

ELD News Edition No. 2

Environmental Liability 2011

The „Kolontár Red Mud Case”

Justice and Environment 2011

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J&E ELD news

This is the second edition of the J&E newsletter on ELD.

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The association Justice and Environment (J&E, www.justiceandenvironment.org) is a European network of environmental law organisations which was created in 2003 and was founded as non-profit association in 2004. J&E is striving to protect the environment, human health and nature by improving environmental legislation and enhancing the enforcement thereof.

Legal assessment of the first major ELD case in the EU

The so called Red Mud-Case in the Hungarian city Kolontár was one of the worst European environmental accidents of the last years (for further information see: <http://justiceandenvironment.org/files/file/2011%20ELD%20Kolontar.pdf>). By the same time it was **the first „major case”** where the Environmental Liability Directive 2004/35/EC (ELD) was applied. Justice and Environment analyzed the case. The study is available under LINK (csaba please make pdf of the study and set the link)

Before transposing ELD, Hungary’s environmental legislation had its own liability regime for damages caused by **“use of environment”** (this is the Hungarian terminology for **“operator”**). ELD implementation introduced new or modified definitions, but in some cases it solely meant the translation of the Directive’s wording, on the other hand there were applicable and practical changes as well.

With transposition of the Directive the **level of environmental protection has been raised** as some requirements have become more detailed and comprehensive.

The implementation and effectiveness of national and EU regulation on environmental liability has been of the highest importance when an ecological disaster took place on **4. October 2010** in Hungary. The western dam of cassette No. X. of the red mud reservoir belonging to a privately owned company ruptured and 600-700 thousand m³ of **red sludge** inundated the towns of Kolontár, Devecser and Somlóvásárhely via the Torna creek.

Most of the measures taken by the authorities were based on the national environmental regulation amended and adopted in accordance with ELD. In the Kolontár case plenty of

questions regarding application of the liability regulation were raised and from the facts revealed it could be unambiguously deduced that **national authorities licensing and monitoring the activity** of the plant and the company also had failures. It also could be concluded that **prevention shall have more importance** in the legislation and in licensing procedures.

The related legislation created a **detailed legal background** for treatment of environmental damages; however, preventing had not been handled as a priority before the accident and – as it was later often referred – the **concerned authorities** did not have clearly designated tasks and competences.

Although the obligation of ELD's **transposition** was more or less **fulfilled** by the legislator, there have been problems in applying the regulation because clear competences in **monitoring and licensing** are lacking and the system **of financial guarantees** for environmental damages was not efficiently set up and applied. The national legislation aims to comply with the Directive regarding the prevention and exposure of the **threat of damage and damage control**. However, actual **financial liability** for the damage has not been properly implemented in the required scope. It seems to be a serious deficiency of the Hungarian legislation that it **lacks the framework regulation** demanding a prerequisite for granting permission to and for operating all activities **with a threat of environmental damage** to have a cost assessment made with the participation of an independent experts, based on which the authority would be under obligation to demand proof of the appropriate financial guarantee from the parties engaged in activities of environmental use.

A simple and easily enforceable scheme would only cover activities regulated under the **IPPC regime** with operators being able to choose from all types of financial security instruments, such as insurance, bonds, and guarantees.

Efficient **compulsory financial security** would mean that users of environment facing potential environmental liability under the ELD must provide evidence to a competent authority demonstrating that costs arising from the potential liability will be covered; this legal instrument would ensure the implementation of the polluter-pays principle.

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