



European Union Action to  
**Fight Environmental Crime**

# Directive 2004/35/EC on Environmental Liability

Work Package 2 on “Instruments, actors and institutions”



This project has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no 320276.



## **ACKNOWLEDGEMENT**

The research leading to these results has been carried out as part of the research project "European Union Action to Fight Environmental Crime" ([www.efface.eu](http://www.efface.eu)). EFFACE is a collaborative effort of 11 European universities and think tanks and is coordinated by the Ecologic Institute ([www.ecologic.eu](http://www.ecologic.eu)). The research leading to these results has received funding from the European Union FP7 under grant agreement No 320276.

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Manuscript completed in March 2015

This document is available online at: [www.efface.eu](http://www.efface.eu)

This document should be cited as: Salanitro, U. (2015). Directive 2004/35/EC on Environmental Liability.

Study in the framework of the EFFACE research project, Catania: University of Catania.

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## Abstract

This report describes and analyses the provisions of the Environmental Liability Directive (ELD) and examines its links with other directives, in particular the Environmental Crime Directive (ECD).

Coherence between those directives is very important for the delimitation of the concept of “damage”: for instance, biodiversity damage in the ELD has to be determined with reference to the criteria of the Birds and Habitats Directives, and water damage has to be determined with reference to the criteria of the Water Framework Directive; the scope of the notion of damage could then be read in a consistent way in both ELD and ECD.

In the ELD, the liable person is the operator: whenever he operates or controls a dangerous activity (listed in Annex III) he is subject to a strict liability rule, with exceptions and defences; in other cases (not listed in Annex III), when he causes damage to biodiversity, a fault based liability applies.

The remedy is not a punitive one, and it does not consist in a cash award. Rather, the operator bears the costs of remedial measures, which restore damaged natural resources or services to the baseline condition or to a similar level.

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## List of Abbreviations

EC	European Community
ECD	Environmental Crime Directive
EEC	European Economic Community
ELD	Environmental Liability Directive
EU	European Union
DG	Directorate General
GMO	Genetically Modified Organism

# 1 Introduction

Directive 2004/35/EC<sup>1</sup> (Environmental Liability Directive, ELD) establishes a framework to prevent and remedy environmental damage. The ELD is based on the environmental principles set out in Article 191 (2) of the Treaty on the Functioning of the European Union (TFEU): the “polluter pays” principle, the preventive principle and the rectifying pollution at source principle.<sup>2</sup>

The ELD entered into force on 30 April 2004. The drafting process was long (the European Commission issued a Green Paper in 1993 and a White Paper in 2000). The transposition process was slow too as it ended only in 2010.

The ELD establishes the powers of “competent authority” and the duties of the “operator” whose occupational activity has caused environmental damage. The ELD provides that operators carrying out dangerous activities are subject to strict liability (with exceptions and defences) for “environmental damage”; the latter is defined as damage to protected species and natural habitats, damage to waters and damage to soil. Operators must take preventive action, if there is an imminent threat of environmental damage, and bear the costs of the remedial measures, if such damage has occurred. ELD also states that operators carrying out other occupational activities are liable, under a fault-based regime, only for damage to protected species and natural habitats.

Ten years after the enactment of the ELD, there are important analytical studies dealing with it,<sup>3</sup> in addition to a General Report from the Commission<sup>4</sup> and several Country Reports from the Member States; those studies and reports suggest to change some rules of the directive, mainly as a consequence of the problems that arose in the implementation of ELD in the Member States (uneven transposition which, for example, can create difficulties to financial security providers).

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<sup>1</sup> Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. *OJ L 143, 30.4.2004, p. 56–75.*

<sup>2</sup> According to CJEU (Grand Chamber), 9 March 2010, Case C-379/08 and C-380/08, *Raffinerie mediterranea spa v Ministero dello Sviluppo economico*, *Report of Cases 2010 I-02007*, also the precautionary principle is relevant in the ELD.

<sup>3</sup> Shailendra Mudgal et al., *Implementation challenges and obstacles of the Environmental Liability Directive*, Final Report (16.5.2013) for the European Commission (DG Environment); Valerie Fogleman, *The Study on Analysis of integrating the ELD into 11 national legal frameworks*, Final Report (16.12.2013) for the European Commission (DG Environment); Katherine Salès, Shailendra Mudgal and Valerie Fogleman, *Study on ELD Effectiveness: Scope and Exceptions*, Final Report (19.2.2014) for the European Commission (DG Environment); Marta Ballesteros et al., *Experience gained in the application of the ELD biodiversity damage*, Final Report (2014) for the European Commission (DG Environment). See also BIO Intelligence Service, *Financial security in environmental liability directive*, Final Report (2008) for the European Commission (DG Environment); Tanja Munchmeyer et al., *Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues*, Report for the European Commission (DG Environment), 2009; Shailendra Mudgal et al., *Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents*, Final Report (17.4.2013) for the European Commission (DG Environment).

<sup>4</sup> The report COM/2010/0581/final is based on Article 14 (2) of the ELD; another report is going to be completed in 2015.

In this report, the ELD will be assessed in detail, in order to understand whether it is possible to achieve satisfactory interpretative solutions on the basis of the text currently in force or, on the contrary, whether it is necessary to amend the directive as suggested by the above mentioned studies and reports.

In light of these studies and reports, the most important issues include the following:

- What is “environmental damage”?
- Who is liable?
- What do mandatory and optional “defences” mean?
- Has the competent authority a faculty or a duty to act in order to repair the damage?
- What are the remedial measures?

## 2 The damage

The purpose of the ELD is to prevent and remedy environmental damage. As previously mentioned, the latter includes damage caused to protected species and habitats, water and land.

The ELD, therefore, does not cover all natural resources: it is necessary to assess whether the selection of the protected natural resources is coherent with the other directives implementing the environmental policy of the European Union (EU). It should be kept in mind that differences between the ELD and other environmental directives could be either the natural consequence of a different scope of application of the directives or the unwanted result of lack of coordination.

### 2.1 The protection of biodiversity

From this perspective, as the ELD concerns the protection of biodiversity it could be compared with the directive on the conservation of wild birds (the so-called Birds Directive, i.e. directive 79/409/EEC, now 2009/147/EC) and with the directive for the conservation of wild fauna and flora and natural habitats (the so-called Habitats Directive, i.e. directive 92/43/EEC).

The Birds and Habitats directives do not protect all wild species of fauna and flora and all natural habitats, but only part of them.<sup>5</sup> In particular, these directives protect - by measures such as the prohibition of killing or capture - only wild species which are listed in the annexes to the directives because they are endangered, vulnerable, rare or endemic; the same directives preserve - by designing special areas of conservation or special protection areas - only natural habitats which are mentioned in the annexes because they are in danger, or have a small natural range, or present outstanding examples of typical characteristics of one or more biogeographical European region, or are suitable for the conservation of wild birds.

Any harm that has significant adverse effects on the status of conservation of these species or habitats is an environmental damage according to the ELD. It is not necessary that the damage affects a species or habitat included within a designed area, as it is only relevant that the species or habitat damaged is listed or mentioned in the annexes to the Birds directive and to the Habitats directive (art. 2, § 3 b, ELD). Therefore, the ELD makes the conservation of biodiversity more effective not only for species and habitats that are inside the designed areas, for the protection” of which the operators are already required by the Birds and

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<sup>5</sup> See Edward H.P. Brans, “Liability for damage to public natural resources under the 2004 EC Environmental Liability Directive. Standing and assessment of damage”, *Environmental Law Review* 7 (2005): 93.

Habitats directives to assess the effects of their activity, but also for species and habitats which are not within designed areas.<sup>6</sup>

Moreover, the ELD allows Member States to extend environmental liability to damage to species and habitats protected under national laws.<sup>7</sup>

According to a report,<sup>8</sup> the language of the ELD is imprecise because the “conservation status” of a species or habitat must refer to one of the following three areas: “the European territory, the territory of a Member State, or the natural range”. In the same report, there is the proposal to intend the word “or” in a conjunctive sense, and not in a disjunctive one; in this perspective, the conservation status should be preserved not only in the European territory, but also in the territory of each Member State. This solution can be agreed upon, but on different grounds: in the problem at stake, the language of the ELD results to be precise if the word “or” is interpreted in the disjunctive sense, because what is decisive is to consider the harm that has “significant adverse effects” on conservation status, whatever is the relevant territory considered.

Another report suggests to amend the ELD so that it refer to the conservation status in relation to each special area of conservation;<sup>9</sup> should this suggestion be upheld, the ELD would be consistent with the Habitats directive, which requires a previous assessment when the project or plan can have significant effects that affect the integrity of the site. However, it is important to mention that a (probably unforeseen) consequence of this proposal is that the proposed amendment would result in contrast with the important current rule that admits the relevance of the damage outside the protected sites;<sup>10</sup> on the contrary, the coherence with the Habitats directive is currently assured by the definition of damage to protected species or 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 adverse effects are “significant”, coherently with the rule of the Habitats directive, when they affect the integrity of a site of community importance: because a single site contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type or to the maintenance of biological diversity. When the damage concerns a habitat, any relevant reduction of the areas that the habitat covers within its natural range or any relevant deterioration in the quality of the structures and of the functions of a significant part of the same habitat affects the integrity of the sites, therefore also affecting the conservation status of the habitat in the Member State. When the damage concerns species, the destruction (but also a reduction) of a population in a site, or the destruction (also partial) of a site that holds a population, usually determines significant adverse effects on the conservation status of a species: either in the case that the reduction of a population in number or in density exceeds a negative variation due to natural causes because the species does not recover the baseline condition in a short time without intervention; or in the case that the partial destruction of a site reduces the areas that the habitat or the species covers within its natural range.

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<sup>6</sup> See Brans, “Liability for damage”, 94; Charles Pirotte, “La directive 2004/35/CE du 21 avril 2004 sur la responsabilité environnementale: premiers commentaires”, in *Les responsabilités environnementales dans l’espace européen*, ed. Geneviève Viney and Bernard Dubuisson (Bruxelles: Bruylant, 2006), 661 ff.; Nicolas De Sadeleer, “La directive 2004\35\CE relative a la responsabilité environnementale: avancée or recul pour le droit de l’environnement des états membres”, in *Les responsabilités environnementales dans l’espace européen*, ed. Geneviève Viney and Bernard Dubuisson (Bruxelles: Bruylant, 2006), 748; Malte Petersen, “The Environmental Liability Directive: extending nature protection in Europe”, *Environmental Law Review* 11 (2009): 5 - 20.

<sup>7</sup> Sixteen member states extended ELD regime to nationally biodiversity: see Fogleman, *The Study on Analysis of integrating the ELD*, 49.

<sup>8</sup> Mudgal et al., *Implementation challenges*, 64 – 67; Fogleman, *The Study on Analysis of integrating the ELD*, 90 – 91.

<sup>9</sup> Ballesteros et al., *Experience gained in the application of the ELD biodiversity damage*, 85 – 86.

<sup>10</sup> It is worth to underline that the purpose of this proposal of the Report is not to reduce the grade of protection of biodiversity and that, as mentioned in the text, the reported result is unforeseen.

Those interpretations could be confirmed by Directive 2008/99/EC, on the protection of environment through criminal law (Environmental Crime Directive, ECD), which involves the following offenses: any conduct (such as killing, destruction, possession or taking of) that affects specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; any conduct which causes the significant deterioration of a habitat within a protected site.

The two directives, in this case, should be interpreted in a consistent manner, because both share the same purpose, namely to protect the favourable conservation status of protected species and habitats.<sup>11</sup> Indeed, it would be paradoxical if the ECD aimed at a more extensive protection than ELD.

## 2.2 The protection of water

The Environmental Liability Directive is also consistent, in essence, with the Water Framework Directive: the water damage is defined as “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, (...)”. Under the Water Directive, the Member States have a duty to prevent deterioration of all water bodies and to restore them so that they achieve a good (ecological or ecological potential or quantitative, and chemical) status in a certain number of years.

In the mentioned reports,<sup>12</sup> it is debated whether the meaning of the expression of the Environmental Liability Directive “damage that affects the status of the waters concerned” is wider than the meaning of the expression “damage of water bodies” used in the Water Directive: on the one hand, “water concerned” seems wider than “water body”; on the other hand, the “status”, in the definition of Article 2 of Water Framework Directive, is related to the water body.

The problem is not easy to resolve, and its solution is also important for the interpretation of the Directive 2008/99/EC, which simply states the relevance of “substantial damage to the quality of water”.

It is sure that not all water is subject to the ELD, but only the water in a water body: for example, if the deterioration affects waters inside an industrial installation, this is out of the scope of both the ELD and the Water Directive. Even the temporary waters may not be included in the notion of water body; in this case, waters do not fall within the ELD. It is also doubtful whether all the wetlands are water bodies.<sup>13</sup> The concept of water body should be interpreted in a broad way: surface, transitional, coastal and ground waters, and their sediments,<sup>14</sup> fall within the scope of both the Water Directive and the ELD, while marine waters have been included in the ELD’s scope by Article 38, Directive 2013/30/EU of 12 June 2013 on safety of offshore oil and gas operation, which has to be implemented by 19 July 2015.

It is not clear whether the damage must affect the entire water body, so passing its status to a lower one. In accordance with the first aim of the Water Directive, which is to “prevent deterioration of water body”, the remedial measures of the ELD (see below, 6) are needed even where a significant damage affects only a relevant part of a water body:<sup>15</sup> waiting until the entire water body is impacted without intervening, would

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<sup>11</sup> Lucas Bergkamp et al., “Sanctions and enforcement”, in *The EU Environmental Liability Directive. A commentary*, ed. Lucas Bergkamp and Barbara J. Goldsmith (Oxford: Oxford University Press, 2013), 327 ff.

<sup>12</sup> Mudgal et al., *Implementation challenges*, 59 – 60; Fogleman, *The Study on Analysis of integrating the ELD*, 87 – 88.; Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 100 – 108.

<sup>13</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 73 – 74.

<sup>14</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 82: usually, persistent contamination regards sediments and not waters.

<sup>15</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 100. Also polder canals and other small streams could be not included in the notion of water body: Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 106.

not suffice to prevent deterioration. It is in accordance with the “polluter pays” principle that the interventions to prevent deterioration, coherent with the aim of the Water Directive, are subject to the ELD rules. Therefore, the ELD does not require that the water body passes from one quality status to a lower one, not even that the entire body must be impacted, before water damage occurs.<sup>16</sup> The damage must affect significantly one or more of the statuses of the waters concerned: if the deterioration regards a relevant part of water body (a part of a lake, for example), whose status passes usually to a lower one, it is significant because it worsens the quality status of the entire water body.<sup>17</sup>

## 2.3 The protection of land

No EU directive, at the moment, protects land, because the proposed Soil Frame Directive has not been approved.<sup>18</sup> The aim of ELD, in this respect, is the defence of the life and the health of people, therefore interventions should occur only if “*the land contamination creates a significant risk of human health being adversely affect*” (art. 2, n. 1, letter b, ELD). A significant risk to human health should be identified not only when pollutants can cause damage directly to people who work or live in or near the contaminated land, but also when such damage may arise indirectly to people (consumers) by the consumption or the use of agricultural or industrial products coming from contaminated land.<sup>19</sup>

ELD rule on land contamination overlaps with case law on contamination caused by waste management.<sup>20</sup> According to some authors, application of the regime resulting from case law will continue in addition to the ELD; case law would thus entail that the producer or the owner of the waste has a duty to remove contaminated soil and groundwater (which were considered waste by the case law, before the amendments of the Waste Framework Directive) as preventive measure, because ELD applies without prejudice for more stringent provision of Community legislation<sup>21</sup>. According to a different opinion, case law rule applies only in case of a damage caused by an event, emission or accident occurred before the implementation time of the ELD, as the directive (which is not retroactive) prevails over the case law developed before the enactment of the directive.<sup>22</sup>

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<sup>16</sup> De Sadeleer, *La directive 2004\35\CE*, 756.

<sup>17</sup> See the Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage/SEC/2003/1027 final - COD 2002/0021/ (“water damage” is still defined by reference to the various concepts defining water quality in Directive 2000/60/EC (“the Water Framework Directive”) but it is no longer required that water's quality should worsen from one of the categories defined in the Water Framework Directive to another”).

<sup>18</sup> The Commission is considering withdrawing the proposed Directive.

<sup>19</sup> *Contra* Valerie Fogleman, “The concept of damage (soil, water, biodiversity)” (paper presented at the Workshop on Environmental Liability and Environmental Crime, Brussels, Belgium, 6 November 2014), available at [www.efface.eu](http://www.efface.eu).

<sup>20</sup> ECJ, 7 September 2004, Case C-1/03, Van de Walle, *Report of Cases 2004 I-07613*; ECJ (Grand Chamber), Case C-188/07, Commune de Mesquer v. Total France SA and Total International Ltd., *Report of Cases 2008 I-04501*.

<sup>21</sup> Lucas Bergkamp and Anke Van Bergeijk, “Scope of the ELD regime”, in *The EU Environmental Liability Directive. A commentary*, ed. Lucas Bergkamp and Barbara J. Goldsmith (Oxford: Oxford University Press, 2013), 74.

<sup>22</sup> Ugo Salanitro, “Danno ambientale e bonifica tra norme comunitarie e codice dell'ambiente: i criteri di imputazione della responsabilità”, in *Rischio di impresa e tutela dell'ambiente, Prevenzione - responsabilità - assicurazione*, ed. Guido Alpa et al. (Napoli: Edizioni Esi, 2012), 225 ff.

The definition of land damage, as a damage that is relevant only if it creates a risk to human health, should be kept in mind in the interpretation of Directive 2008/99/EC on environmental crimes, which simply states the relevance of “*substantial damage to the quality of soil*”.

## 2.4 The protection of air

The definition of environmental damage does not refer in any way to air damage: this gap might seem inconsistent with the idea that the ELD protects all environmental components considered by the European legislation, which has always regulated the activities that may cause air pollution, and also with Directive 2008/99/EC, where relevance is given to “*substantial damage to the quality of air*”. This shortcoming can be explained because the purpose of the ELD relates to the environmental damage for which measures may be required to restore the baseline condition: this aim does not include the air pollution, which may be dangerous for the human health (and in this case should therefore be relevant for criminal law), but remains subject to rapid decay, after the source of pollution is eliminated. When air pollution produces a persistent contamination, the problem does not regard the atmospheric component (on this point, see also below), but another environmental component: as the ELD states, in the fourth recital of the preamble, “*Environmental damage also includes damage caused by airborne elements as far as they cause damage to water, land or protected species or natural habitats*”.

A different problem concerns the preventive measures, because they fall within the ELD if they are intended to avoid an imminent risk of significant contamination to soil, water and biodiversity. Therefore, there could be preventive actions against damage to the air by accidents, fires or explosions, with risks only to human health, but the legal basis for imposing those measures on the polluter would not be the ELD, but other directives (as Article 7 of the Industrial Emission Directive).<sup>23</sup>

## 2.5 The protection of other resources

The Directive on the assessment of the effects of certain projects on the environment (now Directive 2011/92/EU) requires to assess the effects of the project on a wide set of factors, as human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage, and their interaction (Article 3). The protection of human beings, life and health, is also a relevant purpose of Directive 2008/99/EC.

It might be thought that those factors be included in the definition of environment of these directives: in this case, one should wonder why the ELD has taken a notion of environment which has a narrower scope if compared to the Environmental Assessment Directive (and the Environmental Crime Directive).

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<sup>23</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 75 – 76, 84 – 86. See Article 7 of the Industrial Emissions Directive: “Without prejudice to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, in the event of any incident or accident significantly affecting the environment, Member States shall take the necessary measures to ensure that “Without prejudice to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, in the event of any incident or accident significantly affecting the environment, Member States shall take the necessary measures to ensure that: (a) the operator informs the competent authority immediately; (b) the operator immediately takes the measures to limit the environmental consequences and to prevent further possible incidents or accidents; (c) the competent authority requires the operator to take any appropriate complementary measures that the competent authority considers necessary to limit the environmental consequences and to prevent further possible incidents or accidents.”

Human health and material assets do not fall directly<sup>24</sup> within the scope of environmental liability law, because they are the main object of tort law.<sup>25</sup> Climate is certainly an environmental resource, but its modification in the local area, for example resulting by the construction of a reservoir or by a reforestation, does not appear easy to assess in terms of negative or positive effect; its modification in the globe does not fall within the scope of the measures of ELD. Landscape is on the edge of the matter of environment and should be included, by interpretation, in the other matter of cultural heritage.<sup>26</sup> Flora and fauna are protected, if relevant, by the rule on biodiversity damage.<sup>27</sup>

## 3 The liability rules and the liable persons

### 3.1 The operator

When environmental damage, or imminent threat of such damage, occurs, the ELD establishes the liability of the operator. The liable person is an economic operator whose activity is regulated by one or more European directives and is listed in Annex III to the same ELD as environmentally relevant because it presents a risk for human health or for the environment.<sup>28</sup>

A different rule applies to damage to protected species and habitats, because responsibility is also extended to each economic operator, whose activity is other than those listed in Annex III, whenever the operator has been “in fault or negligent”.<sup>29</sup> In the silence of the directive, burden of proof should be on the competent authority, but a reversed rule is consistent with the nature of entrepreneurial activity.

Operator means “*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*”. The meaning of “operator” includes the responsible person in the other relevant European directives on environment, such as the IPPC Directive<sup>30</sup> (“*any natural or legal person who operates or controls the installation or, where this is*

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<sup>24</sup> Human health is indirectly protected through soil and water liability rules.

<sup>25</sup> Human beings, life and health are protected by ECD, because the common criminal law often does not directly protect these interests from damage or endangerment by behaviors of environmental relevance.

<sup>26</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 77.

<sup>27</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 76 – 77.

<sup>28</sup> The predominant opinion is that competent authorities must prove the causal link between the activity of the operator and the environmental damage: see CJEU 4 March 2015, Case C-534/13, *FIPA Group SRL and others*, paras. 54 - 57; also Ballesteros et al., *Experience gained in the application of the ELD biodiversity damage*, 89 – 90, who proposes to amend the ELD. The European Court of Justice has recognised the possibility that a Member State may impose remedial measures for environmental damage on the presumption that there is a causal link between the pollution found and the activities of the operator(s), if the latter are located close to that pollution, it requires the competent authority to have ‘plausible evidence’ capable of justifying that presumption (see CJEU, 9 March 2010, Case C-378/08, *Raffinerie Mediterranee*, paras. 56-58).

<sup>29</sup> “There is no justification under the ‘polluter pays principle’ for that differentiation. All occupational activities causing damage to protected biodiversity should be subject to strict liability”: Ballesteros et al., *Experience gained in the application of the ELD biodiversity damage*, 64. For the opposite opinion, see below.

<sup>30</sup> Now Industrial Emission Directive (2010/75/EU): “operator’ means any natural or legal person who operates or controls in whole or in part the installation or combustion plant, waste incineration plant or

*provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated*)<sup>31</sup> and the Waste Incineration Directive (*“any natural or legal person who operates or controls the plant or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the plant has been delegated”*): the meaning of “operator” in the ELD is wider than in the other directives, because it refers to every occupational activity (and not only to installation or plant) and includes, for example, whoever uses GMOs or produces or transports hazardous goods.

The meaning of “operator” includes not only the person who “operates”, but also who “controls” the activity. It is sure - and confirmed by the second part of the definition of operator which refers to the delegate - that “who operates” is not a director or an officer, neither a dependent, but only the entrepreneur, natural or legal person; on the contrary, the meaning of the words “who controls” is not clear. It is possible that the ELD uses both verbs (“operates” and “controls”) to make sure that the entrepreneur be in any case subject to liability; but one cannot exclude that the use of the verb “controls” makes it possible to include within the scope of the rule a parent (or grandparent) company exercising a decisive economic power over the business and the environmental policy of a subsidiary.<sup>32</sup>

The concept of “operator” is not always relevant for the interpretation of Directive 2008/99/EC on environmental crime, because in the latter the punishment should be directed against the offender, who can be not only an entrepreneur, but also a common citizen and, within the entrepreneurial activity, a director, an officer, an employee etc. (it should be also recalled that, unlike the ELD, the Environmental Crime Directive requires that the conduct is unlawful and committed intentionally or at least with serious negligence). However, the concept of “operator” could be partially relevant, because, under certain conditions, the conducts listed in Article 3 of the ECD may, also be attributed to the legal person for which benefit the offence has been committed (art. 6 and 7 ECD).

## 3.2 Third parties

According to article 11 of the ELD, *“Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or remedial measures”*.

Third parties are only liable for damage arising from occupational activity listed in the Annex III to ELD: as it will be clarified in the next paragraph, in those cases the operator can avoid costs (or liability: see below) by alleging that the damage was caused by a third person. Therefore, if the authority decides to require the operator to carry out the repair, *“Member States shall take the appropriate measures to enable the operator to recover the costs incurred”* from the third parties (art. 8 ELD).

It is controversial whether there is a gap in the ELD as regards the scope of the recovery under the third party defence<sup>33</sup>: in fact, the directive does not state when the third party is liable. If the ELD provisions at stake are interpreted as establishing a systematic rule, it is necessary to include within the definition of “third party” only those operators engaged in activities listed in Annex III, which are subject to strict liability. On the contrary, if one interprets the scope of this defence as broader and concludes that the operator can invoke it also when the third party is not an operator subject to a rule of strict liability under

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*waste co-incineration plant or, where this is provided for in national law, to whom decisive economic power over the technical functioning of the installation or plant has been delegated”*.

<sup>31</sup> Marcel Sousse, “De la responsabilité environnementale”, *Environnement* (2008): 11.

<sup>32</sup> Ugo Salanitro, “La nuova disciplina della responsabilità per danno all’ambiente”, *La responsabilità civile* (2006): 678 ff.; Charley Hannoun, “La responsabilité environnementale des société-mères”, *Environnement* 6 (2009): 33 ff.; Bergkamp and Van Bergeijk, *Scope of the ELD regime*, 53.

<sup>33</sup> Fogleman, *The Study on Analysis of integrating the ELD*, 92 – 93.

the same Directive, then Member States should be allowed – better: required - to establish if the third party is liable for wilful misconduct or for negligence or even strict liability.

### 3.3 Other liable persons

The ELD allows Member States to maintain or adopt “*more stringent provision 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*” (art. 16 ELD).

This provision allows Member States to expand the scope of the ELD, by adding new activities subject to the strict liability rule, in addition to those already listed in Annex III,<sup>34</sup> or to the negligence rule, even beyond the damage to the biodiversity. The same provision allows Member States to provide for the liability of persons other than entrepreneurs, such as the tortfeasor, employee of business or outsider to entrepreneurial activity.<sup>35</sup> The question as to whether the directive allows Member States to provide also for the liability of the owner or the occupier of the land appears to be more difficult:<sup>36</sup> such a provision would be inconsistent with the “polluter pays” principle, whenever the owner is held liable even if he did not cause environmental damage or he did not know of its existence.<sup>37</sup>

### 3.4 Strict and fault-based liability rules

According to a report,<sup>38</sup> the rule of strict liability cannot be limited to the activities listed in Annex III, because it would be contrary to the polluter pays principle and to the aim to avoid the loss of biodiversity: the fault-based rule for biodiversity damage is not considered consistent with public liability regimes for land damage in the Member States, which are based on strict liability, but only with private liability rules for health injuries, property damages and economic losses.

The proposal to amend the directive for extending strict liability to all economic activities (only for biodiversity damage, or also for all environmental damage)<sup>39</sup> does not seem to be persuasive, because it is not reasonable that health and property are less protected than environment: the use of public liability regime does not impose a strict liability rule, because a fault-based liability is equally possible (eventually with the reversed burden of proof). It is consistent with the principles of economic analysis of law that only dangerous or hazardous activities should be subject to strict liability rules, in order to induce operators to insure their activities: it is in line with this principle that only the activities regulated, by one or more EU environmental directives, be considered dangerous.

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<sup>34</sup> Some Member States extend strict liability to other activities that are not listed in the Annex III: Fogleman, *The Study on Analysis of integrating the ELD*, 72 – 75.

<sup>35</sup> Some Member States extend the definition of operator or apply ELD regime to other persons: Fogleman, *The Study on Analysis of integrating the ELD*, 59 – 60.

<sup>36</sup> The owner is secondary liable for environmental damage in some Member States, as United Kingdom, Poland and Hungary: Fogleman, *The Study on Analysis of integrating the ELD*, 25, 76 – 77.

<sup>37</sup> See the opinion of Advocate General J. Kokott delivered on 20 November 2014 in the case C-534/13, *FIPA Group SRL and others*.

<sup>38</sup> Also temporary waters could be not included under the concept of water bodies and, in this case, are not subject to ELD: it is doubtful whether wetlands are water bodies too.

<sup>39</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 52 – 55.

The proposal to extend, by amendments, the list of activities in Annex III subject to strict liability (e.g. pipeline transport of dangerous substances),<sup>40</sup> is more persuasive. It is also arguable that the burden of proof of (lack of) fault be reversed on the operator for the damage caused by the occupational activities, which are not listed in the Annex III.

## 4 The defences

### 4.1 The mandatory defences

Where the environmental damage is caused by an occupational activity, which presents a risk for human health or for the environment, the ELD establishes, in principle, a rule of strict liability.

This rule, however, bears some exceptions and some defences.

The directive does not extend the liability rule to cases where the damage is caused by an act of armed conflict or by a natural phenomenon of exceptional, inevitable and irresistible character: these damages are outside the scope of the directive and therefore the rules of repairs do not apply.

When the environmental damage – or the imminent threat of such damage – occurs, the operator can invoke two defences the operator can either prove that the damage, or the threat, was caused by a third party, and that it occurred despite the fact that appropriate safety measures were in place or that the damage resulted from compliance with a compulsory order or instruction emanating from a public authority. In these cases, the directive requires that the damage caused by the third parties or by the authorities is repaired: shifting costs to the third parties, when they are held liable; imposing costs on the community when the damage is caused by an order of the public authority.

It is discussed whether those rules are “*defences to costs*” (in which case the operator must repair the damage and can then seek reimbursement of the costs) or “*defences to liability*” (in which case the operator does not have to repair the damage): the doubt, which is reflected in the different solutions given by national laws, arises from the imprecise language of the ELD and should be resolved by an amendment of the text.<sup>41</sup>

According to an opinion, the text of the ELD is not imprecise and the interpretation of “*defences to costs*” is confirmed by Article 8 (3), last sentence, requiring Member States to “*take the appropriate measures to enable the operator to recover the costs incurred*” when the defences occur.<sup>42</sup>

The same conclusion emerges from Article 5 (4) and Article 6 (3) of the ELD, according to which “*if the operator ... is not required to bear the costs under this directive, the competent authority may take these measures itself*”, and from Article 11 (3), of the same text, which provides that, when the damage was caused by a third party, “*competent authority may empower or require third parties to carry out the necessary preventive or remedial measures*”. Indeed, according to its wording, the ELD establishes “*defences to costs*”, because it allows the competent authorities - and not the Member States - to decide whether to

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<sup>40</sup> Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 57 – 63.

<sup>41</sup> Mudgal et al., *Implementation challenges*, 10–11, 61–62.

<sup>42</sup> See Valerie Fogleman, “The polluter pays principle for accidental environmental damage; its implementation in the environmental liability directive”, in *Principi europei e illecito ambientale*, ed. Alessandro D’Adda, Ida Nicotra and Ugo Salanitro (Torino: Giappichelli, 2013), 140-142; Fogleman, *The Study on Analysis of integrating the ELD*, 88 – 89; Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 133. *Contra*, Lucas Bergkamp and Anke Van Bergeijk, *Exceptions and defences*, in *The EU Environmental Liability Directive. A commentary*, ed. Lucas Bergkamp and Barbara J. Goldsmith (Oxford: Oxford University Press, 2013), 89.

take an action against operators, which do not have to bear the costs of repair, or against third parties; when the authorities choose the first way, the operators should be required to carry out the works and they are granted (by national laws) the right to recover costs from third parties.

This interpretation is confirmed by a practical argument: if the rule establishes “*defences to liability*”, neither the operator, nor the third party, should be required to prevent or to repair the environmental damage until a court has made the final ruling on the liability and, during this time, the damage would not be remedied and could worsen if pollutants migrate.<sup>43</sup>

## 4.2 The optional defences

The ELD allows Member States to establish other two defences in favour of the operator who caused the environmental damage: the state of the art (or development risk) defence and the permit defence. Coherently with what was argued above about the mandatory defences, such optional defences are “*defences to costs*” as well. According to some authors, the latter defences are different from the first defences because “*they concern matters that are not entirely outside the control of the operator*”<sup>44</sup> and violate the spirit of strict liability.<sup>45</sup> However, it is possible to interpret the rules so as to admit these defences, in a way that is consistent with the principle of strict liability.

The state of the art defence<sup>46</sup> allows the operator not to bear costs of remedial action - but not of preventive action - when he demonstrates that he was not at fault or negligent and the environmental damage was caused by an emission or activity - or any manner of using a product in the course of an activity - which the operator proves that 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 (art. 8, paragraph 4, letter b). This defence is not uncommon in strict liability causes of action under private law and especially product liability law.<sup>47</sup> This defence is consistent with the principle that only dangerous activities are subject to the rule of strict liability. In fact, it should be admitted that the activity, when it was performed, could not be considered dangerous as regards the specific damage that has occurred. Therefore, it is fair to derogate from the rule of strict liability because the specific damage occurred did not correspond to one of the risks that could be calculated at the time in which the operator would have to determine the level of risk of the activity. Reference to negligence, in this rule, means that the operator must prove that he is not at fault as to the knowledge of the dangerousness of the activity, not only at the time the activity was carried out,<sup>48</sup> but even later when he could intervene with preventive measures: this is the only interpretation that makes the rules of the ELD coherent among

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<sup>43</sup> Mudgal et al., *Implementation challenges*, 61.

<sup>44</sup> See Fogleman, “The polluter pays principle”, 140 – 141; Mark Wilde, *Civil liability for environmental damage. A comparative analysis of law and policy in Europe and United States* (The Hague - New York: Kluwer Law International, 2002), 323.

<sup>45</sup> See Eckard Rehbinder, “Implementation of the Environmental Liability Directive in Germany”, *Environmental Liability* 5 (2007): 201; Fogleman, “The polluter pays principle”, 140: “*Neither of the defences implements the polluter pays principle. Instead, they dilute the ELD by weakening the strict liability regime in respect of environmental damage covered by the defences to a fault – based regime*”; Kristel De Smedt, “Is harmonization always effective? The implementation of the environmental liability directive”, *European Energy and Environmental Law Review*. (2009): 9.

<sup>46</sup> Sixteen member States have adopted permit defence: Fogleman, *The Study on Analysis of integrating the ELD*, 51 - 53

<sup>47</sup> See Rehbinder, *ibidem*.

<sup>48</sup> Wilde, *ibidem*: “*an operator could be precluded from relying upon the development risk defence where it is shown that he failed to implement proper system to evaluating risk and keeping abreast of the latest scientific evidence*”.

themselves, requiring the operator, who would have to incur the costs of prevention, to bear the costs of repair.<sup>49</sup>

The other defence<sup>50</sup> allows the operator not to bear cost of remedial action where he demonstrates that he was not at fault or negligent and the environmental damage was caused by an emission or an 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, as applied at the date of the emission or the event (Article 8 (4), letter a).

Against appearance, the permit defence is not consistent with a fault-based regime, in which the burden of proof is reversed: the correct interpretation of the rule must make it consistent with a stricter regime. This defence does not allow the operator to demonstrate that he is not at fault as he has tried to diligently comply with the authorization of the activity, because the defence is not related to the damage caused by the operator's activity, but to the damage caused by an authorised emission or specific event.<sup>51</sup> Strict liability continues to apply to accidental pollution, because accidents (which can cause incalculable harm) cannot be authorised; the permit defence applies only to the residual or chronic (continuous or periodical, or connected to a specific event) pollution, which is manageable by public authorities with a cost – benefit analysis.<sup>52</sup>

Some scholars hold that the permit defence *fails to encourage polluters to reduce the harm caused by the pollutants or the quantity of pollutants discharged below the limits set by the permit*.<sup>53</sup> With regard to this observation, two considerations should be underlined. First, when there is a permit that identifies the optimal level of pollution, it is not necessary to re-determine the quantitative polluting level of an economic activity, and it is therefore fair to derogate from the rule of strict liability. Second, the normative text states that the operator must demonstrate not only that the activity complies with the permit, but also that he is not at fault: this rule can be interpreted as imposing on the operator an obligation to keep himself up to date on the latest developments regarding the environment and to check for changes of the sites that receive pollutants.<sup>54</sup> This interpretation prevents also the adverse effects of “*regulatory capture*”,<sup>55</sup> because it requires the operator to demonstrate to the court that the environmental damage could not be foreseen, nor avoided with preventive measures.<sup>56</sup>

If the significant adverse effects of an act of an operator have been previously identified and expressly authorised by the competent authority, in accordance with provisions implementing Article 6 (3) and (4) and Article 16 of the Habitats Directive and Article 9 of the Birds Directive (or other national laws), the damage is not subject to the rules of the ELD. This rule is different from the “*permit defence*”, as it does not

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<sup>49</sup> Salanitro, “Danno ambientale e bonifica”, 225 ff.

<sup>50</sup> Sixteen member States have adopted permit defence: Fogleman, *The Study on Analysis of integrating the ELD*, 50 – 51.

<sup>51</sup> Pirotte, “La directive 2004/35/CE”, 676 ff; Salanitro, “Danno ambientale e bonifica”, 225 ff.; Bergkamp and van Bergeijk, “Exceptions and defences”, 91.

<sup>52</sup> Pirotte, “La directive 2004/35/CE”, 679 ff.; Salanitro, “Danno ambientale e bonifica”, 225 ff.

<sup>53</sup> Fogleman, *The polluter pays principle*, 141; Salès, Mudgal and Fogleman, *Study on ELD Effectiveness*, 144 – 146.

<sup>54</sup> See Wilde, *Civil liability for environmental damage*, 226: “*Failure to comply with this duty would preclude the licence holder from relying upon the regulatory compliance defence*”.

<sup>55</sup> Pierre Bentata - Michael Faure, “The role of environmental civil liability: an economic analysis of the French legal system”, *Environmental Liability, Law, Policy and Practice*, 20 (2012): 120-128.

<sup>56</sup> The defence seems to be intended to be narrow, according to some authors: Fogleman, *The polluter pays principle*, 142; Kristel De Smedt – Michael Faure, “The implementation of Environmental Liability Directive”, *Zeitschrift fuer Europäisch Privatrecht* 4 (2010): 800.

concern the event (e.g. the construction of a road), but the adverse effects, which are authorised because they are not significant or because they are offset by compensatory measures.<sup>57</sup>

## 5 The powers of the competent authority

Articles 5 and 6 of the ELD do not make clear whether the competent Authority has a duty or a faculty to intervene. On the one hand,<sup>58</sup> the competent authority *may* either require the operator to take the necessary preventive or remedial measures, or take itself the necessary measures; on the other hand,<sup>59</sup> the same authority *shall* require that the measures are taken by the operator and, if the measures are not taken, *may* take these measures itself, as a mean of last resort.

According to the cited report, the only logical interpretation of these rules is that the operator has an obligation to take measures required by the authority, and the competent authority has a duty, but also a power, to require the operator to take the measures.<sup>60</sup>

If the measures are not taken by the operator (or by a third party), it is doubtful whether the authority has or has not a duty to take itself the measures. According to several scholars, the authority has no such duty, in light of the final version of the ELD and considering the letter and the history of the rule.<sup>61</sup> In a partially different way, one can invoke the rule in paragraph 3 of Article 7 ELD, which states that “*Where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary remedial measures are taken at the same time, the competent authority shall be entitled to decide which instance of environmental damage must be remedied first*”: the competent authority cannot decide not to carry out the measures, but it can only decide to postpone them. One can also invoke the rules in Articles 12 and 13 ELD, which state that persons, having a sufficient interest in environmental decision, shall be entitled to submit to the competent authority a request for action which should be considered by the authority; the authority shall inform the persons of its decision to accede or to refuse the request and shall provide the reason for it; against the decision of the authority, persons shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality.

A persuasive solution is that the authority does not have a duty or a faculty, but has a power controlled by public interest (discretionary power).<sup>62</sup>

For the reasons that were just mentioned above, this solution certainly applies to land damage. A different solution should apply to water damage and biodiversity damage, because the rules on protection of those natural resources provide a duty for Member States to intervene, through the competent authority (which may be different from the one that carries the remedial measures), to prevent deterioration and to improve the environmental conditions.

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<sup>57</sup> On the comparability of compensatory measures in the Habitats and Birds directives and the complementary measures in the ELD, see Marta Ballesteros et al., *Experience gained in the application of the ELD biodiversity damage*, 56 – 57.

<sup>58</sup> See the third paragraph of Article 5 and the second paragraph of Article 6 in the ELD.

<sup>59</sup> See the fourth paragraph of article 5 and the third paragraph of article 6 in the ELD

<sup>60</sup> Mudgal et al., *Implementation challenges*, 63.

<sup>61</sup> Barbara Pozzo, “La nuova direttiva 2004\35 del Parlamento europeo e del Consiglio sulla responsabilità ambientale in materia di prevenzione e riparazione del danno”, *Rivista giuridica dell’ambiente* (2006): 11 ff.; Ballesteros et al., *Experience gained in the application of the ELD biodiversity damage*, 92 – 93.

<sup>62</sup> De Sadeleer, “La directive 2004\35\CE”, 768 ff.

The competent authority may have interest not to take any action, if it is not sure that it will recover the costs of the remedial measures in the assets of the liable party or if it has not sufficient public resources. To solve the first problem, the ELD provides two solutions: in general, “Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive” (Article 14 ELD);<sup>63</sup> in any case, after the damage occurred, the competent authority may obtain security over property or other appropriate guarantees from the operator who caused damage, so it can recover the costs incurred (Article 8 (2) ELD).

According to Article 10 of the ELD, “The competent authority shall be entitled to initiate cost recovery proceedings against the operator, or if appropriate, a third party who has caused the damage or the imminent threat of damage in relation to any measures taken in pursuance of this Directive within five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later”.<sup>64</sup>

## 6 The preventive and remedial measures

When there is an imminent threat of environmental damage – for example, because an accident occurred – the operator has an obligation to take the “preventive measures” to prevent or minimise the damage: preventive measures should cover not only the measures to prevent the damage from happening, but also those actions that prevent or minimise any damage from becoming significant.<sup>65</sup> These preventive measures are different from the preventive measures that other directives impose on the operators, which have the purpose to avoid incidents and pollution.

The environmental damage is not only a loss of resources, but also a loss of services: both these losses have to be compensated by remedial measures.

The competent authority shall decide which remedial measures shall be implemented. In case of land damage, Annex II merely provides for remedial measures aimed to remove all risks of health damage.

When the damaged resources are water or biodiversity, there are three kinds of remedial measures: primary, complementary and compensative remediation. All those measures purport to restore the environment to its baseline conditions, through different ways.

According to the Annex II:

*“Primary remediation is any remedial measures which return the damaged natural resources and/or impaired services to, or towards, baseline condition.*

*‘Complementary’ remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services: 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.*

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<sup>63</sup> Only eight Member States impose mandatory financial security: Fogleman, *The Study on Analysis of integrating the ELD*, 53 – 57.

<sup>64</sup> See Pozzo, “La nuova direttiva 2004\35”, 14 ff.

<sup>65</sup> Ballesteros et al., *Experience gained in the application of the ELD biodiversity damage*, 96.

*'Compensatory' remediation is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect": 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".*

The choice of the remedial options is open and depends on an assessment of the competent authority: in the ELD, "primary remediation" does not seem to be a priority. According to Annex II, *"When evaluating the different identified remedial options, primary remedial measures that do not fully restore the damaged water or protected species or natural habitat to baseline or that restore it more slowly can be chosen. This decision can be taken only if the natural resources and/or services foregone at the primary site as a result of the decision are compensated for by increasing complementary or compensatory actions to provide a similar level of natural resources and/or services as were foregone. This will be the case, for example, when the equivalent natural resources and/or services could be provided elsewhere at a lower cost"*.

Complementary and compensatory remediation require an assessment as to the equivalence between lost resources and introduced resources, thus making it possible to replace resources that would otherwise be irreplaceable. According to Annex II, *"when determining the scale of complementary and compensatory remedial measures, the use of resource-to-resource or service-to-service equivalence approaches shall be considered first. Under these approaches, actions that provide natural resources and/or services of the same type, quality and quantity as those damaged shall be considered first. Where this is not possible, then alternative natural resources and/or services shall be provided. For example, a reduction in quality could be offset by an increase in the quantity of remedial measures. If it is not possible to use the first choice resource-to-resource or service-to-service equivalence approaches, then alternative valuation techniques shall be used."*

This is compensation by way of equivalent measures (such as a specific performance rule) rather than a cash award.<sup>66</sup> Monetary valuation is only aimed at establishing the equivalence between lost resources and services and those to be introduced, but it is irrelevant for the purpose of calculating the amount due as compensation for damage: according to Annex II, *"The competent authority may prescribe the method, for example monetary valuation, to determine the extent of the necessary complementary and compensatory remedial measures"*.

The environmental resources provide services not only to other natural resources, but also to the public: the loss of the environmental services to the public is not remedied with financial compensation to members of the public, but with measures, as compensative measures, that improve environment and so indirectly benefit public users of environmental services. This is an interesting way to compensate for collective losses, which overlaps with the controversial issue of the application of tort law in some cases of pure economic loss.<sup>67</sup>

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<sup>66</sup> Gilles J. Martin, "Les effets de la responsabilité environnementale: de la réparation primaire à la réparation compensatoire", *Environnement* 6 (2009): 29 ff.

<sup>67</sup> Ugo Salanitro, "L'evoluzione dei modelli di tutela dell'ambiente alla luce dei principi europei: profili sistematici della responsabilità per danno ambientale", *Nuove leggi civili commentate* (2013): 795 ff.

## 7 Summary

This report interprets and clarifies the provisions of the Environmental Liability Directive (ELD) and examines its links with other directives, in particular the Environmental Crime Directive (ECD).

Coherence between those directives is very important for the delimitation of the legal concept of environmental damage: for instance, biodiversity damage in the ELD has to be determined with reference to the criteria of Birds and Habitats Directives, and water damage has to be determined with reference to the criteria of the Water Framework Directive; the scope of the damage could then be read in a consistent way in both ELD and ECD directives.

In the ELD, the liable person is the operator: whenever he operates or controls a dangerous activity (listed in Annex III) he is subject to a strict liability rule, with exceptions and defences; in other cases (not listed in Annex III), when he causes damage to biodiversity, a fault based liability applies.

The remedy is not a punitive one, and it does not consist in a cash award. Rather, the operator bears the costs of remedial measures, which restore damaged natural resources or services to the baseline condition or to a similar level.

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