

ENVIRONMENTAL LIABILITY IN EUROPE ONE TARGET - TOO MANY OPTIONS

Environmental Liability 2012

Position Paper

Justice and Environment 2012

Environmental Liability in Europe

One Target – Too Many Options

Position Paper

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. ELD entered into force on 30th April 2004 but transposition of ELD was not completed before July 2010. Little experience on ELD practice in EU member states is available yet and it is therefore valuable to figure out particular shortcomings of ELD transposition and application in national practice. Thus 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 cases².

Position of J&E:

The main outcomes of our analytical work showed that a broad variety of liability regimes exist and are applied vividly within national practice – although these systems mainly do not entirely and adequately serve their purpose:

- Administrative liability systems are very fragmented, regarding competent authorities and other aspects – every different environmental element has different rules
- Financial security systems are only partly existent within sectoral regimes - and if so - the most systems lack detailed regulations on financial guarantees
- The majority of the assessed systems are still oriented towards penalization or compensation than prevention/remediation
- No uniform systematic method for the estimation of damages or costs does exist
- Basically the assessed liability systems (with single exceptions) do not allow for public participation.

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 Please see J&E ELD Publications 2012: <http://www.justiceandenvironment.org/publications/eld-2012>

So 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.

The major strength of the assessed national liability systems is their existence and practice – thus environmental liability is not just restricted to the ELD regime which is far too narrow to deal with all environmental damages. ELD still suffers from its continuous non-application in a high number of European member states. Mainly competences of different authorities with respect to ELD application are not clarified sufficiently and the concern was raised that the competent ELD authorities are paralysed due to the lack of knowledge and funding for ELD execution.

As a result, the ELD is not used in practice and its innovative aspects could not become the norm, spreading to other liability regulations. Liability provisions within sectoral environmental laws are too brief and do not cover a whole range of essential aspects.

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.

Contact information:

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

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

