIA of the Environmental Protection Act 1990 (England), section 78.A(4), defines harm as “harm to
definitions bring within their scope significant adverse risk to both human health and the environment. It is disappointing to note that, although the ELD enables Ireland to define land damage more broadly, the ELR’s simply mirrors the ELD’s definition of land damage. This failure to include risk to the environment as well as human health can be regarded as a missed opportunity to bring within the ELD regulatory net as many risk sites as possible, as well as according more readily with the definition of “environmental pollution” under Irish law.

The ELD appears to leave it largely to the discretion of the relevant competent authority at national level to determine the parameters of the definition, in particular significant risk. It is submitted that (statutory) guidance in respect of the definition of land damage for the purposes of the ELD in Ireland, ought to be developed. This guidance should scope out of the meaning of “land” as well as “significant risk” so that operators and the public alike can recognise when duties under the ELD arise.

2.2. EXCLUSIONS

The ELD does not cover actual or imminent threat of land damage caused by acts of armed conflict, exceptional /irresistible natural phenomenon (i.e. act of god), nuclear risks, national defence, international security activities and activities for protection from natural disasters. In addition, land damaged caused by diffuse pollution is only covered where a clear causal

the health of living organisms or other interference with the ecological systems of which they form part and, in case of man, includes harm to his property”.

35 Article 16 to the ELD enables Member States to impose stricter requirements than that contained in the Directive. The Directive at preamble 8 calls on rules to extend to damage to the environment.

36 EPA Act 1992 (as amended), section 4. See also definition of “environmental pollution” under the Waste Management Act 1996 s.5, “environmental pollution” means, in relation to waste, the holding, transport, recovery or disposal of waste in a manner which would, to a significant extent, endanger human health or harm the environment…”.

37 See, e.g. in England Defra ‘Guidance on the Legal Definition of Contaminated Land’ (2008); Statutory Guidance to Part IIA of 1990 Environment Protection Act, Circular 1/2006. See also DEFRA In-depth Guide to the Environmental Liability Regulations 2009, Annex I, wherein DEFRA developed guidance for “land damage” for the purposes of the ELD.


39 Act of god is a common law defence for more detail see McMahon and Binchy, Irish Law of Torts (3rd Ed. Butterworth, Dublin 2000) at p.730. See Scannell, Environment, and Land Use Law (2nd Ed. Roundhall, Dublin, 2006) at p.562, which describes act of god as an extraordinary natural event, or phenomena that cannot reasonably be foreseen or guarded. E.g. Hurricane Charlie. It is suggested that scientific knowledge and forecasting techniques makes this defence more difficult to prove.

40 The Department of Environment Heritage & Local Government, Environmental Liability Directive, Screening Regulatory Impact Analysis, Version 2, July 2008 at p.39 suggests that activities of the Irish Defence Forces may come within this exclusion. Use of munitions, explosives and pyrotechnics during field training, transportation and storage of dangerous goods may result in environmental damage.

41 ELD, Article 4.1,4.2,4.6. ELR, Regulation 4. In respect of natural disasters The Department of Environment Heritage & Local Government, Environmental Liability Directive, Screening Regulatory Impact Analysis, Version 2, July 2008 at p.39 indicates that drainage activities for the purposes of protection from natural disasters may qualify. ELR Regulation 4.2 also excludes damage arising from incident in respect of which liability/compensation is covered under the following International Conventions (ratified in Ireland) Convention on Civil Liability for Oil Pollution Damage, and Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage.
connection can be established between the damage and the operator’s activity. In an Irish context, these exclusions mean that liability for the prevention and remediation of contaminated land caused by certain activities cannot be dealt with under the ELD regime, and must therefore be dealt with under existing rules, if at all applicable.

3. LIABLE PERSONS

3.1. OPERATOR OF OCCUPATIONAL ACTIVITIES

In accordance with the polluter pay principle, the ELD regime makes an operator of occupational activities liable for the prevention and remediation of environmental damage, including land damage. The operator can be an individuals as well as companies, organisations, private and public entities.

There are two categories of operators. First, the operator of occupational activities listed in Annex III is strictly liable for actual or imminent land damage. Annex III covers the vast majority of soil damaging activities, such as IPPC and waste licensed activities, licensed discharges to water, the handling of dangerous substances and GMOs and the management of mining waste. Schedule III to the ELR largely mirrors these Annex III activities. Making the operator strictly liable for the damage is not new to the Irish regulatory landscape. Strict liability means that liability for land damage can be imposed on an operator regardless of fault and is useful in situations where fault is difficult to prove. Strict liability may also incentivise

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42 ELD, Article 4.5, ELR Regulation 4.5
43 ELD, Article 2.6, an operator 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.” ELR contains a similar definition at Article 2. The ELR does not though clarify that the operator can be either a natural or legal person, public or private entity. However, reliance can be placed on the definition in the ELD in this regard ELR, Regulation 2.2, “a word or expression that is used in these Regulations and also used in the Directive has the same meaning in these Regulations as in the Directive”.
44 ELR develops this activity by explicitly including waste facility permit activities, activities requiring certificates of registration, and waste licences (to include operation of landfills, incineration plants, etc.
45 ELD, Annex III.8 provides that it covers transport of dangerous goods by road, rail, inland waterways, sea or air of dangerous goods or polluting goods. It refers explicitly to definitions in the Directives on transport of dangerous goods by road, by rail, and vessels
47 The Department of Environment Heritage & Local Government, Environmental Liability Directive, Screening Regulatory Impact Analysis, Version 2, July 2008 at p. 8. See Sch. 1 to the Environmental Liability Bill, which inserts a new Sch. 3 to the Environmental Liability Regulations, paragraph 2 excludes the spreading of sewage sludge from “urban wastewater treatment plants, treated to an approved standard for agricultural purposes.” However, it would appear that the ELR’s equivalent of Annex III activities is narrower in scope. ELR only include IPPC, waste, discharge to water activities that are already subject to an authorisation See Sch. 3, which refers to, e.g. discharge of substances into groundwater “operated under an licence issued.” It does not appear to cover these activities when carried out otherwise than under an appropriate licence. Land damage (actual or imminent) caused by activities outside of the scope of the ELR, fail to be dealt with, if at all, under the existing rules on liability for land damage.
49 Green Paper on ELD acknowledged the importance of using strict liability for environmental damage caused by certain activities.
better risk management and prevention of damage.\textsuperscript{50}

The second category of operators under the ELD is the operator of non-Annex III activities. This operator is liable for actual or imminent damage to habitat and species only where it is negligent or at fault.\textsuperscript{51} Fault based liability for a non-Annex III activity does not apply to land damage situations.

3.2. Other Persons

Article 16.1 of the ELD specifically enables Member States to impose liability for remediation on persons other than the operators of occupational activities. This could include for instance, owners and occupiers of contaminated sites, once such is permissible under national legislation.\textsuperscript{52} Owners and occupiers of contaminated sites could be considered polluters, in situations, where they failed to stem the contamination from for instance, migrating to groundwater. Imposing liability first and foremost on operators of Annex III activities and failing this on current owner/occupiers of damaged land may be desirable in an Irish context. Such a hierarchical approach may be useful in situations where the responsible operator cannot be identified, insolvent, or cannot be made to bear the costs under the ELD.\textsuperscript{53} The ELR has not opted for this hierarchical approach to liability for land damage.

4. Temporal Limit on Liability

The ELD limits liability for land damage to 30 years from the date of the incident, emission, or event, giving rise to the damage.\textsuperscript{54} Article 17 also indicates that an operator cannot be made retrospectively liable for causing land damage. More particularly, an operator cannot be made not liable for:

(a) Damage caused by an event, incident or emission that took place before 30 April 2007, the date the ELD was required to be transposed into law in the Member States; or

(b) damage that takes place subsequent to this date, but caused by an emission, event, or incident that took place and finished before 30 April 2007.\textsuperscript{55}

Regulation 5 to the ELR contains similar temporal limits on liability. This temporal limit means that the ELD regime in Ireland does not extend to historically contaminated land. Historically contaminated land will have to be remediated, if at all, under existing domestic rules.\textsuperscript{56} In respect of (b) above,

\textsuperscript{50} Commission Communications, Green Paper on Remedying Environmental Damage, 14 May, 1993 p.7

\textsuperscript{51} ELD, Article 3; ELR, Regulation 3.1(a). The ELD also imposes liability for protected habitat and species damage (actual or imminent) on operators of non-annex III occupational activities where it is at fault or negligent.

\textsuperscript{52} Article 15.5 of the Irish Constitutions prohibits the enactment of law, which imposes retrospective liability. This article may pose difficulties in imposing liability on current owners and occupiers.

\textsuperscript{53} Slabbinck R, et al, Implementation of the Environmental Damage Directive in Belgium (Flanders) [2006] 1 Env. Liability Journal, at p. 11

\textsuperscript{54} ELD, Article 17. ELR 2008 Regulation 5(c)

\textsuperscript{55} ELD Article 17, ELR Regulation 5(a) & (b) with the exception that the trigger dates is 1 April 2009 not 30 April 2007.

\textsuperscript{56} This temporal limit may be contrasted with the approach proposed in the SFD. Under Chapter III to the
it would appear that damage caused by an emission or event which took place and finished before April 2007, is not covered by the ELD regime. However, damage caused by a leak before and after April 2007 is likely to be covered by the regime. It is envisaged that the operator would be liable for the proportion of damage attributable to the emission/incident, which occurs after the coming into force of the Directive. Apportioning liability in such a situation may prove difficult in practice. Disputes are likely to arise in relation to when the damage occurred i.e. before or after the entry into force of the regime.

Imminent Threat of Land Damage
If one adopts a literal interpretation of Article 17, the ELD does not appear to impose this temporal limit on liability in respect of an imminent threat. It would therefore appear that Article 17 enables Member States to impose liability on operators in respect of imminent threat of land damage, irrespective of when the incident giving rise to the threat took place. Regulation 5 of the ELR does not appear to impose a temporal limit on liability for an imminent threat of land damage This provision does not sit comfortably with Ireland’s constitutional prohibition on retrospective liability. However, EC law has supremacy over Irish law and therefore Article 15.5 of the Constitution cannot have the effect of invalidating legislation, which transposes this element of the ELD. It is of note that the English approach, explicitly imposes a temporal limit on liability for imminent threat of damage. By excluding liability that is not excluded in the ELD, England is adopting rules less stringent than that contained in the ELD and therefore is arguably in breach of EC Law.

However, it is not altogether clear whether the non-application of a temporal limit on imminent threat of land damage was a definitive policy preference of the EU. It seems anomalous to require the operator to take preventive action to stop land damage from occurring in respect of a pre-April 2007 incident, when the operator is not required to take remedial action, if the preventive action is ineffective. Furthermore, it would appear from the travaux preparatoires, that the EU wanted to steer clear of having a retrospective element to the liability regime. By adopting perhaps a more purposive

See DEFRA Consultation on the Environmental Liability Directive (February 2008) at p.16
ELR, Regulation 5 (a) “damage caused by an emission, event or incident which takes place before 1 April 2009”
Article 15.5 provides that “the Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.” This article clearly indicates that Ireland cannot enact retrospective laws declaring acts to be an infringement of the law which were not so at the time. The imposing of a new imminent damage duty in respect of matters, which occurred in the past, may be objectionable from a constitutional law perspective. See Hamilton v Hamilton [1982] I.R. 466 . Article 15.5 applies to civil and criminal matters “(McKee v. Culligan [1992] 1 IR at 2272.
Environmental Damage Regulations 2008, Regulation 8(1)(B) “damage that takes place after that date, or is threatened after that date, but is caused by an incident, event or emission that took place before that date”
interpretation of Article 17 and reading it in the light of the ELD as a whole, it may be arguable that retrospective liability does not apply in respect of an imminent threat. However, the European Court of Justice is the appropriate authority for making a final determination on the interpretation of this provision.

**Trigger Date**

Another issue that arises in respect of the temporal liability is the trigger date. The ELR indicates that the trigger date is 1 April 2009, not 30 April 2007 as stated in the ELD. The ELR, by applying the ELD regime to a date after 30 April 2007, would appear to be less stringent than the ELD and therefore possibly in breach of EC law. It is unclear how the Irish regulatory authorities will deal with damage, which occurred after 30 April 2007 but before 1 April 2009. Arguments may be made that certain provisions of the ELD have direct effect in Ireland as and from 30 April 2007.

5. **Preventive Measures**

5.1. **Operator Positive Duties**

The ELD provides that the operator whose activity causes an imminent threat of land damage must “without delay take the necessary preventive measures” and if these measures fail to dispel the threat, to inform the competent authority of “all relevant aspects of the situation.” Similar positive duties on the operator are contained in Article 7 of the ELR. Article 7 indicates that the operator must comply with these duties where it is or

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62 ELR, Article 5
63 Case 278/85 Commission v Denmark [1987] ECR 4069 held that the date provided for in the Directive was meant to be the date from which the obligation to notify new substances were to take effect. Court found that the Dangerous Substances Directive did not give Member States the scope to introduce earlier or later date in national transposition instruments. See also UKELA, Responses to DEFRA Consultation on the Environmental Liability Directive (UKELA, May 2008) Commission have already successfully taken Luxembourg and Slovenia to task for failure to implement the Directive on time- C- 402/08 Commission v Slovenia ECJ, 12.03.2009 and C-331/08 Commission v Luxembourg, ECJ, 24.03.09
64 House of Commons Environment, Farming and Rural Affairs Committee, Implementation of the Environmental Liability Directive, (6th Report, Session 2006-07) at p.16 the gap may prejudice the operator has it has no guidance on duty under the ELD between April 2007 and the date the ELD is brought into force in England. The British Insurance Broker Association called on DEFRA to set out interim measures to apply to this gap for the purposes of ensuring legal certainty. However, the Minister indicated that the preference is to apply existing environmental legislation in respect of this period.
65 See for example Case C-236/93 Comitato di Coordinamento per la Difesa Della Cava [1994] E.C.R. 1-4947, in which the courts held that Article 4 of the Waste Framework Directive did not have direct effect as the article was not sufficiently precise or unconditional to give individuals direct rights against the State.
66 ELD, Article 2.9. defines An imminent threat of land damage as a sufficient likelihood that land damage will occur in the near future. See also DEFRA In-depth Guide to the Environmental Liability Regulations (DEFRA, 2009) at p. 24 gives practical examples of imminent threat e.g. where the event has not occurred but is likely to lead to damage if no action is taken, would include a tank containing dangerous substances situated near an aquifer (of e.g. regional importance) is in poor condition and likely to leak without action to secure the tank. If the event occurs but no damage yet there is likely to be land damage this could be a situation where there is a leak from this tank, substances enters the soil and is likely to migrate to the groundwater.
67 ELD, Article 5.1: 5.2. Article 5.2 can be interpreted to require notification regardless of whether or not preventive action was successful. Whereas the corresponding ELR provision would appear to only require notification of imminent threat, where the operator’s preventive action fails.
68 See section 6.2 for discussion on operator’s positive duties
ought reasonably be aware of the threat. Breach of these positive duties is a criminal offence.\textsuperscript{69}

\textbf{5.2. Competent Authority Role}

The role of the EPA as competent authority, supplements the operator’s positive duties when faced with an imminent threat of land damage. Under the ELR, if the EPA is aware that there is or may be an imminent threat of land damage, it must issue a direction\textsuperscript{70} to the operator (who notified the threat or any other person it considers appropriate),\textsuperscript{71} to take the necessary preventive measures. The operator can appeal this direction to the District Court within 7 days of issue.\textsuperscript{72} The appeal does not though automatically suspend the direction. The operator must in fact apply to court to have it suspended pending the outcome of the appeal. The ELR does not spell out the grounds of appeal. If the appeal is unsuccessful, the operator must carry out the direction, or be at the risk of criminal prosecution\textsuperscript{73} or a court order.\textsuperscript{74}

EPA has the option to take the necessary preventive measures itself where the operator fails to, cannot be identified or where the operator can prove that the threat was caused by a 3rd party or was a permitted incident or emission.\textsuperscript{75} Both the ELD and ELR make it clear that the EPA / State has a discretion as opposed to a duty to take preventive measures and seek recovery of its costs.\textsuperscript{76}

\textbf{6. Clean Up}

\textbf{6.1. Operator’s Positive Duties}

Operators whose activity causes land damage must inform the competent authority immediately; and take

\begin{quote}
all practicable steps to immediately control, contain and remove or otherwise manage the relevant contaminants and/or other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or impairment of services
\end{quote}

Similar duties are imposed on the operator in respect of actual land damage under Article 9 of the ELR. The aim here is for the operator to notify actual land damage to the EPA and to take immediate short-term action to manage the contamination and minimise their effects without the need for State intervention. It is likely that in respect of land damage, short-term steps are

\textsuperscript{69} ELR, Regulation 7.3
\textsuperscript{70} ELR, Regulation 8(1)(a)-(c) the direction must include a request for more information. Regulation 25 requires the direction to contain reasons for issuing it as well as advise of right of appeal. Regulation 26 deals with mode of service of the Direction. See also ELD, Article 5.4,11.4
\textsuperscript{71} ELD, Article 11.2, explicitly requires the competent authority to identify the responsible operator who caused an imminent threat of land damage. Arguably, the ELR does not explicitly require the EPA to actively identify responsible operators. Regulation 8.1 of the ELR indicates that the duty to issue a direction only triggers if an operator comes to their attention.
\textsuperscript{72} ELR Regulation 13.1
\textsuperscript{73} ELR, Regulation 8(2),13
\textsuperscript{74} ELR, Regulation 22 – EPA can seek injunctive relief for failure to comply with a direction or requirement.
\textsuperscript{75} ELD, Article 5.4, ELR Regulations 8.3(a)–(c). See chapter 8 for more details.
\textsuperscript{76} See chapter 7,8 for more details on recovery of costs and financial guarantees
\textsuperscript{77} ELD, Article 6.1 (a)(b)
confined to minimising adverse risk to human health and does not extend minimising impairment of services. The ELR clarifies that these duties trigger when the operator is aware of or ought to be aware of land damage.

6.2. IMPLICATIONS OF OPERATORS POSITIVE DUTIES

Environmental authorisations usually contain a positive duty on operators to notify incidents causing actual or imminent environment pollution. In addition, a general positive duty to notify can be found in the Waste Management Act 1996 in respect of waste activities and in the Water Pollution Act 1977. However, there is no specific duty under Irish law for operators to notify of actual or imminent land damage per se. Neither is there a positive statutory duty on operators to take emergency measures to manage the risk, without state intervention. These new ELR duties will force operators to establish internal reporting system and response plan for land damage. It is hoped that these duties will incentivise best environmental practice. Guidance as to when these duties trigger is desirable i.e. when there is actual or likely land damage. Clarification is also desirable in respect of the extent of the duty to take immediate emergency measures to manage the risk.

6.3. COMPETENT AUTHORITY - DUTY & POWER

The EPA plays an important role in clean up of land damage under the ELD regime. Once the EPA becomes aware of the land damage, it has the duty to require the operator to take the necessary remedial measures. The ELR explicitly requires the EPA to issue a direction to the identified operator requesting further information, requiring immediate practical steps to be taken, as well as necessary remedial measures. The operator can though appeal this direction. If the appeal is unsuccessful, the operator must comply with the direction or face criminal prosecution or a court order.

78 Annex II of the ELD indicates that the standard of remediation for land damage is so that the land no longer poses any significant risk of adversely affecting human health having regard to current and approved future use of a site. Impairment of services refers to functions performed by a natural resource for the benefit of another natural resource or the public. (Article 2.13, ELD)

79 Waste Management Act 1996, section 32(3)

80 Water Pollution Act section 14 requires a person “responsible” for accidental discharge, spillage, or deposit of any polluting matters, which enters or is likely to enter waters to notify the appropriate regulatory authority.

81 Troman S. et al, Contaminated Land (2nd Ed. Thomson, Sweet & Maxwell, London) at para. 13.44. Troman suggests that an operator should make a baseline condition assessment of a site to avoid being held liable for damage, which took place before it took charge of a site, or damage, which is not attributable to its activities.

82 Environmental Liability Directive, Screening Regulatory Impact Analysis, (Department of Environment Heritage & Local Government, Version 2, July 2008) at p. 75 indicates that the operator should adopt a precautionary approach and take necessary preventive measures when in doubt if there is actual or imminent land damage.

83 The EPA may become aware of possible land damage via the operators or a third party notification, REF or through some other means. Note the ELD explicitly requires the competent authority to identify responsible operators under article 11.2 of the ELD.

84 ELD, Article 6.3

85 ELR, Regulation 10

86 See Section 5.2

87 ELR, Regulation 9.3

88 ELR, Regulation 22 – EPA can seek injunctive relief for failure to comply with a direction or requirement.
Remediation Procedure

Like the ELD, the ELR at Article 11, lays down a specific procedure to be followed when identifying the appropriate remedial measures:-

1. The operator must submit a remedial plan to the EPA. This plan must be carried out within a specified time and in accordance with an appropriate risk assessment procedure.  

2. The EPA must decide on the appropriate remedial measures to be implemented, having regard to this plan and Schedule II to the ELR. The EPA has the power to prioritise remedial measures where there are a number of environmental damage situations.

3. Before issuing the operator with a direction to remediate, the EPA must consult with relevant third parties.

Once the EPA has identified the appropriate remedial measures, the ELR requires the EPA to issue a direction to the operator notifying it of the damage, the necessary remedial measures to be taken, as well as any necessary monitoring or inspection. Article 13 of the ELR enables the operator to appeal this direction. Failure to comply with the direction is an offence.

Article 23 of the ELR gives the EPA officers numerous powers on foot of a warrant to carry out its functions. Such as the power of entry to carry out inspection, to include taking samples and photos as regards possible soil damage, and to take copies or remove relevant records from the premises. It is an offence to obstruct the EPA officer in the course of exercising their power under Article 23.

The EPA is likely to be required to publish guidance for operators and the public in general on its procedures for clean up. A mechanism for definitive sign off of remedial action should also be developed to provide an element of finality to the matter. It is also likely that national guidance on contaminated land risk assessments will be needed. Perhaps along the lines of the Code of Practice Environmental Risk Assessment for Unregulated Waste Disposal Sites, recently published by the Environmental Protection Agency. This Code

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89 See ELD Article 7.2; Annex II, ELR 2008 Regulation 11.4; Sch. II, which provides that the presence of significant risk must 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.”

90 ELD, Article 7.2, ELR Regulation 11.1, Regulation 11.3 the EPA must issue the operator to identify the appropriate remedial measures.

91 ELD Article 7.3; ELR Regulation 11.8

92 ELD Article 7.4; ELR Regulation 11.5 (to include environmental NGOs), 11.6 (relevant owners/occupiers of the land)

93 ELR, Regulation 12

94 See chapter 6.3 above, n. 87-89

95 ELR, Regulation 12.2

96 Environmental Liability Directive, Screening Regulatory Impact Analysis, (Department of Environment Heritage & Local Government, Version 2, July 2008) at p. 80 states that the competent authority will be required to develop guidance on clean up procedure.

97 April 2007, EPA. Source www.epa.ie
of Practice appears to follow the UK model, which takes account of the risk of substances making its way to vulnerable receptors (S-P-R linkage) as well as the cost-benefit and technical feasibility of remediation. Voluntary agreements to ensure remediation before going down the formal route of issuing a direction may prove useful.

Consideration should also be given to the development of national soil guidance values. Soil Guidance /screening Values, are indicative values for concentration levels of contaminants in the soil which may or may not pose a risk and can be used as part of the risk assessment. As far back as 1999, the EPA indicated the desire to set non-statutory guideline values for contaminants in the soil, based on the risk-based generic guideline value in other Member States. However, no national soil guidance values have been developed to date in Ireland. It would appear that regulatory authorities in Ireland lack a coherent approach to the use of SVs in the assessment of contaminated land. The development of national soil guidance values for Ireland would therefore be a welcome development and could assist in achieving a more uniform approach to the management of contaminated land. Given the similarity of soil types in the UK, it would be useful to develop national values, along the lines of those currently being developed in the UK.

99 Fogleman V., Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions, [2006] 4 Env. Liability 127 at p.127 discusses the establishment of moratorium period on directions/orders issued by enforcing authority to facilitate voluntary works. See also s.78H (5)(b) Part IIA of the Environmental Protection Act 1990(England) which provides that no remediation notice can be served where the authority is satisfied that the contamination is being appropriately remediated without the need to issue a notice.
100 UKELA, Response to Defra on the Environmental Liability Directive and Part IIA (UKELA, 7 October 2005) indicates that soil guidance values will be difficult to introduce in respect of GMOs and that the current range of SGV in the UK are not comprehensive enough.
101 Note the diversity of terms used in the various EU Member States Soil Screening Values, guidance values, target and intervention values, trigger values, environmental quality objectives, etc. See Carlton C., Derivation Methods of Soil Screening Values in Europe. A review and evaluation of national procedures towards harmonisation (JRC Scientific and Technical Reports, 2007), at p.3.
102 Defra, Improvements to Contaminated Land Guidance, Outcome of the Way Forward Exercise, to Soil Guideline Values, (Defra, 22 July 2008) at para.7 provides that local authorities are to use these values as screening thresholds in their risk assessment on determining whether land is contaminated under Part IIA. It stated that these values should no longer be used as trigger values.
103 Ferguson, Assessing the Risk from Contaminated Sites – Policy and Practice in 16 European Countries, Land Contamination and Reclamation, Vol. . . .27, 1999, at p.44
104 Under section 75 of the EPA Act, the EPA has powers to specify and publish quality objective s in relation to any environmental medium for the purposes of protecting the environment. EPA Discussion Document ‘Towards setting environmental quality objectives for soil – Developing a Soil Protection Strategy for Ireland’, (EPA Ireland, 2002)
106 EPA Ireland’s Environment 2008 at p.180 stated that the development of environmental quality standards for soil would assist in delivering a consistent approach to the management of contaminated soils. Note
6.4. **CLEAN UP STANDARD & TECHNIQUES**

The qualitative clean up standard imposed on the operator under the ELD is for land to no longer pose significant risk of adversely affecting human health, having regard to current or approved future use of land. Use must be ascertained on the basis of the land use regulations, or other relevant regulations, in force, if any, when the damage occurred. In an Irish context, the relevant law is the Planning and Development Acts and regulations made there under. This suitable for use approach is consistent with the contaminated land regimes in many Member States and would appear to be the approach endorsed by the EPA in Ireland.

Schedule II to the ELR mirrors the ELD’s qualitative clean up standard. Before this, Ireland did not have in place a national qualitative standard for the remediation of contaminated land. However, it is disappointing to note that the ELR does not go beyond the clean up standard envisaged in the ELD and include risk to human health and the environment. This would accord more readily with the qualitative standards for clean up in other Member States, that required in respect of IPPC licensed sites in Ireland, as well as the proposed standard contained in the Soil Framework Directive Proposal.

Remediation techniques that can be employed to clean up include the removal, control, containment, or natural recovery option. It would be desirable if the ELR specifically required that in respect of the natural recovery option in particular, the operator must monitor and inspect the site for a specific period. In the alternative, guidance on the ELD, (if developed in Ireland) should recommend the monitoring and inspection of sites for a specific period and make it a requirement of the remedial plan.

7. **DEFENCES**

108 ELD, Annex II.2, ELR Schedule II


110 See, EPA Guidance on Environmental Liability Risk assessment, Residual Manage Plan and Financial Provision (EPA, 2006) although section 3.4 on the preparation of restoration and after care management plans for licenced facilities, fails to refer to whether the restoration of the site so that it does not pose risk to the environment, is based on the baseline of multifunctional use of site or current or future use of a site. The executive summary at p.76 indicates that the restoration should be to a level that is suitable for future use “an agreed end use”. See also EPA, Landfill Restoration & Aftercare Manual (EPA, 1999) at p.2 states that “restoration is a process which will return a site to a condition suitable for its proposed after use whilst incorporating measures to protect human health and the environment”.

111 The EPA Act 1992 at section 83(5)(x) provides that the EPA can require as a condition of an IPPC licence that “necessary measures will be taken upon the permanent cessation of the activity (including cessation resulting from abandonment of the activity) to avoid any risk of environmental pollution and return the site of the activity to a satisfactory state” EPA Act 1992 (Ireland) (as amended) , section 4 defines “environmental pollution” as “the direct or indirect introduction to an environmental medium (including land), as a result of human activity, of substances, heat or noise which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment.” See also section 48 of the WMA the operator of a waste facility must apply to the EPA for surrender of a waste licence. The EPA will only accept the surrender if the condition of the facility is not causing or likely to cause environmental pollution (s.48.7). It may therefore be stated that clean up of sites under the IPPC or waste management regime is to a standard that no longer poses (significant) risk to human health or the environment.

112 SFD proposal, Article 1 and 13.2
7.1. Introduction
The ELD provides that the operator must bear the cost of preventive or remedial measures, unless the circumstances come within one of the defences outlined in Article 8 of the ELD. Article 8 contains four defences to liability for costs, two mandatory and two discretionary defences. The ELR adopts the two mandatory defences, namely the permitted and 3rd party defence. The Environmental Liability Bill (Ireland) proposes to transpose the discretionary defences, namely the state of art and permit defence. The burden of proving these defences is on the operator.

7.2. Mandatory Defences
The ELD provides that an operator is not liable for the cost of preventive or remedial action taken under the ELD, where it can prove that the actual or imminent land damage was caused by a 3rd party and that the operator had adequate safety measures in place. (“3rd Party” defence) The operator must prove that the incident or event causing the damage (actual or imminent) was beyond its control. Therefore, if the operator had engaged a 3rd party to carry out work, which caused damage, then this defence would not be available. Furthermore, an operator cannot be liable for costs where the damage (actual or imminent) resulted from compliance with a compulsory order or other instructions emanating from the public authority. (“Permitted” defence) Regulation 17 of the ELR provides for these defences.

In respect of these mandatory defences, Ireland is obliged to have measures in place to enable cost recovery in the appropriate circumstance. The ELR does not go further than enabling the operator to recover costs from either the third party or public authority, by way of debt collection in a court of law.

7.3. Optional Defences
ELD also gives Member States the option to provide for additional defences to liability for the cost of remedial action (only) where the operator can show it is not at fault or negligent and that:

(a) the damage was caused by authorised action e.g. an emission (“Permit” defence); or
(b) the action taken by the operator was not considered at the time (in light of scientific and technical knowledge) likely to cause damage (“State of the Art” defence)

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113 ELD, Article 8.1
114 ELD, Article 8.2, 9.4
115 Regulation 17.1, 17.4, 17.5 ELR for the mandatory defences.
116 ELD Article 8.3(a); ELR, Regulation 17.4(a).
117 ELD, Article 8.3(b) provides that the permitted defence does not apply where instructions are issued on foot of an environmental transgression. ELR, Regulation 17.4(b).
118 ELR, Regulation 17.5
119 Article 8.4 ELD. Charles Pirotte, Environmental Liability Directive: a harmonised liability Regime? 2007 19 ELM 237 at p. 243 compares the state of art defence in the ELD with the “development risk” defence in the Product liability Directive which was interpreted by the ECJ in the case of C300/85 Commission v United Kingdom [1997] ECR I-2649 para. 26-29 to mean that knowledge of the producer is not actual
As mentioned above, the Environmental Liability Bill proposes to implement these optional defences. The Bill limits the use of these defences to claims for cost of medium to long-term remedial action as opposed to initial emergency action to manage the risk. In addition, the Bill provides that these defences do not apply in respect of deliberate release of GMOs. This would appear to be more restrictive than that envisaged in the ELD.

The Irish Regulatory Impact Analysis indicates that these defences are important for the viability of businesses in Ireland. However, it may be the case in respect of the permit defence, the regulators will tighten up licence conditions to minimise the possibility of successfully arguing this defence. Too onerous a condition in a permit may also affect the viability of businesses. From an environmental protection perspective, Lee argues that the availability of the permit defence means that the operator has no incentive to go beyond regulatory compliance even if an operator knows that the activity poses risk of land damage. The ELR does not clarify the situation when an operator successfully argues an optional defence. It is unclear who in such circumstances will have to pay the costs of clean up in these circumstances. The Irish Regulatory Impact Analysis appears to indicate that where the permit defence is successfully argued the State could undertake and fund remedial measures.

7.4. Defence to Liability for Costs or Preventive/Remedial Action?

Applying a literal interpretation to Article 8 of the ELD, arguably these defences are not defences to the operator’s liability to carry out preventive or remedial action, but rather defences to liability for the costs of action taken. The operator would appear to have to carry out the necessary preventive or remedial measures before it can seek recovery of costs.

The English authorities have pointed out that it is not practical to require an operator to carry out remedial work where it knows it is not liable for costs. DEFRA is of the view that this would have the effect of making the State responsible for remediation, which in DEFRA’s view was not the intention of the ELD. It considers that the most sensible interpretation of Article 8 is that where the defences apply the operator is not required to carry out remedial

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120 Head 4.1, Environmental Liability Bill 2008 for proposed discretionary defences.
121 ELD, Article 3.2 enables Member State to adopt rules that are more stringent.
124 See Lee M., EU Environmental Law, Challenges, Changes and Decision Making (Modern Studies in European Law, 2005) at 205
125 Screening RIA (version 2) at p.45 (Department of Environment Heritage and Local Government, 2008)
127 Article 8.2 the ELD states that the operator shall not be required to “bear the cost of preventive or remedial actions TAKEN pursuant to this Directive” Article 8.4 provides that “member states may allow the operator not to bear the cost of remedial actions TAKEN pursuant to this Directive”
Based on this rationale, the English transposition instrument enables the operator to appeal a direction to clean up using these defences as grounds of appeal, if successfully argued the operator does not have to clean up. In respect of preventive measures however, it would appear that the operator must carry out these measures and then seek recovery of costs from either the public authority or a 3rd party. In contrast, the Spanish and German transposition instruments would appear to require the operator to prevent or restore damage to the environment and then recover costs from the third party or the public authority.

The Irish Regulatory Analysis does not deal with this issue directly. Regulation 17 of the ELR, which transposes the mandatory defences read as a whole, would appear to indicate that the approach to be adopted in Ireland is that these defences are defences for liability for cost and not the actual carrying out of remedial action. Regulation 17 is headed “liability for prevention and remediation costs”. Regulation 17.5 appears to imply that the operator is required to take preventive or clean up measures and then recover its costs from either the responsible 3rd party or the public authority who permitted the incident /emission gave rise to the damage. If this the approach being adopted in Ireland, it may prove difficult to ensure the operator carries out remedial works, where the operator is of the view that it comes within one of the above-mentioned defences, and therefore not liable to bear the costs of remediation. This will be particularly so where the operator is unlikely to be able to recover costs from a 3rd party who is unidentifiable or insolvent. The enabling of recovery of costs as a contract debt under the ELR will not be useful in such circumstances. It is unlikely that the operator could claim against the State in such a situation, as this would offend against the discretion given to Member States/ or their competent authority in respect of taking preventive or remedial measures itself. This leaves an unsatisfactory situation for an operator who can avail of these defences and is likely to diminish the willingness of an operator to clean up where it cannot recover costs.

8. **STATE/EPA Action**

Where the operator fails to take the necessary measures or cannot be identified or made to bear the costs, the ELD enables the competent

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128 DEFRA, Consultation on the draft regulations and guidance implementing Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage (DEFRA, February 2008) at p.21-22.

129 Environmental Liability Regulations 2009 (England) , Regulation 19(3)

130 Ibid., Regulation 16. Regulation 19 dealing with appeals does not provide for appeal in respect of directions on preventive measures to be taken.


132 At para. 34-39 Save in so far as to say that when deciding on remedial measures the EPA has discretion as regards assigning the cost if the risk was not anticipated in the permit. It unhelpfully states that it would be difficult to determine whether or not there would be any instances in which environmental damage would be left unremediated. Para 39 does indicate that in certain instances costs could fall to the State.

133 emphasis added

134 ELD , Article 5.3, 6.3 , see also DEFRA Consultation (November 2006), at para. 5.23 which indicates that if the operator could claim against the State in this instance then this would have the effect of introducing subsidiary liability of the State, where the ELD does not explicitly provide for.
authority to take the necessary preventive or remedial measures itself.\textsuperscript{135} The ELD makes it clear that \textit{remediation} by the competent authority must be an avenue of last resort.\textsuperscript{136} The taking of preventive or remedial measures by a competent authority is without prejudice to the operator’s liability under the ELD regime.\textsuperscript{137}

ELR 2008 largely mirrors the Directive in this regard.\textsuperscript{138} This discretionary power is a feature of other environmental regimes in Ireland.\textsuperscript{139} The EPA has the discretionary power as opposed to duty, to carry out necessary preventive or remedial measures, where the operator fails to take the necessary measures, cannot be identified or where the operator can prove the 3\textsuperscript{rd} party or permitted defence.\textsuperscript{140} The carrying out of remedial measures by the EPA must be an avenue of last resort.\textsuperscript{141}

If the EPA decides not to exercise its discretion to take action, the only avenue of redress for anyone to check on the reasonableness of this decision is judicial review proceedings, which is costly and difficult to succeed on.\textsuperscript{142} Giving the EPA the power as opposed to the duty to remediate contaminated land, may result in an unsatisfactory situation particularly in respect of high-risk site which are not otherwise dealt with in existing domestic rules outlined above. The failure to clean up these sites will not benefit either the environment, human health or the economy. Perhaps the ELR should have gone further than the ELD and require the EPA to carry out necessary remedial measures in respect of high-risk (orphan) sites, where all other avenues of redress fail.\textsuperscript{143} The State would though need to establish a funding mechanism for these orphan types sites, akin to that envisaged in the SFD proposal.\textsuperscript{144} The Irish Regulations Impact Analysis of the ELD recognises that an environmental fund, sinking fund, or public fund would be useful in this situation.\textsuperscript{145} It considers that a fund could consist of levies collected from potential polluters. However, does not consider it feasible to impose such a fund at this time, due to lack of information on potential environmental damage incidents. However, it envisages considering the merits of an environmental fund at a later stage.\textsuperscript{146} The Irish Regulatory Impact Analysis

\textsuperscript{135} Article 5.4 and 5.3(d), ELD
\textsuperscript{136} Article 6.3, ELD
\textsuperscript{137} Article 8.5, ELD
\textsuperscript{138} ELR Article 8.3 (a) - (c) (preventive); Article 10.3 (remediation)
\textsuperscript{139} See for example s.13 of the Local Government (Water Pollution) Act 1977 (as amended) enables the local authority to take clean up or preventive measures in respect of polluting incidents.
\textsuperscript{140} ELR Regulation 8.3 and 10.3
\textsuperscript{141} ELR, Regulation 10.3
\textsuperscript{142} Furthermore s. 15 of the EPA Act 1992 provides a general immunity of EPA from being sued for damages or other loss, caused or contributed to the failure of EPA to carry out its functions.
\textsuperscript{143} ELD, Article 16.1 enables Ireland to go beyond ELD requirements.
\textsuperscript{144} SFD proposal, Article 13.
\textsuperscript{145} Environmental Liability Directive, Screening Regulatory Impact Analysis (Department of Environment, Heritage and Local Government) July 2008 at p. 81. See also Screening Regulatory Impact Analysis – Environmental Liability Directive - Summary of Responses at p.8. The EPA expressed its concern as competent authority to exposure to unquantifiable liabilities, where EPA had to take and fund remedial measures it.
\textsuperscript{146} SFD proposal, Article 13.3 It is of note that the proposal for SFD envisages the setting up of a State funding mechanism to clean up orphan sites. This provision has not yet though been finalised.
indicates that the EPA should develop guidance on the use of this discretion to take preventive and (emergency) remedial measures.\textsuperscript{147}

\textit{EPA Recovery of Costs}

Like the ELD,\textsuperscript{148} Article 17 of ELR enables the EPA to take action to recovery its preventive and remedial costs,\textsuperscript{149} subject to the operator’s 3\textsuperscript{rd} party and permitted defence.\textsuperscript{150} Recovery of costs by a competent authority is a feature of other Irish environmental regimes.\textsuperscript{151} However, this power has rarely been used.\textsuperscript{152} In a land damage situation, the EPA may be unwilling to clean up, where it is unlikely to recover its costs. As mentioned above, perhaps a funding mechanism for such situations ought to be put in place to support the EPA in carrying out its functions under the ELD. In England a system of direct grants was provided to local authorities to carry out their functions under its dedicated contaminated land regime, where cost recovery is uncertain or very slow.\textsuperscript{153}

It is disappointing to note that the ELR only enables the EPA to recover its costs by way of a simple contract debt in a court of law. This goes against Article 8.2 of the ELD, which explicitly provides that the competent authority must recover costs (preventive and remedial), among other avenues, via security over property or other appropriate guarantees from the operator. The ability of the EPA to recover costs via security over property or other appropriate guarantees could be an easier and more successful route to recover costs and would encourage the EPA to exercise its discretionary powers to take action in respect, high-risk sites in particular. A specific power to recover costs by way of security over property would be innovative from an Irish environmental law perspective, and could prove very effective in practice. The English transposition instrument enables the competent authority to recover its costs via security over the property of the operator. It does this by serving a charging notice over the property. All other entities


\textsuperscript{148} ELD, Article 8.2

\textsuperscript{149} ELD, Article 2.16 “means costs which are justified by the need to ensure the proper and effective implementation of this Directive including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs” Environmental Liability Directive, Screening Regulatory Impact Analysis, (Department of Environment Heritage & Local Government, Version 2, July 2008  indicates this does not include EPA set up costs

\textsuperscript{150} The ELD, Article 8.2 goes further in that defence as available for competent authority recovery of costs is the permit and state of art defence if available. The Environmental Liability Bill ought to make this explicit if this is the desired effect.

\textsuperscript{151} E.g. section 86(1)(b) (xii) EPA Act, EPA can impose as condition of IPPC licence the operator to pay the EPA for its cost in determining whether non compliance with a licence and the steps taken to monitor emissions.

\textsuperscript{152} Contaminated Land Capital Projects Programme. See Also CLAN1/06.

Article 14 of the ELD encourages Member States to establish financial security instruments and markets to enable operators to use financial guarantees to cover their responsibilities under the ELD. Article 14 does not indicate whether these securities should be entered into before or after damage occurs. \(^ {155} \)

These instruments would be key to ensuring remediation of contaminated land in Ireland and can in particular cover insolvency situations. Moreover, operators would be inclined to exercise caution when carrying out its activities. \(^ {156} \) These financial guarantees could include for instance, insurance policy or bank guarantees. \(^ {157} \) The Spanish have taken the lead among the member states by introducing a compulsory system of financial security. Operators who have the potential to cause damage in excess of 2 million euro, are obliged to provide financial guarantees in the form of insurance policy, bank guarantee or a contingency fund. \(^ {158} \) Furthermore, the imposition of financial securities in respect of actual or imminent land damage is already feature of Dutch soil legislation. \(^ {159} \) The regulatory authorities have the discretion to impose these securities having regard to risk, cost-effectiveness, and insolvency. However, industry have criticised this approach as too burdensome, particularly for SMEs. \(^ {160} \) It would also appear that regulators do not use this power regularly because of the cost of implementation and lack of expertise in assessing financial risk of an industry. \(^ {161} \)

Although financial guarantees are already a feature of IPPC and waste licensing regimes in Ireland, the ELR has not taken the opportunity to establish mandatory financial security instruments in respect of land damage situation under the ELD. The Irish Regulatory Impact Analysis indicates that the development of financial security instruments in respect of ELD liability would be explored into the future. \(^ {162} \)

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\(^ {154} \) Environmental Damage Regulations 2009 (England) Regulation 27. The authority acts like a mortgagee. If it does not recover its costs, the property can be sold to cover costs.

\(^ {155} \) Under the Flemish contaminated land regime, financial securities must be entered into after the damage has occurred.


\(^ {157} \) Coroner, Environmental Liability Directive: how well are Member States handling transposition? , [2006] 6 Env. Liability 225 at 227, indicates that the Spanish government have established compulsory system of financial security. The Spanish system proposes to require relevant operators who have the potential to cause damage in excess of 2 million, to provide financial guarantees via insurance policy, bank guarantees, or contingency fund.

\(^ {158} \) Coroner, Environmental Liability Directive: how well are Member States handling transposition? , [2006] 6 Env. Liability 225 at p227

\(^ {159} \) Environmental Management Act (Netherlands) 1993 , Article 8.15; Besluit financial zekerheid, Staatsblad 2003 nos. 71,150

\(^ {160} \) Peeters, van der Woerd, Financial security obligations to prevent orphan damage: the Netherlands [2006] Env. Liability at p.218

\(^ {161} \) Peeters, van der Woerd, Financial security obligations to prevent orphan damage: the Netherlands [2006] Env. Liability at p.219

\(^ {162} \) Environmental Liability Directive, Screening Regulatory Impact Analysis, (Department of Environment
10. Interaction with Existing Rules
As regards the interaction of the ELD land damage provisions with existing rules, Article 3.2 of the ELR provides that the ELD regime applies without prejudice to stricter European Community legislation and domestic law dealing with environmental damage. Therefore, existing rules, which can deal with damage or imminent threat of land damage, remain in place and apply when damage cases do not come within the scope of the ELR, or where these existing rules go further than the ELR. For instance, there may be situations where the ELD is inapplicable in the face of land damage e.g. because damage results from a waste activity which predates the coming into effect of the regime. In this situation the relevant provisions of the Waste Management Act are more appropriate to deal with actual or imminent threat of land damage. Another example might be the requirement under the IPPC rules to leave a site in a satisfactory state after closure. This is likely to necessitate minimising risk to the environment as well as human health and so the “environment” element of the clean up is in addition to that required under the ELR.

Furthermore, Article 3.2 is likely to mean that if land damage or an imminent threat of this damage comes within the ELR, then the ELR is applicable unless other domestic rules achieve the same result within a reasonable period. It can be implied that Article 3.2 requires a land damage situation to be dealt with under either the ELR or some other domestic law but not both. As a corollary to this, it would appear that Article 14 of the ELR envisages cooperation between the EPA as competent authority under the ELD regime and other public bodies with environmental damage function. Formal liaison between the EPA and these other public bodies when faced with a land damage situation can minimise duplicity of function. If Guidance on the ELR is developed it ought to clarify the interaction of the operator’s duties under the ELR with other regulatory regimes dealing with land damage to provide some comfort to those being regulated. 163

11. Conclusion
Ireland as Member State of the EU has an obligation to transpose and comply with the land damage provisions of the ELD. As outlined above, Ireland’s approach to regulating contaminated land is rather fragmented. Unlike many other Member States, Ireland lacks a dedicated contaminated land regime. Although existing rules regulate to an extent the prevention and remediation of contaminated land. These rules are designed largely to deal with associated issues and not contaminated land per se. It is therefore likely that the ELD land damage provisions will have significant substantive impact in Ireland. The ELD rules will have the effect of supplementing and in some instances enhancing the regulation of contaminated land in Ireland.

The main substantive impact of the ELD land damage provisions will be the operator’s positive duties, as well as the general power and duty on the EPA

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to deal with land damage situations. Operators have a new positive duty to report imminent or actual land damage, as well as a duty to take immediate interim steps to manage the risk, without the need for State intervention. These ELD duties expose operators to more environmental risk and costs and will require companies to carry out more comprehensive due diligences and contractual protection. Operators might be well advised to take out environmental impairment insurance to cover the cost of liability under the ELD.

Another positive from an environmental protection perspective is Schedule 3 to the ELR, which appears to indicate that land damage should be a material consideration in planning matters. Statutory Guidance for planning authorities in respect of land damage in planning matters may need to be developed. The ELD also standardises to some extent the procedure for clean up. It is hoped that guidance on identification and assessment of land damage, as well as the possible adoption of national soil guidance values and clean up standards will be developed.

However, the land damage provisions of the ELD have their limitations and may not be the total answer to regulating contaminated land in Ireland. Many contaminated sites in Ireland will not come under the regime, such as historically contaminated sites and sites that only pose environmental risk. These sites may not necessarily be cleaned up under existing rules. Moreover, the ELR does not go beyond minimum transposition of the ELD provisions. It fails to take the opportunity to impose strict liability for clean up beyond Annex III type activities, to develop financial security mechanisms or to enable the EPA to recover its costs by way of security over property.

In conclusion, the full extent of the requirements in respect of liability for land damage in Ireland and how they will interact with existing rules is yet unclear. Transposition is incomplete and implementation is at infancy stage. Given the lack of a dedicated regulatory regime for the remediation of contaminated land in Ireland, it is arguable that the ELD land damage provisions will have significant substantive impact on how contaminated land is cleaned up in Ireland. However, its effectiveness will largely depend on how Ireland implements its ELD obligations. At the very minimum it will be far-reaching in its appeal for enhanced prevention and remediation of damaged land. It may pave the way for the establishment of a dedicated legislative regime for the management of contaminated land in Ireland.

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164 See for example English approach: PPS 23, Planning and Pollution Control – Annex 2: Development on Land affected by Contamination, 2004 at paragraph 2.1 which provides that a ‘fundamental principle of sustainable development is that the condition of land, its use and its development should be protected from potential hazards’

165 See also Regulatory Impact Analysis 2007 Version 2 at p.7 which states that existing domestic legislation requiring remediation of environmental damage are incidental to other regulatory provisions aimed mainly at protecting of the environment through creation of statutory obligation. They do not provide same incentive to prevent or remediate environmental damage, as is the case with the ELD. These liability provisions are: “far less comprehensive than those of the ELD”

166 A dedicated regime could provide for a comprehensive definition of contaminated land; systematic mechanisms for identifying and assessing contaminated land, as well as the establishment of liability for prevention and remediation where existing rules (dealing largely with associated issues) are not available.
Aoife Shields