

THE ENVIRONMENTAL LIABILITY DIRECTIVE

An effective tool for its purpose?

Environmental Liability 2012

Comparative study on existing environmental liability regimes and their practical application

Justice and Environment 2012

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TABLE OF CONTENTS

| | | |
|--------|--|----|
| 1. | INTRODUCTION | 3 |
| 2. | SCOPE OF THE ANALYSIS/RESEARCH FRAMEWORK | 4 |
| 3. | EXECUTIVE SUMMARY | 5 |
| 4.1. | CIVIL LIABILITY REGIMES | 7 |
| 4.1.1. | <i>Weaknesses</i> | 8 |
| a) | Scope/Damage covered | 8 |
| b) | Accountability | 8 |
| c) | Damage prevention/remediation | 8 |
| d) | Burden of proof | 9 |
| 4.2. | NATIONAL ADMINISTRATIVE LIABILITY REGIMES VS. ELD | 10 |
| 4.2.1 | <i>Competent Authorities</i> | 11 |
| | Conclusion | 13 |
| 4.2.2 | <i>Scope and extent of damage covered</i> | 14 |
| | Conclusion | 16 |
| 4.2.3 | <i>Liability/Accountability</i> | 17 |
| | Conclusion | 20 |
| 4.2.4 | <i>Preventive and Response Actions</i> | 21 |
| | Conclusion | 23 |
| 4.2.5 | <i>Access to justice</i> | 24 |
| | Conclusion | 25 |
| 4.2.6 | <i>Burden of proof</i> | 26 |
| | Conclusion | 26 |
| 4.2.7 | <i>Costs</i> | 26 |
| | Conclusion | 27 |
| 4.2.8 | <i>Time limits</i> | 27 |
| | Conclusion | 27 |
| 4.2.9 | <i>Financial Security</i> | 27 |
| | Conclusion | 28 |
| 4.3 | THE MAJOR STRENGTHS AND WEAKNESSES OF NATIONAL ADMINISTRATIVE LIABILITY SYSTEMS .. | 28 |
| 5. | SELECTED CASES/APPLICATION IN PRACTICE | 29 |
| 5.1 | ESTONIA – FUEL TRUCK ACCIDENT (AS OLEREX) | 30 |
| 5.2 | AUSTRIA – LEAKAGE OF AN OIL PIPELINE | 30 |
| 5.3 | CZECH REPUBLIC – TOXIC COMPOUNDS LEAKAGE | 31 |
| 5.4 | HUNGARY – PHARMACEUTICAL PRODUCTION WORKS IN EAST HUNGARY | 32 |
| 5.5 | SLOVENIA – NOISE FROM HEAVY TRUCKS ON REGIONAL ROAD G1-3 | 33 |
| 5.6 | CZECH REPUBLIC – DAMAGE ON FORESTS | 34 |
| 5.7 | SPAIN – AZNALCOLLAR CASE (1998) | 35 |
| 5.8 | CONCLUSIONS | 35 |
| 6. | RECOMMENDATIONS | 37 |

1. Introduction

With the Environmental Liability Directive¹ (ELD) the EU tried to establish a common liability framework for the prevention and remediation of damage to animals, plants, natural habitats water resources and soil damages. The liability scheme basically is narrowed to certain specified occupational activities. Public authorities are responsible implementing the necessary (financial, preventive, remedial) measures on responsible operators.

ELD entered into force on 30 April 2004. Although the EU Member States had three years to transpose the Directive in domestic law, the transposition of ELD was completed by the last member state not before July 2010. Due to the long delay in transposing ELD in several Member States and further reasons to be highlighted within this study little practical experience is available yet on its implementation. Administrative authorities often did not have rules compliant with the ELD in place on time. Operators and the insuring industry showed unawareness regarding the specific legal obligations and further requirements for making ELD working efficiently in practice. During the last years information had to be collected on ELD implementation and practice.

Ever since its commencement - ELD, its transposition and national practice has been on the agenda of J&E. Analytical work has been done and measures been taken to raise awareness on the existence and content of ELD beneath the public, stakeholders and decision-makers. In 2011 J&E compared three environmental liability regimes (the Lugano Convention/Draft UNEP Guidelines/ELD) in order to provide a comparable framework and a basis for further analytical work on national level.

In 2012 the European Commission commissioned studies on implementation challenges and obstacles of ELD. The studies aim to evaluate the strengths and weaknesses of the current ELD regime and undertake legal and empirical research on the effectiveness of the Directive in focused areas. As a complementary measure Justice and Environment (J&E) conducted legal analyses focusing on applied liability systems in member states' practice to bring more clarity on the interaction of ELD legislation with other liability regimes and to demonstrate on the other hand value and weaknesses of all these systems. Furthermore J&E collected ELD and national liability cases to give an oversight on the national practice in environmental liability cases. The mentioned studies will be presented within the current paper.

¹ DIRECTIVE 2004/35/CE 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

2. Scope of the analysis/Research framework

The objective of the current study was to provide evidence on the added value/weakness of ELD in EU member states.

Therefore studies on the application of ELD (**J&E National Environmental Liability Reports 2012**) in six member states were carried out consisting of:

- 1. Legal analyses comparing ELD legislation and other liability legislation and**
- 2. ELD and non-ELD case studies**

As a starting point for the research, J&E has created a unified assessment template for the examination of the respective national liability systems. The issues analyzed by the participating countries have been the following:

- Existing liability systems
- Differences of national liability regimes with respect to ELD
 - a) Competent authorities
 - b) Scope/Damage covered
 - c) Extent of damage required/Thresholds
 - d) Liability/Accountability
 - e) Preventive/Response Actions
 - f) Liability Regime
 - g) Costs
 - h) Access to Justice and Claims for Compensation
 - i) Burden of proof
 - j) Financial security
 - k) Time limits for presentation of claims
- Strength and weaknesses

Equally for the case studies a template has been created referring to the same issues mentioned above.

Following J&E members have handed in respective analyses:

- **Austria**
- **Estonia**
- **Czech Republic**
- **Hungary**
- **Slovenia**
- **Spain**

In the following an analytical comparison of these reports aims to:

- ❖ Highlight the differences of national liability systems and ELD
- ❖ Focus on cross-cutting problems regarding national liability systems
- ❖ Deduce valuable information from application in practice
- ❖ Provide information of strength/weaknesses of national liability regimes compared with ELD.

3. Executive Summary

The basic characteristics of the national administrative liability systems can be subsumed under the following points:

- The national administrative liability systems are **very fragmented**, regarding competent authorities and other aspects – every different environmental element has different rules. Some of those complex systems are even not used in practice (cp. Czech Republic, Slovenia).
- **Financial security systems are only partly** established, and if so, the most countries **lack detailed regulations** on financial guarantees.
- In a lot of cases **procedures tend to last very long** – and preventive measures might lose their efficiency by then.
- Basically the majority of the assessed systems still **prioritise monetary compensation/financial penalties instead of natural restitution** – talking about environmental damages it would be indeed more appropriate to impose remediation measures than only monetary compensation or penalties. Mainly these systems also **lack of a preventive oriented mechanism** and a respective regulation. Due to the above mentioned fragmentation of the national systems no general strict liability regime for national administrative liability has been established so far.
- Due to the absence of a comprehensive legal system on damage prevention and remediation within national sectoral laws - the sums to be paid in case of damage often are not very well reasoned and in some cases probably do not cover the real damage (i.e. in case of damaging protected areas or species) – **there is a need to establish a systematic method for estimation of damage costs.**
- **None of the assessed systems allows for public participation** (except the civil case law in Spain and Slovenia gives way to public participation in civil environmental liability procedures).
- It has been showed that **in some cases ELD application is hindered by practical reasons** – a better national administrative system established, vividly applied in practice, resources and competences already set and allocated. It is to be assumed, that no adequate mechanisms, organizational structures, knowledge, financial capacities have been put in place for ELD application on national level.

Regarding ELD case law it is to be highlighted firstly, that the **lack of knowledge about practice** makes it nearly impossible to adequately assess ELD application in practice. Only one ELD case could be provided. Cases handled according to national administrative or civil liability regimes with huge environmental impacts have been indeed provided. Thus the assumption arises, that **national liability regimes are functioning and used in practice thereby undermining ELD application**. With respect to the various weaknesses of national liability regimes a **comprehensive ELD** regime (polluter pays, strict liability, financial security, etc.), if applied, could contribute to a **better standard of damage prevention and remediation**. But with respect to the low numbers of cases it is definitely not working very efficiently for its purpose. The ELD left a really **wide maneuvering room for the national legislator** and beyond that was mainly adopted without configurations into the national systems – now the system does not function properly – this indicates that ELD needs to be revised towards a more stringent system including procedural and organizational specifications, providing more detailed guidelines for the member states.

The major strength of the assessed national liability systems is their existence - so environmental liability is not just restricted to the ELD regime which is far too narrow to deal with all environmental damages. The major argument for its supposed non-application is its narrow scope in every direction – environmental elements, occupational activities, severity thresholds etc.) And in the most states the liability for ‘legal’ actions is fundamentally limited by permit defence. Furthermore competences of different authorities with respect to ELD application are not clarified and the concern was raised that furthermore the competent ELD authorities are paralysed due to the lack of funding for ELD execution.

4. Existing liability regimes in the analysed countries

In general there is no overarching environmental liability system covering all environmental elements within the examined legal frameworks – three types of liability regimes have been detected:

- Public liability within sectoral environmental laws
- Civil liability
- Criminal liability

By assessing the different liability regimes a broad variety of sectoral liability provisions – still in force after the national implementation - have been discovered. These liability provisions can be mainly found in different acts each regulating different environmental elements, or dangerous activities having potential impact on environmental elements – e.g. air, water, forest, protected areas and species, waste, GMO, nuclear facilities. A significant characteristic of the national regimes is their fragmentation. In Spain and Slovenia the duty to repair environmental damages is established on constitutional level.

The assessment of criminal environmental liability will be avoided in the current analysis, as the criminal liability is too far from European ELD regime as to provide valuable results for comparison.

4.1. Civil liability regimes

In all states also civil liability regimes can be applied when it comes to environmental liability.

Austria has several civil liability acts establishing a strict liability system regarding damages produced by certain dangerous activities or operations – e.g. Nuclear Liability Act². Civil liability provision can also be found within sectoral environmental laws – e.g. Art 26 Water Management Act regarding liability for damages resulting from the existence or operation of a water utilization system - e.g. hydroelectric power plants, Art 53 – 56 Forestry Act regarding liability for forestry harmful air pollution. Moreover **the Czech Civil Code** explicitly foresees liability for breaching preventive duties (Art 415 Civil Code – “*Everyone must act so as to avoid damages to health, property, nature and environment.*”) which allows the court to take preventive measures in case of imminent danger. The **Hungarian Civil Code** has a likely provision.

All civil liability regimes establish **strict liability for the exercise of dangerous activities** – being the manifestation of the principle that an operator of dangerous activities is to be held liable for the damage produced by his activities regardless of personal responsibility or fault. But very often the **unlawfulness of the damaging event is precondition** for the liability in these cases (basically application of permit defences). Furthermore **neighbourly emission control** comes into application in most of the analysed legal regimes. Basically damages caused to third parties as a result of actions or omissions including the utilization of the environment are to be evaluated according to the civil fault-based liability regulated in the respective Civil Codes.

In Slovenia a general environmental prevention mechanism for protection of the **constitutional right for a healthy living environment** exists (Art 72 Constitution of the Republic of Slovenia). Art 14/1 of the Slovenian Environmental Protection Act states:

“In order to exercise the right to a healthy living environment, citizens may, as individuals or through societies, associations and organizations, file a request with the court demanding that the holder (hereinafter referred to as the 'holder') of the activity affecting the environment stops the activity when it would cause or does cause an excessive environmental burden or it would present or does present a direct threat to human life or health, or that the person responsible for the activity affecting the environment be prohibited from starting the activity when there is a strong probability that the activity would result in such consequences.”

In this respect Art 133 Code of Obligations states that **the above mentioned stakeholders** can demand the removal of a dangerous source **threatening him or other people** or may demand to stop the disturbing activities or the threat of damage. The court orders suitable measures for the prevention of (further) damage. **Strict liability** regime is to be applied. If the danger arises from allowed activities or objects (with all legal permits), only the compensation of damage that exceeds the conditions set in the permit has to be granted.

² Federal Law Gazette Nr. 170/1998

The legal protection under Art 133 of the Slovenian Code of Obligations implements the above mentioned right for a healthy environment. This regulation is noteworthy as it allows every person to **claim preventive measures** if an environmental damage or threats to other people are to be feared **at civil courts**. However permit defence is foreseen within this regime. In Slovenian legal practice **this liability has never been evoked**.

4.1.1. Weaknesses

a) Scope/Damage covered

Mostly, general environmental damages are not covered by civil liability regimes – damage is considered as such if certain legal goods (e.g. property, fishing rights, human health, other physical goods) are affected negatively.

As exceptions can be stated **Slovenia's** general environmental prevention mechanism (see above Chapter 3.1.) which focuses on an “**exceeding burdening**” of the environment (that is: every emission exceeding the allowed limit). According to Slovenian jurisprudence possible damages might be damaging of trees, death of bees, losses in property value. Furthermore the Environmental Protection Act defines environmental damage as negative effects to environmental elements (e.g. flora, fauna). The strict liability for forestry harmful air pollution according to the **Austrian Forestry Act** (Art 53ff ForstG) covers all damages on forests produced by the respective air pollution.

b) Accountability

Civil strict liability only holds the operator liable for damages produced by his/her activities. The kind of activities for which liability can be created usually is established by the respective sectoral laws – whereby not every sector has his special civil liability regime for the production of damages, and therefore – apart from excluding general environmental losses – operators cannot be embedded in a strict liability regime.

c) Damage prevention/remediation

In general civil liability comes into action if damage was caused and not if an imminent danger arises. Nevertheless arising from the **legal duty to maintain safety** the obligation arises to **prevent the origin of danger** – in the Austrian legal framework this is a legal principle. **Preliminary injunctions** are mostly allowed to stop further emissions and to prevent further damages –usually cross-undertaking in damages has to be rendered. No overall system guaranteeing for a broad variety of preventive and remedial measure has been established by the analysed states in matters regarding civil environmental liability. Partly adequate preventive measures have been legally arranged (e.g. avert dangers of environmental harmful products by taking adequate measures).

A special rule is applied according to the **Austrian Genetic Engineering Act** - the administrative authority is entitled and obliged to order measures re-establishing the environment or measures preventing further environmental harm **even if no legally protected individual interests** are violated (cp. Art 101a Genetic Engineering Act). This provision diverges from the general civil liability regime which tends to focus on the protection of certain legally recognized goods/interests.

Compensation is mostly granted **in money** according to civil liability rules. Natural restitution often cannot be applied regarding environmental damages. Naturally polluted water, or destroyed wood cannot be easily restored to its original state. **Remediation** sometimes is required if the damage on some protected good simultaneously is to be evaluated as environmental harm (cp. Austrian Nuclear Liability Act).

Civil law does not concede legal standing to a broad range of stakeholders. Basically legal standing is granted to those being affected in their legally protected interests – so in general no legal standing for third parties, NGOs or other members of the public. According to Spanish³ case law – NGOs can have legal standing in civil procedures claiming remediation/compensation of environmental damages (here: fauna damages). Furthermore the Slovenian Civil Procedure Act provides that the court could recognise associations as party if they fulfil particular conditions.

d) Burden of proof

Basically strict liability according to civil law encompasses facilitation for the claimant – who has to make credible the sole possibility that a certain operator has produced the damage by his activities. In all other cases the burden of proof lies with the injured party.

Civil procedures are started by individual actions. So the court has no duty to prosecute the causation of harm, as it is in administrative procedure where the authority is obliged to initiate proceedings by itself. Equally within evidence procedures civil courts do not act on their own motions - parties have to provide evidences and bear the costs. This leads to – for individuals – very cost-intensive proceedings. Whereas in administrative proceedings the authority is obliged to ascertain the truth and to collect all necessary evidence on its behalf and costs.

e) Time limits for the presentation of claims are very tight in civil matters – basically damage claims can be submitted within three years.

³ *FAPAS case regarding the Brown Bea (Spanish Supreme Court Judgement 1st April 1993, case number 5964/1990.*

4.2. National administrative liability regimes vs. ELD

National administrative liability regimes are the ones closest to the ELD framework. Therefore a closer analysis of these regimes might be useful for detecting relevant strengths and weaknesses of current ELD.

Some states already had Environmental Protection Acts (Hungary⁴, Slovenia⁵ and Czech Republic⁶) containing liability provisions before ELD came up – those mostly in interaction with single administrative liability provisions within sectoral environmental laws. Spain once worked on a proposal for an Environmental Liability Act in 1999 which was not adopted in the end. Austria and Estonia did not have any concentrated environmental liability regime before ELD.

Single administrative liability provisions within sectoral environmental laws have not been revoked by the national implementation of ELD in none of the analysed legal frameworks. ELD was transposed mainly by a separate legislative Environmental Liability Act or by amendment of an already existing Environmental (Liability) Protection Act.

- In **Estonia** the ELD regime is regulated only by one act – the Environmental Liability Act (ELA).⁷
- In **Austria** the ELD regime was transposed by one Federal Environmental Liability Act (B-UHG⁸) – regarding water and soil damages, and nine regional Environmental Liability Acts (L-UHG) – regarding soil and biodiversity damages.
- In **Czech Republic** the ELD was transposed by a separate regulation: the Environmental Damage Act⁹
- In **Spain** the ELD has been transposed by the Environmental Liability Act¹⁰
- **Slovenia** did not enact a new Act but rather transposed ELD into its legal system by an amendment of the Environment Protection Act.
- **Solely in Hungary** ELD has been implemented into the existing national legal system on environmental liability by amending the Acts on Environmental Protection (EPA), the Water Management Act, the Nature Protection Act et al.¹¹

⁴ Act LIII of 1995 on environmental protection

⁵ Environmental protection act: RS 41/2004

⁶ Law on Environment (No. 17/1992 Coll.)

⁷ It has to be noted that codification of Estonian environmental legislation is in process since 2007 and should be finished by 2014, including revision of the environmental liability regime. Since the process is ongoing, it is not clear yet how the environmental liability will be regulated in future.

⁸ Federal Law Gazette Nr. 55/2009

⁹ No. 167/2008 Coll.

¹⁰ Law 26/2007, 23rd October (Ley de Responsabilidad Medioambiental)

¹¹ Act XXIX of 2007 on the amendment of different environmental related acts in connection with environmental liability:

- Act LIII of 1995 on environmental protection (hereinafter as EPA)
- Act LVII of 1995 on water management;
- Act LIII of 1996 on nature protection;

As basically single national administrative liability provisions are still in force and applied next to the new established ELD regime this comparative study will focus on the borders of mutual application and the strengths and weaknesses of these national administrative liability provisions in comparison with ELD.

4.2.1 Competent Authorities

In Estonian ELD regime, the main competent authority is the Environmental Board – an authority who's responsibilities involve also issuing environmental permits, supervising environmental impact assessment, administrating protected areas etc.

The Estonian national environmental damage regime is much more fragmented, as there may be three competent authorities in different issues and cases - **Environmental Inspection, Environmental Board** and **municipality**. In some cases, two or all of them are competent, according to law (though in practice, only one of them can really act as competent authority).

Usually, the competent authorities are not allowed to eliminate the damage by themselves or arrange it, except in some specific cases that concern damages from contamination of waste, surface water and body of ground water, forest or soil, or the contamination that is caused by the operator that has to have an IPPC permit.

In accordance with the **Austrian ELD regime** the locally responsible administrative district authority (*Bezirksverwaltungsbehörde*) is competent to decide in environmental liability matters.

In national administrative liability matters the respective authorities competent for decisions in this material have to conduct also the liability procedure. Regarding the obligations resulting from Sec. 31 Water Management Act the **water authority** is the competent authority (or the competent mayor or security authority) – in Austria **the administrative district authority** is acting as first instance water authority.

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- Act XLIII of 2000 on waste management;
 - Gov. Decree 90/2007. on the system of preventing and remedying environmental damage;
 - Gov. Decree 91/2007. on the provisions related to the assessment of the size of damages to nature and on the rules of remedying the damages
 - Gov. Decree 92/2007. on the amendment of Gov. Decree 219/2004 on groundwater protection;
 - Gov. Decree 93/2007. on the amendment of Gov. Decree 220/2004. on surface water protection.

The authority is to be informed in case of damage or imminent threat of damage – it prescribes measures, or under exigent circumstances it is allowed to conduct/mandate the necessary measures

The **Slovenian ELD regime** establishes a competence of the Ministry for Agriculture and Environment or more correct its competent body the Environmental Agency. The Agency is competent to order preventive or remediation measures.

As the constitutional liability regime based on the right to a healthy environment (see above Chapter Civil liability regimes) by its elements comes very close to typical national administrative liability systems – this scheme will be mentioned under the current chapter. Competent court in these cases is **the district court**. First instance court decisions can be rendered by two types of courts – county and district court. For environmental cases no special functional jurisdiction exists.

In **Czech Republic** the competent authority for ELD is the Czech Environmental Inspectorate¹² The Czech Environmental Inspectorate has the right:

- to enter a foreign property,
- requiring the necessary documents,
- impose fines,
- impose preventive and corrective measures.

Under the special national administrative liability regimes in general either the Environmental Inspectorate or the municipality are competent – their competences are the same as the Environmental Inspectorate's competences under the ELD regime.

¹² see: <http://www.cizp.cz/Departments-of-CEI>

In **Hungary** the regional environment, nature conservation and water management inspectorates and their supervision body, the National Inspectorate for Environment, Nature and Water are mainly the competent authorities in applying the regulation on environmental liability (based on ELD). In special cases:

- The regional water directorates (VIZIG)
- The national parks (NPI)
- The directorates of disaster recovery
- The county-based policy administration services of public health and
- the Hungarian Food Safety Office (in fishery and forestry matters)

Are competent in environmental liability cases.

In Hungary all of these authorities are **mutually cooperating in environmental liability matters**¹³ – the competence the relevant special sectors lies with the VIZIG in matters concerning waters and the national parks in nature conservation matters. Regarding other questions the support of other authorities will be delivered. The environmental inspectorate is the supportive body endorsing remediation plans, keeping records, detecting environmental damages in cooperation with VIZIG and NPI, classifies the environmental damages etc. whereas VIZIG (for water issues) and NPI (for nature conservation matters) prepare remediation plans, operate monitoring systems etc. Furthermore VIZIG and NPI¹⁴ are competent to take preventive/remedial actions.

As mentioned above (see Chapter 3.2) Hungary integrated ELD into the national liability system – therefore the same authorities are competent in environmental liability matters than before.

As in **Spain** the major environmental competences are delegated to the Regions (*Comunidades Autónomas*), these Regional administrative authorities are essentially responsible to enforce environmental law except for a few state and local competences and consequently responsible for asking for environmental administrative liability.

Conclusion

In Estonia, Slovenia, Czech Republic and partly Hungary (in cooperation with the functional competent body) **one state body is responsible for the implementation of ELD**. In Austria and Spain the competence lies with the district authorities.

¹³ Gov. Decree 90/2007

¹⁴ Gov. Decree 91/2007

The competence in national administrative environmental liability matters is obviously very fragmented in states with more federal elements – some competences are exercised by local or district authorities and others by federal bodies always depending on their legislative and executive competences (cp. Spain and Austria). Also in states having a main state body implementing ELD, further national administrative liability is exercised by both regional authorities e.g. municipalities) as by functional state bodies (e.g. Environmental Board in Estonia). Only in Slovenia a particular environmental liability system implemented by (civil) district courts exists – also this system is labelled by its vicinity.

4.2.2 Scope and extent of damage covered

Under ELD only **damages on water, soil and biodiversity** caused by certain operational activities are covered.

According to ELD:

- damage to protected species and natural habitats, is any damage that has **significant adverse effects** on reaching or maintaining the favourable conservation status of such habitats or species.
- water damage is a direct or indirect negative impact that **significantly adversely affects** the ecological, chemical or quantitative status or ecological potential of the respective waters.
- Soil damage additionally needs to create a significant **risk of human health being adversely affected** and applies solely to the direct or indirect introduction, of substances, preparations, organisms or micro-organisms.

Estonia

The **Estonian** national damage compensation regime involves a wider range of environmental elements. Through different acts, different elements are “protected” by the national liability regime – **mineral resources and soil, water, fish stock, protected natural objects, wild game, forest and damage arising from waste or from activity of industry (facilities with IPPC permit)**. The exact content of what constitutes “damage” in case of each of these elements is very specifically listed in each of the acts regulating the relevant topic (Earth’s Crust Act, Water Act, Nature Protection Act etc.).

The **extent of environmental damage** covered by ELD and national damage compensation regime is substantially different in one aspect: whereas under ELD regime, the harmful consequence is regarded to be damage (e.g. “significant adverse effect” to the elements), the obligation to compensate environmental damage under national regime may in addition arise simply from certain kind of activity (e.g. cutting trees that are younger than allowed, causing fire in protected area etc.). Sometimes the damage is defined as “*causing contamination*”. The definition of contamination, established in IPPC Act, is very broad. It involves the possibility of threat to human health and environment, causing material damage, or disturbance of the use of environment for recreational or other legal purposes.

Austria

In **Austria** some environmental elements are protected by the respective sectoral laws – e.g. Art 31 Water Management Act protects **any adverse effect on the water quality**, the **Forestry Act** covers applies to forestry harmful immissions.

Basically the extent of damage required by sectoral legal provisions is variable – some require ‘*measurable effects*’¹⁵ on certain environmental media others speak of “*significant harm*”¹⁶ and others do not establish special thresholds. Notably the **Water Management Act** (Art 31 leg cit) says that an adverse effect on the water quality is to be understood as following: **any deterioration of water quality and any reduction of its self-purifying capacity** (Sec. 30/3 Water Management Act). No significantly adverse effect on the water quality is required for this provision to be applicable.

Slovenia

The environmental protection according to the Slovenian constitutional regime applies to the “**exceeding burdening**” of the environment - Everything exceeding emission and other standards and rules. Only damages enumerated under EU-Law are protected under the Slovenian national regime.

Only **damages exceeding authorized limits** are subject to the general environmental prevention mechanism (permit defence).

Czech Republic

The administrative liability regimes in Czech Republic definitely have a broader scope than the ELD regime. They cover **damages on water, soil¹⁷, flora, fauna and habitats¹⁸, forests and air**. The broadest definition of damage is provided by the Law on Environment¹⁹, which describes the environmental damage as **any loss or weakening of the natural functions of ecosystems, caused by damage to their constituents or disruption of internal links and processes that are results of human activity.**²⁰

¹⁵ Cp. **Austrian Forestry Act**: harmful air pollution is to be categorized as pollution causing **measurable damages to forest soil and flora** (endangerment of forest culture).

¹⁶ Cp. Art 79b **Austrian Genetic Engineering Act**

¹⁷ **The Czech Law on Agricultural Land** defines that soil shall not be contaminated. As a result of contamination, there is described the contamination of food chain and drinking water, which endanger the health or life of the people and the existence of living organisms; damage the surrounding land and favourable physical, biological and chemical soil conditions.

¹⁸ **The Czech Act on Nature and Landscape Conservation** covers damage on nature and landscape protected under this law, i.e. flora, fauna, habitats, minerals, rocks, paleontological findings and geological units, ecological systems and landscape units, etc.

¹⁹ No. 17/1992 Coll.

²⁰ This law is not used in practice.

The Czech Environmental Damage Act stipulates the same thresholds as ELD does. **No specific thresholds** are foreseen by sectoral national laws. As a result, the damage is covered by the liability regime without assessment, whether it has reached some limits or not. The competent authority has to decide to initiate proceedings and this decision is usually based on **considerations of procedural economy**.

Hungary

As ELD was incorporated into the Hungarian national liability system the application of the respective legislative acts is restricted to damages to water, soil and biodiversity. Nevertheless the definition of environmental damage is a bit more detailed in the Environmental Protection Act (EPA) than in the ELD. "Environmental damage" means **any measurable adverse and significant change in the environment or any environmental media which may occur directly or indirectly, or any measurable impairment of a natural resource service which may occur directly or indirectly**. (Art 4. point 13 EPA). According to EPA, liability rules may be applied in case of environmental damages not falling under the scope of ELD (**diffused pollution, deterioration of air quality, noise and vibration emissions etc.**).

The legal definition of environmental damage contains the expressions "**any measurable adverse and significant change**" and "**any measurable impairment of a natural resource service**" – all environmental damages covered by Hungary's legal system are covered by the regulation if they can be classified as mentioned.

Spain

The Spanish special administrative environmental liability regimes cover **any damage** to any natural resource, including air and **do not stipulate specific thresholds**.

Conclusion

So in the most cases the national administrative liability regimes – although fragmented – cover a much broader range of environmental elements than ELD prescribes. The Czech Republic even disposes of an overall legal notion of environmental damage as "**any loss or weakening of the natural functions of ecosystems, caused by damage to their constituents or disruption of internal links and processes that are results of human activity**"²¹ Even the Hungarian system – although harmonized with ELD by its transposition – still disposes of a broader notion of environmental damage within its Environmental Protection Act than ELD does. Indeed quite high thresholds are applied on all kinds of damages within the Hungarian system (only measurable significant damages are covered by this regime). On the other hand the use of the term "*measurable*" does not cope with the term "*significant*" – lots of negative impacts on environmental elements can be measurable. And

²¹ Czech Law on Environment

therefore a reference to measurable damages would basically broaden the scope in comparison with ELD. Furthermore the system focuses on measurable changes or impairments and not impacts – also measurable environmental harmful emissions without measurable impact could be covered under the Hungarian system. In this respect the Czech formula concentrating on “*loss and weakening*” might be even stricter.

Noteworthy is the Austrian Water Management Act which does explicitly point out that “**any deterioration of water quality and any reduction of its self-purifying capacity**” fall under the respective liability regime. Firstly this establishes a legally binding threshold – by not establishing any thresholds – which leads to stricter implementation by the authorities (no area of discretion). Secondly the water authority is competent for the implementation of this liability regime – this authority has experience in Water Management issues, calculation of losses, connections to respective experts etc. than another authority would have.

4.2.3 Liability/Accountability

Accountability according to ELD

The environmental liability regime according to ELD applies to environmental damages caused by any of the **occupational activities** listed in Annex III of the Directive, and to any imminent threat of such damage occurring by reason of any of those activities – e.g. IPPC operations, waste management activities, work with GMO, certain activities requiring permits according to the Water Management Act etc. - Furthermore it applies to damages to protected species and natural habitats caused by other occupational activities than those listed in Annex III of the Directive, whenever the operator has been at fault or negligent. The operator can be held liable for the damages produced – basically this is **the natural or legal, private or public person who operates or controls the occupational activity**.

Estonia

As a general rule, according to Estonian national administrative liability it does not matter who caused the damage (natural or legal person), except in Integrated Pollution Prevention and Control Act (only the owner of integrated environmental permit or obligator of this permit could be regarded as the polluter). There may be special rules. For example, it is regulated in Waste Act that if the transport of waste is not organised by the municipality, the municipality must cover the costs of decontamination (this is valid only in some cases).

Liability Regime

The Estonian Environmental Liability Act uses **fault based liability** as a rule. However, there is a list of activities in case of which strict liability is applied (operating facilities with IPPC permit, deliberate release into environment of GMOs etc.), i.e. the person who caused damage, is liable despite of the fault (§ 8(2) of ELA)). This is different from the national damage compensation regime. Furthermore also strict liability requires a causal link between the damage produced and the operational activity.

Mainly, the national administrative liability regime in Estonia is fault-based - a person will be liable if he/she has been acting deliberately or negligently. There are exceptions - in some cases the strict liability is applied, so the person has increased responsibility. For example, under the **Waste Act** the owner of the land where the illegal waste is located, is liable without fault and has to eliminate the waste if the real polluter is not ascertained during one year since the procedure of offences was initiated.

As for the **thresholds**, it can be said that according to ELA, the threshold of strict liability is in some cases the threshold of operating capacity above which permit is required. General liability is restricted with the limits of definition of “environmental damage”. No thresholds apply for the national damage compensation regime – the liability depends on what constitutes “damage” in concrete case. In this regard, the systems are similar.

Austria

According to Art 31 Water Management Act the **objective polluter** – which is the one being in an close relation to the source of danger: this can be legal persons , operators of facilities, natural persons etc. – can be held liable. The paragraph one of this provision establishes a general obligation of pollution control: **Everybody in his occupational and private activities has to keep clean the waters** (Sec. 31/1 Water Management Act). The property owner is subsidiary liable and an obligation to cumulative action is foreseen.

Basically the **Austrian national ELD regime** establishes a strict liability regime, weakened by the fact that they require sort of causal link between the environmental damage and the operational activity of a certain operator – the damage needs to be connected to a specific operator. Furthermore the Austrian ELD regime applies the **permit defence** regarding **biodiversity and soil damages**. Regarding **water damages** a modified regime comes into application – as according to the Austrian Water Management Act a water permit never authorizes significant damage on waters no permit defence can be applied here.

Apart from the civil strict liability regime for dangerous activities (cp. Nuclear Liability Act), the national administrative liability provisions do not establish an overall strict liability regime in environmental matters. Art 31 **Water Management Act provides for a strict liability regime**, no fault or negligence is required to create an obligation – as stated above everybody who is able to legally or factually control the risk of water pollution is obliged to set control measures – even if the polluter is someone else. The here established duty of action reaches much further than most environmental liability provisions. According to this provision the polluters are jointly liable. If the damage was produced by a facility holding a water permit the Water Management Act liability regime exempts those damages covered by the water permit from the respective liability regime – but according to Austrian jurisprudence and legal practice a significant adverse effect on waters can never be subject to a water permit (for these damages no permit defence is applicable).

Slovenia

Everyone causing an environmental damage can be held liable. State liability comes into effect if the causer cannot be defined. Furthermore state liability by omission may result from Article 72 of the constitution – the establishment/conservation of a healthy environment is duty of the state – suitable regulatory, administrative and juridical frames for the implementation of this human right are to be elaborated. In these cases the state could be held responsible also for pollution caused in the frame of permits and regulations.

According to the Slovenian ELD regime²² Article 110a explicitly defines the operations/activities that are under strict liability (absolute). The liability is established when the damage is caused and it is possible to define cause/effect connection between the operation and environmental damage (causal link).

The environmental protection according to the Slovenian constitutional regime establishes a kind of strict liability, because there is no need to prove unlawfulness. This is similar to the ELD regime. According Article 14 Environmental Protection Act citizens could demand from the “polluter” to stop (or not to begin) the activities and inform the ministry about the situation. According to ELD regime the ministry would order some preventive or remediation measures to the polluter. Officially there is no established procedure which guarantees the functioning of the constitutional system – probably a major reason for its absent application. The enforcement of this right is mainly operated within the regime according to civil law – where permit defences are legal and strict liability is reduced to certain dangerous activities (functioning as a base for compensation claims).

Czech Republic

Under the national administrative liability regime liable subject is mostly the natural or legal person, who causes damage (see Act on Nature and Landscape Conservation, Law of Water, Clean Air Act, Forest Act). There are no limits or further definitions who can be liable (in contrast with the ELD). The only exemption is the Law on Agricultural Land: the liable person is always the owner or tenant of the land (soil). They can ask the country for cost reimbursement in the case they did not cause the damage. This possibility of refunding has never been used in the practice.

The liability regime in Environmental Damage Act is the same as in the ELD. Czech Republic opted in the permit and state of the art defence.

In general the liability for environmental damage is always strict (not fault-based) usually without directly mentioned the defence (e.g. no state-of-art defence). The national specific regime does not use explicitly the permit defence – but as the national liability covers only accidents or illegal activities the system might result in an application of permit defences.

²² specified in articles 110a-110i Environmental protection Act

Hungary

Based on the EPA, “polluters” shall bear liability for environmental damages according to civil law and criminal law, regulatory and administrative provisions (**“polluter pays” principle**).

The owner as well as the possessor (user) of the real property on which the activity is or was carried out shall be held **jointly and severally liable** - until evidence is provided to the contrary. The owner shall be exempted from the joint and several liability, when naming the actual user of the real property and proving beyond any doubt whatsoever that the responsibility does not lie with him. In Hungary strict liability is to be applied in case of national administrative liability as well as for damages caused by activities hazardous to the environment.

Spain

Operators, producers or any person who causes damage can be liable, including juridical persons/companies. Authorities can be liable and there is a special proceeding for the citizen to denounce environmental damages.

Although civil liability regime requires fault-based actions or omissions - the jurisprudence of the Spanish Supreme Court (*Tribunal Supremo*) has recognized Absolute liability for “*those economic activities dealing with big environmental risks for and therewith obtaining benefits*.”²³ Within national administrative liability some Fault-based offences (e.g. Water) and some absolute-liability offences (e.g. GMO) can be detected. State liability on environmental damages is always based on strict liability.

Conclusion

The general rule is: the **polluter** is to be held liable for environmental damages. Nevertheless **sectoral laws restrict responsibility to the operators of certain facilities** (e.g. the holder of land property, the operator of a waste incineration plant). It is worth to mention that some states do not bind liability to the operation of facilities or certain other occupational activities neither within sectoral provisions (e.g. Estonia, Czech Republic, Hungary). The notion of the “polluter” according to **the Austrian Water Management Act** (Art 31 WRG) reaches very far – the one who is **in a close relation to the source of danger** (that does not need to be necessarily the operator or the owner or an occupational activity) is liable for damages produced by this source. **Spanish** jurisprudence recognized absolute liability only for **economic activities** dealing with big environmental risks.

²³ Supreme Court Judgements -SSTS- of 13.7.1999 and 5.11.2004

Different liability regimes have been detected in the analysed legal systems – **Estonia's** liability regime is mainly a fault-based liability system. The **Slovenian** constitutional system would be very far reaching if applied in practice (everyone could demand the omission of activities causing environmental damages). **Permit defences** are the rule within the analysed legal systems. The **Austrian** Water Management Act – a particularity - establishes **liability for significant damages regardless of any permission**. Although the **Czech** national administrative liability regime does not explicitly mention or recognize permit defences – the system covers damages produced by accidents or illegal activities which in the end results in a factual application of permit defences as activities covered by a permit do not fall under the national administrative liability. So basically most of the national liability regimes allow for permit defences – as ELD does. On the other hand the former have much broader perceptions of the “polluter” as ELD has – not only operators in their occupational activities can be held liable. Unfortunately strict liability for environmental damages is not applicable in some of the analysed states – a situation that needs to be adapted to ELD standards.

4.2.4 Preventive and Response Actions

ELD states in its Art 5 and 6²⁴ the necessary procedure for preventive and remedial action:

the operator has **to take preventive action**, in case of an imminent threat of an environmental damage. Where environmental damage has occurred the operator shall inform the authority and take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants. Each member state is obliged to establish adequate damage information systems. The authority may require the operator the necessary steps to prevent/remediate damage, should be allowed to give instructions to the operator or should take the preventive/remediation measures itself.

Estonia

The national liability regime in Estonia establishes preventive measures mostly in environmental permits (usually there is a specific provision in the relevant legal act). Other laws establish the general rule that damage must be prevented or kept on a minimum level (cp. Earth's Crust Act, Water Act, Waste Act or Forest Act). This general rule should be followed by every operator or person, but there are no more specific provisions that could guarantee implementation of these requirements.

Two remediation possibilities exist:

- 1) decontamination or bearing the costs of decontamination
- 2) paying monetary compensation. Mostly, the monetary compensation is required.

²⁴ Art 5f 2004/35/CE

Austria

A general principle in Austrian civil law is the **legal duty to maintain safety**. This is to be understood as a behavioural obligation to prevent the origin of danger – the omission of this responsibility can create strict liability for damages caused thereby. Preliminary injunction is guaranteed against acts or omissions within civil immission control. Civil liability law is based on the **principle of natural restitution** – natural restitution is owed if it's doable. In civil liability this principle is applied as long as sectoral laws do not prescribe differently. So basically remediation wouldn't be an option within Austrian civil liability regime – as the baseline situation cannot be re-established very often in case of environmental damages.

Like in Estonia some sectoral Austrian laws establish the duty to prevent damages arising from different activities or operations.²⁵ **Art 31 Austrian Water Management Act** establishes similar to ELD a regime of **preventive and remedial measures** which have to be taken, including informative obligations for the polluter.

Slovenia

According to the Slovenian constitutional system no obligation for taking preventive measures does exist, before the liability according to the article 14 Environmental Protection Act is demanded before civil courts. In this respect the interested party should primary claim for measures to prevent or remove the danger or disturbances (Art 133 Code of Obligations). This shows that in Slovenia apart from ELD no similar preventive/response mechanism comes into effect, as civil procedures primarily focus on the omission of disturbances etc. and remediation may not be claimed if no legally protected good was affected.

Czech Republic

The Czech national liability system provides the same framework regarding preventive/remediation measures like ELD does. The liable subjects must carry three basic liabilities under the special national law – informative obligations, preventive and corrective measures. The main drawback of imposing remedies is the lack of detailed methodology for the selection and justification for the choice of the particular measure. In some cases, the public authority itself carries out corrective measures at the expense of the responsible entity. The national specific regime does not use “*complementary measures*” (the restoration of site nearby of equivalent environmental value, when a damaged site itself cannot be restored, see Annex II of ELD).

²⁵ Cp. Nuclear Liability Act, Product Liability Act, Water Management Act, Genetic Engineering Act et al.

Hungary

In Hungary the “user of the environment”²⁶ has to take all necessary measures to prevent/remediate damages. The Gov. Decree 90/2007 regulates the measures and mechanisms in case of environmental damages. Furthermore it differentiates between remedial measures in case of damages requiring immediate action (damage threatens public health, public safety, more effective enforcement etc.) and remedial actions in any other cases. The competent authority may itself undertake the preventive remedial measures in connection with environmental damages, or may hire others to do so.

Spain

Except for the Environmental Liability Act, which follows ELD, there are no requirements for preventive actions since the other forms of liability are reparation-oriented models (*ex post facto*) with no preventive actions.

Conclusion

Preventive and response measures do not seem to be the rule within the national liability regimes – civil liability regimes are reparation-oriented and if there exists a special civil mechanism only omission (injunctive reliefs) of dangerous/harmful activities may be required (cp. Slovenia, Austria, Spain). Obligations to prevent and control environmental dangers found within the relevant sectoral legislations (e.g. Waste Acts, Water Acts, Industrial Mining Acts et al.) and/or can/have to be incorporated into the respective operation permits. But as the analyzed situation in Estonia shows, these obligations lack in a system guaranteeing its factual implementation. A further deficiency of the national systems is the lack of a detailed methodology for the selection and justification of particular measures (cp. Czech Republic).

In accordance to civil liability regimes the national systems in some cases adapted the natural restitution model which in remediation cases of environmental damages cannot be applied adequately – so subsidiary compensation of damages is to be applied. Hardly ever the ‘polluter’ himself is obliged to take remediation measures – in some cases the compensation for decontamination costs is to be paid (cp. also Estonian Waste Act or Water Act). A good aspect derives from the Hungarian framework for prioritizing damages: differentiation between remedial measures in case of damages requiring immediate action and in any other cases. A better methodology in the evaluation of damages and actions to be set would be really useful to establish a more efficient environmental liability system.

²⁶ Art. 101/2 EPA

4.2.5 Access to justice

Estonia

In Estonian ELD regime NGOs and interested persons can claim preventive or remedial measures to be implemented

The public access to justice and claims for compensation is not granted under the Estonian damage compensation regime. Only the Environmental Board or Environmental Inspection is entitled to a remedy.

Austria

The Austrian Environmental Liability Act (ELD regime) grants legal standing to any natural or legal person potentially affected in their/its rights. Furthermore certain environmental NGOs and the ombudsman for the environment have legal standing in environmental liability proceedings – if they indicate this within two weeks after the publication of the remedial measures by the competent authority. They have to show these facts creating their legal standing credibly. They have the right to appeal with the Independent Administrative Tribunal (UVS).

Within the national administrative liability regime legal standing is granted solely to the injured/endangered party and the 'polluter' (cp. Art 26 and Art 31 Water Management Act, Genetic Engineering Act, Forestry Act). This methodology follows general legal principles in civil law: legal standing is granted to those being affected in their legally protected interests in – basically no third parties, NGOs or other members of the public is granted legal standing in liability proceedings.

Slovenia

As concerns the Slovenian ELD regime also NGOs with status of public interest can be party in the administrative and then also administrative court procedure regarding the administrative decision about measures for rehabilitation of already caused environmental damage.

Equally in Slovenia legal standing basically is limited to those person affected in their legally protected interests. A particularity of the Slovenian civil system is that the court could concede legal standing to some organized associations if they fulfil the main conditions to be a party according to the Civil Procedure Act. The praxis did not yet show out if also this could be officially recognized NGOs with public environmental interests (by now: 13 NGOs).

Czech Republic

The transposition of ELD by the Czech Environmental Damage Act is not clear in the point of public participation and access to justice. However, the public interested has the right to request the initiation of proceedings and the competent authority would be obliged to initiate the proceeding upon this request.

As in all other legal regimes also the Czech national liability regime is based on a two-party procedure. Basically the public can only ask the competent authority to initiate proceedings and to impose corrective measures – Nevertheless the authority is not obliged to act upon this request.

Hungary

According to Hungarian ELD regime individuals showing affected legal interests and environmental NGOs active in the impact area have the legal status of being a party administrative environmental liability procedures.²⁷ NGOs not active in the impact area have only a right to make comments: All these parties is automatically granted legal standing in following appellate proceedings – judicial and administrative. NGOs are even entitled to file lawsuits against the user of the environment.

Spain

In Spain rules the two-party procedure within the national liability system – is it has been shown before in all other countries (except: Hungary). Indeed once Spanish jurisprudence conceded legal standing to a NGO to ask for compensation for fauna damages (FAPAS case regarding the Brown Bear).

Conclusion

None of the analysed national liability regimes admits public access to justice – The regimes follow the general legal principles in civil law where legal standing is granted to those being affected in their legally protected interests. Even the Austrian national administrative liability according to Art 31 Water Management Act does not allow for public participation – although this provision is very similar to ELD and solely aims for the protection of the environment. Rather interesting are the developments to be observed in Spain or Slovenia, where courts have already/are able to concede legal standing to public interest associations in civil liability procedures claiming for compensation/remediation. In all analysed regimes legal standing within the first instance is the precondition for access to justice. It might be worth mentioning that according to Art 9 (3) Aarhus Convention the public concerned is to be granted access to justice in environmental matters regardless of their status obtained within first instance proceedings – An adequate implementation of this guarantee has to be brought forward in

²⁷ Art 98.1 Hungarian EPA and Art. 15 Act CXL (2004)

every country which is party to the Convention. Furthermore it is to be considered if – based on Aarhus Convention Compliance Committee (ACCC) findings and ECJ Case law – the provision might be directly applicable in cases where this right has not been conceded by law yet.

4.2.6 Burden of proof

All of the analysed countries do not use special rules for evidence procedures within their national administrative liability regimes. The **prima facie evidence** - (relieving the authority from its burden of proof) is applied if the activity/operation/facility carries out some high risk activities or/and this is stated in the respective sectoral law.²⁸

Conclusion

Basically within administrative procedures evidence rules are a bit different to ordinary civil procedures. The burden of proof lies with the authority. In appellate procedures the applicant himself needs to prove what he claims. A general problem within the assessed system is to provide evidence in cases where permit defence is used. It is particularly difficult to prove that the damage was produced not by allowed but exceeding emissions.

4.2.7 Costs

Nearly all the analysed national liability systems (civil liability oriented) function in accordance with the **principle of natural restitution**. In the first case natural restitution of the damage is owed and in the second case satisfaction in money has to be provided. In Estonia two options do exist: monetary compensation or decontamination - no obligation for natural restitution (e.g. natural restitution of damages on fish stocks or wild game) exists – except for environmental liability cases according to ELD. According to **Art 31 Austrian Water Management Act** the ‘polluter’ owes decontamination/remediation or has to bear the cost for the necessary remediation measures. Also the **Hungarian regime** – harmonized with ELD – the polluter is obliged to set remediation measures him/herself.

The evaluation mostly follows a case by case basis (e.g. in Slovenia, the Czech Republic, Austria). Equally in Spain the evaluation method for damages follows the respective criteria set by the jurisprudence. The Czech Republic states some exemptions regarding calculation methods of damage caused to forests²⁹, defining and calculating the different types of damage; and Regulation on determining forestry risk zones influenced by air pollution.³⁰

²⁸ Cp. Also Art 26/5 Austrian Water Management Act, Art 54 Austrian Forestry Act, Art 79d Austrian Genetic Engineering Act.

²⁹ No. 55/99 Coll.

³⁰ No. 78/1996 Col.

Conclusion

All in all cost calculation and damage reparation basically follows principles established within civil liability systems. This system focuses on the infringement of legal protected individual interests and the reparation of these interests. Whereas the basic idea of environmental liability is resting in the preservation of our environmental goods at their best, for the purpose of an overall public interest. The analysed systems are directed more towards indemnification – the principle of prevention and remediation of environmental damages as such, apart from national ELD legislation is realized just scarcely within some national administrative liability regimes. Especially preventive measures are not explicitly foreseen in many liability systems – they are more directed towards damage reparation.

4.2.8 Time limits

Time limits are very differently ruled in the analysed legal systems – a basic division can be made between time limits for civil claims according to general civil liability provisions and time limits for civil claims according to national administrative liability provisions. Furthermore in Slovenia within sectoral environmental laws only sanctions/fines are subjected to certain time limits. In Spain measures or claims regarding damages of environmental public goods (river basins, coastal shore) have no time limitation. Equally in Estonia environmental damage public claims are not subjected to special limits. In certain cases it is practiced and regulated that if after a certain period the objective polluter cannot be ascertained – the land owner or legal descendent can be held liable (cp. Estonia, Austria).

Conclusion

The most crucial problem regarding time limits for environmental damage claims might be the occurrence of loss – because harmful activities may already have been started years ago (e.g. emissions) till a damage can be measured (e.g. crop failures). This circumstance is to be considered within every environmental liability legislation – for the sake of its effective application. Otherwise private claims might be easily undermined – contravening the purpose of civil liability law.

4.2.9 Financial Security

In Estonia are no systems for financial securities in cases of environmental damage – except from mandatory security according to SEVESO Directive. The Austrian Product Liability Act, Genetic Engineering Act and Nuclear Liability Act provide for mandatory financial security – further law do not, and consequently no financial security system for damages which go beyond the before mentioned Acts does exist in Austria. Equally in Slovenia financial security systems regarding nuclear liability do exist – furthermore the Slovenian Environmental Protection Act allows the establishment of financial security systems for environmental damages (Government decision) – regulation for waste deposits does already exist. Also in the Czech Republic compulsory financial security is required by some regulations (e.g. Waste Act or the Act on Prevention of Major Accidents). In Hungary Art. 101. 5-6 Environmental Protection Act requires that the user of the environment undertaking activities

specified in separated piece of legislation shall provide financial guarantees or, that – under separately regulated conditions - environmental insurance may be required. The decree on detailed rules of financial guarantees has not adopted yet. Spain has a voluntary financial security system for civil liability and Public Body's liability.

Conclusion

As we can see financial security systems do not state the rule within national administrative liability systems. Some states provide for voluntary financial security systems and some for mandatory financial security systems for particular dangerous activities (e.g. nuclear activities). The lack of adequate financial security systems may lead to an acquittal of operators not prepared to have funds for prevention and remediation measures to be taken in case of an accident. On the other hand financial guarantees for the remediation of damage with respect to major accidents or catastrophes do exist on regional level (e.g. water fund – cp. National Environmental Liability Report 2012: Czech Republic³¹)

4.3 The major strengths and weaknesses of national administrative liability systems

Basically the national administrative liability system is very fragmented, regarding competent authorities and other aspects – every different environmental element has different rules. Some of those complex systems are even not used in practice (cp. Czech Republic, Slovenia). Financial security systems are only partly established, and if so, the most countries lack detailed regulations on financial guarantees. In a lot of cases procedures tend to last very long – and preventive measures might lose their efficiency by then. Basically the majority of the assessed systems still prioritise monetary compensation/financial penalties instead of natural restitution – talking about environmental damages it would be indeed more appropriate to impose remediation measures than only monetary compensation or penalties. Mainly these systems also lack of a preventive oriented mechanism and a respective regulation. Due to the above mentioned fragmentation of the national systems no general strict liability regime for national administrative liability has been established so far.

Due to the absence of a comprehensive legal system on damage prevention and remediation within national sectoral laws - the sums to be paid in case of damage often are not very well reasoned and in some cases probably do not cover the real damage (i.e. in case of damaging protected areas or species) – there is a need to establish a systematic method for estimation of damage costs. None of the assessed systems allows for public participation (except the civil case law in Spain and Slovenia gives way to public participation in civil environmental liability procedures).

The major strength of the assessed national liability systems is their existence - so environmental liability is not just restricted to the ELD regime which is far too narrow to deal

³¹ See J&E ELD Publications 2012: <http://justiceandenvironment.org/publications/eld-2012>

with all environmental damages. The major argument for its non-application is its narrow scope in every direction – environmental elements, occupational activities, severity thresholds etc.) And in the most states the liability for ‘legal’ actions is fundamentally limited by permit defence. Furthermore competences of different authorities with respect to ELD application are not clarified and the concern was raised that furthermore the competent ELD authorities are paralysed due to the lack of funding for ELD execution.

As a result, a lot of national ELD regimes are not used in practice and its innovative points could not become the norm, spreading to other regulations. The major reason might be the still enduring application of national liability regimes – this hinders the consistent application of ELD on national level. National liability systems established within sectoral environmental laws are too brief and do not cover certain situations, e.g. if natural restitution is not possible, public participation, etc. – here the established ELD standards and principles such as the concept of environmental damage and remediation can be simply ignored. As a result, in some environmental damage cases no (or inappropriate) remedial measures are carried out.

5. Selected Cases/Application in practice

The analysed National Environmental Liability Reports do include practical examples of environmental liability regimes – seven cases studies from six different countries (as above: Estonia, Austria, Slovenia, Czech Republic, Hungary and Spain) have been conducted. One ELD case and six national liability cases have been presented. The major messages which can be deduced by the analyses of these case studies will be disclosed in the following chapter.

Two of the cases presented have been (administrative) liability procedures according to the respective national Water Management Acts:

- **AUSTRIA – Leakage of Oil Pipeline**
- **CZECH REPUBLIC – Leakage of Toxic Compounds**

The Estonian case was the only ELD case presented, the damage prevention and remediation procedures were applied in accordance with the Estonian Environmental Liability Act (ELA). The case was about a **fuel truck accident producing water damages**.

The **Hungarian** case is about the **burying of barrels containing hazardous substances by a pharmaceutical factory in East Hungary during the 1950s and the 1960s**. Huge soil and groundwater contaminations have been detected later on.

The **Slovenian** case was about **immaterial damages by noise due to transit traffic** on the regional road G1-3 (Maribor – Hungarian Border). Another **Czech case** regarded **damage on forests** mainly produced by sulphur compounds (SO₂). In **Spain** the **breach of a mining dam produced heavy metal spills and damages on soil, water, flora and fauna**.

Whereas the **Austrian, the first Czech, the Estonian and the Hungarian** case are **national administrative liability cases**, the **Slovenian, the second Czech and the Spanish** case fall under the **national civil liability regime**.

5.1 ESTONIA – Fuel Truck Accident (AS Olerex)

In **December 2010** a fuel truck (AS Olerex) transporting specially marked diesel fuel had a road accident in the Estonian Harju County – consequently **about 6000 - 8000 liters of flown-out fuel produced imminent threats to surface and ground waters**, including threats to human health. According to official records, this has been the biggest and most significant accident in Estonia where preventive and response actions according to the Estonian ELD regime have been implemented (although it might not be the biggest accident where environmental damage has been caused). Remediation plans have been elaborated by the polluter (AS Olerex). The Environmental Board was able to order adequate remediation measures within two months after the accident. **In spring 2011** (4 months after the accident) the water quality was sampled – **no exceedance in existing pollution limits was detected at that time**.

This is one of two cases in practice where environmental damage or threat of damage has been identified according to the Estonian Environmental Liability Act (ELA) – the Estonian ELD regime. The current case seems to have been handled in a timely manner in mutual cooperation between the polluter and the competent authorities. This shows that ELD regime allows setting preventive and remedial measures in a timely manner. But the major objection against this regime is, that only nine environmental liability cases have been reported to be handled by the Environmental Board so far (although in Estonia ELA is in force since December 2007). It is barely credible that **hardly any accident (involving environmental damages) happening within the last five years does not fall under the environmental liability regime** – or is it that officials are just not sufficiently competent or equipped to apply ELA in practice even if it could be applicable? So on the one hand the environmental liability regime, if applied, could contribute to a better standard of damage prevention and remediation, but against the background of low numbers of cases it definitely is not working very efficiently for its purpose – to avoid or remedy environmental damage.

5.2 AUSTRIA – Leakage of an Oil Pipeline

In Austria water damages are persistently (even after ELD transposition in 2009) assessed under the administrative environmental liability regime of the Austrian Water Management Act. Due to its practical significance in the past the here presented case falls under the scope of the Austrian Water Management Act, even though the incident happened before ELD entered into force.

During the renovation of a salesroom in **October/November 2000** - in the Austrian region Schärding - a pipeline was damaged. In January 2001 a thereby produced leakage led to a **discharge of about 5000 litres of heating oil into the ground**. This incident produced imminent threats to soil and groundwater.

The water authority imposed several informative, preventive and remedial measures to the objective polluter. These administrative orders have been repeatedly challenged by the latter – consequently **safeguarding and remediation proceeded very slowly**. This may be a considerable weakness in comparison with the Estonian case where ELD was applied and prevention and remediation rules are in place and applied in a timely manner. The Austrian **Water Management Act lacks of detailed prevention, safeguard and remediation rules**, one possible cause for long-standing processes. Furthermore (as a general remark) this liability system does not provide for public participation (“one party” procedure) – only the authority itself may initiate procedures – another reason why administrative actions may not been taken in time.

On the other hand the national administrative liability according to the Water Management Act is stricter in comparison to the Austrian Environmental Liability Acts (ELD regime). Especially the scope of the Water Management Act regarding the concept of the polluter and the notion of damage, the measures to be taken by the polluter etc. are quite comprehensive is – therefore a broader range of water damages fall under this liability regime which is vividly applied in practice.

5.3 CZECH REPUBLIC – Toxic Compounds Leakage

A waste depositor stored oil **contaminated soil without any permit since June 2005**. Toxic compounds began to leak into the environment and destroy the trees. Furthermore the facility did not have the necessary technical parameters for operation. The case was handled by the **Czech Environmental Inspectorate** according to the Administrative Procedure Act³². The Czech Environmental Inspectorates' (CEI) primarily responsibility is the supervision of the enforcement of environmental legislation. In this case the CEI **imposed the measures to remedy the defective condition in order to protect surface and groundwater against illegal waste discharges**. As the CEI first had to prove the damage, causal links and the extent of damage it therefore conducted exploratory drillings. In 2006 the polluter was fined (€ 200.000,--). In 2010 response actions (process survey and documentation of the effect of storage of oil polluted soil to the environment, drafting response actions, removal of disposal and wastewater etc.) were imposed to the polluter. In the following **the polluter decided to close down his activity and enter into liquidation** before he was forced to take responsive action or pay the fine. The remediation costs will be borne by the Czech state. As a result, the polluter pays principle has been violated.

32 No. 500/2004 Coll

The **major weaknesses** of the current case have been on the one hand that **no public participation** is allowed according to the Czech Water Management Act – The competent authorities do not have to follow notifications or suggestions from the public regarding a particular incident. The authority does not even have to decide about these notifications. As a result a waste disposal site **permanently polluting** soil and groundwater **may exist for 5 years** without any actions taken. The **lack of a mandatory financial security** (insurance is compulsory only for operators with waste permits) lead to the result, that again the state has to step in for damage remediation – the **polluter pays principle does not work** in these cases.

5.4 HUNGARY – Pharmaceutical Production Works in East Hungary

During the **1950s and the 1960s**, barrels containing **hazardous substances** stemming from production of pharmaceuticals had been buried in the area of the operating pharmaceutical factory. As it was **revealed in the early 2000s**, this activity resulted in **severe soil contamination** later and the pollution also had spread to the neighbouring areas owned by other entities (the groundwater was contaminated in 8.6 to 12.8 meters deep in the affected area). The **successor of the works denied the responsibility** for the pollution. Regarding the damages on its own areas, the factory referred that the relevant **environmental regulation has not been in force when the barrels were buried**. In connection with the pollution of the soil of the surrounding areas, the company argued that **the owner is responsible for the damages revealed on its territory** and it was not sufficiently proved, that the pollution of the other areas arose from the barrels buried under the pharmaceutical works' container-park.

In **2000/01** the Environmental Inspectorate ordered to **carry out fact finding missions** on the pollution in the affected areas – Then the obliged party was the BIOGAL Ltd. (the predecessor of TEVA Ltd). In 2005 when the fact finding mission was still going on, the TEVA Ltd. (**successor of BIOGAL Ltd.**) **disclaimed its responsibility for the pollution** and its obligations therefore. In 2007 the Environmental Inspectorate made its decision and ordered TEVA Ltd. to carry out a technical action plan – the **obliged party continuously appealed against the administrative and judicial decision** taken against it. During the years – following the year of the detection of the pollution – **deciding on measures and actions was hindered by the incompleteness of the documentation and the debate on its liability** with the pharmaceutical factory. As the Supreme Court finally stated the TEVA Ltd. liable for carrying out the actions necessary, the company has to tackle the significant historical ground water pollution which originated decades ago.

The main obstacles in this case were the following:

- the successor – beyond conducting the fact finding report - **disclaimed its responsibility** for taking measures;
- until 2008 the environmental authority - having the obligation to ascertain the facts to make its decision - did **not have sufficient financial sources** to have expertise prepared;

- due to obstacles in the fact finding mission, the **administrative procedure lasted almost 7 years** from the detection of the pollution and, in the meantime the only measure taken was the horizontal separation of the pollution.

5.5 SLOVENIA – Noise from heavy trucks on regional road G1-3

On the regional road G1-3 **traffic with heavy trucks has increased** and was increasing every year **until the new highway was finished and traffic was redirected there in 2008**. The intensity increased in 2005 - that was after Slovenia entered the EU. There were about **1,4 million heavy trucks per year** passing this road. The road G1-3 is regional and is going through the villages. According to Roads Act the purpose of regional roads is to connect important centres of local communities. Some houses are only one or few meters far from the road. **About 600 households have been affected by noise emissions.**

Claims for compensation from injured parties were filed between 2006 and 2010 to civil district courts. In 2010 already first compensations were paid. Altogether about **2100 claims** for compensations for **about 14 million €** were filed. About 700 cases have been settled so far (judgements or settlements) and 8,3 millions € compensation has been paid (mostly in 2009 and 2010). The final compensation varies from about 2.400 € to maximum 7.000-8.000 € per individual person. In 2011 the payments were reduced (due to state bad financial situation) and they are now in delay.

In this case **the polluter cannot be held liable** for the damage produced to the neighbours of the G1-3. According to the Roads Act **the Republic of Slovenia**/Directorate of the Republic of Slovenia for Roads (*Direkcija Republike Slovenije za ceste*) as the manager of state roads **is liable for the damages produced by state road traffic. No preventive or response actions** have been taken as the road was used just temporarily for transit traffic – till the construction of the (problem solving) highway was finished. The procedural framework in this case was **civil procedural law** – so the evidence procedure, the cost decision, legal standing, time limits etc. follow civil principles (see above Chapter 3.1.)

This case evaluated **under the ELD regime**, would **not allow any compensation for individual parties**. Furthermore the notion of the polluter/operator is different within ELD (cp. Annex III 2004/35/CE). Major environmental damages can indeed be caused by the **operation of national/regional highways (road traffic)** – it should be possible to access also state bodies as operators of environmental harmful facilities and make them responsible for damages produced thereby and to claim remediation measures for damages produced. On the other hand as it is typical within civil procedures only those **persons showing a legal interest** can participate in the proceeding – **no general interest for environmental protection** is legally protected. Furthermore the prevention principles held by ELD are not followed within civil procedures – the latter **focus on compensation rather than prevention of damages.**

5.6 CZECH REPUBLIC – Damage on Forests

In the Czech Republic, more than **60 % of all forests are damaged by the pollution**. This number is exceptionally high within Europe. This damage is most often produced by the **sulphur compounds (SO₂)**, which is contained in the ambient air in non-solid form of gas. Remarkably is that all these sulphur emissions are **produced within valid permits of operators**. The ten biggest operators caused almost three quarters of all the pollution, of which 48% is caused by only one operator – the biggest Czech electricity producer.

The contemporary Czech case law is really strict. The liability is not precluded by permit defence, neither investment in new environmental technologies: *“Responsibility of the operator for damage caused to forests by discharges of pollutants into the air is not precluded by the fulfilment of obligations resulting from regulations on air protection, including the payment of fees for pollution.³³”* or *„Investment in new environmental technologies that reduce the extent of polluting emissions, does not give cause for exemption of liability for damage caused by operating activities in forests.³⁴”* The only compensation is the satisfaction in money. Although the Forest Act imposes an obligation that operators shall take all necessary measures to prevent and mitigate harmful effects by their facility.

In the current case the necessity for each forest owner to demand compensation from each operator **caused extensive transaction costs**. The whole process was so expensive and time demanding - only the one biggest owner – Lesy ČR – was able claim for compensation.

Compensation for damage caused by other than sulphur emissions – e.g. transport – will not be granted. Furthermore it is always difficult to define and measure the exact damage and find the causal link between harmful activity and damage as such. However the current Czech jurisprudence has formulated several concepts to solve these problematic questions. Nevertheless the Czech courts do not use any of these concepts. They just base the causal link among individual operators and damage on dispersion studies and mathematical models without any measuring of probabilities or further reasoning.

It is to be considered whether a correctly set system of air pollution fees and redistribution of this fee would produce much lower transaction costs, be cheaper, fairer and more satisfactory for all participants than the here presented civil liability regime.

³³ 25 Cdo 769/2006

³⁴ 25 Cdo 769/2006

5.7 SPAIN – Aznalcollar Case (1998)

The 25th of April 1998, a **mining damn spill in Aznalcollar (6.200 inhabitants)** produced more than six millions litres of waste – including four millions of heavy metals. The spill affected the basin of Guadiamar River, close to the National Park “Coto de Doñana”. The damages included **4.634 hectares of soil damage in a river basin, 62 kilometres of a river course and 200 hectares of agricultural soil**. The authorities decontaminated and restored the soil, the river and the flora and fauna, trying to avoid a bigger disaster if the spill met the National Park and the groundwater. The spill was similar to the Kolontár’s accident in Hungary in 2010. Although all the evidences pointed at Boliden Apirsa as responsible for the accident, the **company rejected the liability** (fault-based liability regime) arguing that the defects happened during the construction of the damn. No preventive measures were taken.

The costs for decontamination and remediation were borne by the company (Boliden Apirsa) 20,1%, the State Government (Ministry of Environment) - 7,4% and the Regional Government (Environmental Agency) - 72,5%.

There have been civil, criminal and administrative procedures in this case - The company Boliden Apirsa was held as responsible for an offence against the Water Act only after a process initiated by the Ministry of Environment. A fine was imposed on the company (600.000 €) and the obligation to pay damage and remediation costs (more than 2.500.000 €). However, when the authorities claimed the respective costs the daughter company (Boliden Apirsa) went to bankrupt and it was impossible to seizure the mother company in Sweden (Boliden AB).

Basically by this case several shortcomings on the Spanish liability systems can be highlighted:

- Lack of clear environmental damage regime
- No obligation for setting preventive measures
- Missing mandatory financial security
- No public participation within the procedures
- Long and complex judicial proceedings for cost recovery

5.8 Conclusions

Regarding ELD case law it is to be highlighted firstly, that the **lack of knowledge about practice** makes it nearly impossible to adequately assess ELD application in practice. Only one ELD case could be provided. Cases handled according to national administrative or civil liability regimes with huge environmental impacts have been indeed provided. Thus the assumption arises, that national liability regimes are functioning and used in practice thereby undermining ELD application. With respect to the various weaknesses of national liability regimes a comprehensive ELD regime (polluter pays, strict liability, financial security, etc.), if applied, could contribute to a better standard of damage prevention and remediation. But with respect to the low numbers of cases it is definitely not working very efficiently for its purpose. The ELD left a really wide maneuvering room for the national legislator and beyond that was mainly adopted without configurations into the national systems – now the system does not function properly – this indicates that ELD needs to be revised towards a more stringent system including procedural and organizational specifications, providing more detailed guidelines for the member states.

The national civil or administrative liability systems mostly lack of adequate safeguarding and remediation procedures – there is a need for detailed rules to adequately measure damage, costs and enforce measures preventing/remediating environmental harm. Furthermore due to various reasons procedures advance very slowly – also due to the fact that as it comes to safeguarding measures the polluter tends to challenge his corresponding obligations. Furthermore the conservation of evidence to be carried out by the respective authorities may take long periods – caused by personal shortages or financial reasons.

Civil and administrative liability systems are mainly “two party procedures”. The lack of public participation may result in continuous environmental pollution without any actions taken (see above Chapter 4.3.: Czech Case).

ELD does not cover the whole range of environmental elements – Within our case studies we could see that considerable harm is produced to other environmental elements as air, forests, flora, fauna in general by occupational activities which cannot be adequately prevented and remediated within the national systems. Therefore it would be advisable enable a progress towards a uniform European environmental liability system covering a broad range of environmental elements to ensure that the main intent of the environmental liability – to prevent/impede further site contamination and greater loss of biodiversity in the future – will be achieved.

It has been showed that in some cases the broader scope (e.g. Austria – see above Chapter 4.2.) would inhibit the ELD application out of practical reasons – a better system established, vividly applied in practice, resources and competences already set and allocated. It is to be assumed, that no proper mechanisms, organizational structures, knowledge, financial capacities have been put in place for ELD application on national level – this might be a further obstacle – apart from its narrow scope - for ELD application in practice.

The **lack of a mandatory financial security** (insurance is compulsory only for operators with waste permits) lead to the result, that again the state has to step in for damage remediation – the **polluter pays principle does not work** in these cases.

6. Recommendations

As the existing system does not work for its purpose there is a need for a **comprehensive European environmental liability regime** with not only the potential but the pragmatism to effectively prevent/impede further site contamination and greater loss of biodiversity in the future.

This system should:

- contain a broader range of environmental elements as ELD does at the moment
- have lower severity thresholds
- not be limited by using permit defences
- provide for mandatory financial security
- realize the “polluter pays principle” – strict liability system
- be integrated into the national administrative liability systems
- be equipped with the necessary financial and human resources to be put into practice

ELD needs to be revised towards a more stringent system including procedural and organizational specifications, providing more detailed guidelines for the member states. Therefore we highly recommend the corresponding revision of ELD towards the establishment of an effective and practiced system aiming at a sustainable protection of our environmental goods.

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