ELD News Edition No. 2

Environmental Liability 2011

The „Kolontár Red Mud Case“
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 became 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 deducted 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.

Contact information:

name: Thomas Alge
organization: J&E
address: Volksgartenstraße 1, A-1010 Wien
tel/fax: 43 1 5249377/fax DW 20
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.