

Austria

Environmental Liability 2012

National ELD Report

Justice and Environment 2012

Environmental Liability 2012

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I.

Comparative Legal Analysis on ELD and other liability legislation

AUSTRIA

The Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) is – among others - subject to various shortcomings with regard to scope and definitions which might be one of the reasons for the low number of cases. Problems are also reported with regard to the economic assessment of damages and remediation methods.¹²

This analysis aims to help to collect evidence on the added value/weakness of the ELD to bring specific arguments for better implementation and as to a revision of the directive. Therefore the national ELD legislation is to be compared with similar liability regimes to bring on the one hand 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.

1. National liability regimes

Side note:

Before going into detail on Austria's liability regimes, for an adequate understanding it is important to explain the basics of the legal system and the respective juridical competences:

Austria applies the principle of separation of executive and judicial powers – That is why there has to be distinguished

- a.) **The civil and criminal judicial branch, and**
- b.) **The administrative judicial branch**

In **civil and criminal matters** four different types of courts exist (listed from the lowest to the highest judicial level):

- District Courts
- Regional Courts
 - Serve as courts of first instance in more important cases
 - Also act as appeal courts in relation to the district courts
- Four Courts of Appeal
 - Function as appellate courts solemnly vis-à-vis the district courts

¹ Compare the results of the **Stakeholder and Practitioner Workshop** on the implementation of the ELD in the EU: <http://ec.europa.eu/environment/legal/liability/workshop081111.htm>

EC Report on the effectiveness of the EU Environmental Liability Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0581:EN:NOT>

² See **J&E legal work in 2011** with regard to ELD:

<http://www.justiceandenvironment.org/publications/eld>

- Supreme Court for Civil and Criminal Affairs

Civil and criminal courts have no competence to review decisions or rulings issued by administrative authorities.

Basically **in administrative matters** no such judicial system exists. Only some decisions made by administrative bodies can be subject to review by Independent Administrative Tribunals in the Laender (*Unabhängige Verwaltungssenate* - UVS). If all administrative remedies have been exhausted an extraordinary complaint to a court of last instance (Administrative Court – *Verwaltungsgerichtshof*) is the only possibility to access a court in administrative matters.

The **Austrian ELD regime** is a public liability regime and according to the before mentioned system - Administrative authorities are competent with regard to ELD.

Liability Regimes:

The environmental liability scheme regulated under public law consists of **one Federal Environmental Liability Act (B-UHG³)** – regarding water and soil damages, **and nine regional Environmental Liability Acts (L-UHG)** – regarding soil and biodiversity damages.

Basically Austria has **no overarching public liability regime** on environmental damages similar to ELD. A basic distinction might be made between:

- a) **Single public liability provisions within sectoral environmental laws**
- b) **Civil liability acts providing for strict liability regarding damages produced by certain activities or operations**
- c) **Single civil liability provisions within sectoral environmental laws**

Ad a)

Single **public liability provisions** within sectoral environmental laws have not been revoked by the national implementation of ELD in Austria. Administrative authorities are competent to require or set the necessary preliminary or remedial measures to prevent environmental damage – no infringement of subjective rights or a special claimant is needed to initiate these proceedings. This regime is the one closest to the European scheme of environmental liability (ELD). The most important of those liability provisions is

- Sec 31 Water Management Act⁴

³ Federal Law Gazette Nr. 55/2009

⁴ Federal Law Gazette Nr. 215/1959 as amended in Nr. 87/2005

Ad b)

The **Nuclear Liability Act (Atomhaftungsgesetz – AtomHG⁵)** establishes a liability regime for damage caused by ionizing radiation from nuclear facilities, nuclear material or radionuclides

The **Federal Act on Governing the Liability for a Defective Product (Produkthaftungsgesetz)⁶** and the **Railway and Automobile Liability Act (Eisenbahn- und Kraftfahrzeughaftpflichtgesetz - EKHG⁷)** provide for strict liability rules based on dangerous activities. Certain provisions within the before mentioned acts may establish strict liability for environmental damages.

Ad c)

Furthermore single **civil liability provisions** (claimed before civil courts) can be found within certain sectoral environmental laws – e.g.:

- As there is the Water Management Act (Wasserrechtsgesetz – WRG⁸) stating liability for damages resulting from the existence or operation of a water utilization system - e.g. hydroelectric power plants (cp. Sec. 26 WRG).
- The Mineral Resources Act (Mineralrohstoffgesetz – MinroG⁹) states liability for subsistence damages (Sec. 160 – 169).
- The Forestry Act (Forstgesetz – ForstG¹⁰) encompasses liability provisions regarding forestry harmful air pollution (Sec. 53 – 57 ForstG).
- The Genetic Engineering Act (Gentechnikgesetz – GTG¹¹) incorporates liability provisions for damage caused by genetically modified organisms (Sec. 79a – 79j GTG).

2. Civil and Criminal Liability regimes

As mentioned already above specific environmental laws (Water Management Act, Forestry Act, Mineral Resources Act, Genetic Engineering Act, Nuclear Liability Act) provide for liability under certain circumstances **to be claimed at civil courts**. These sectoral liability provisions **are leges speciales** with regard to general civil liability stated in (Sec. 1293 ff Civil Code) – **they usually provide for strict liability and certain alleviations of the burden of proof.**

⁵ Federal Law Gazette Nr. 170/1998

⁶ Federal Law Gazette Nr. 99/1988

⁷ Federal Law Gazette Nr. 48/1959

⁸ Federal Law Gazette Nr. 215/1959 as amended in Nr. 87/2005

⁹ Federal Law Gazette Nr. 38/1999 as amended in Nr. 115/2009

¹⁰ Federal Law Gazette Nr. 440/1975 (last amendment: Federal Law Gazette I Nr. 55/2007)

¹¹ Federal Law Gazette Nr. 510/1994

The neighbourly immission control and liability is regulated within the Austrian Civil Code (Sect. 364 and 364a Civil Code). **Furthermore personal and property damages as a result of harmful effects on the environment can be assessed according to the civil fault-based liability (Sections 1293 ff Civil Code).** As stated above the liability provisions within sectoral environmental laws are specific and therefore applied preferably in relation to the conventional civil liability regime.

Environmental criminal provisions are incorporated in the Austrian Penal Code (Strafgesetzbuch – StGB) within the Part “hazardous common offenses and offenses against the environment”. These provisions threaten with fines and custodial sentences. These offenses according to the Penal Code require a parallel infringement of an administrative law or decision to be punishable.

Environmental administrative penal law provides for the punishment of environmental offenses by administrative bodies. It creates subsidiary liability with regard to the environmental criminal law. The relevant administrative penal provisions are not codified within one codex, they are rather found within sectoral laws.

3. Main differences of national liability regimes compared with ELD

a) Competent authorities

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

Regarding the obligations resulting from **Sec. 31 Water Management Act** the **water authority** is the competent authority. 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.

For all the above mentioned **civil liability matters** the respective **civil courts** (functional competence is either depending on the amount of damage produced or specific references within the law) are competent to decide. The court can decide on the validity of the claim and the compensation to be conceded for the injured party. Some special competences may be regulated within sectoral laws – e.g. In certain cases the water act establishes a

competence of the administrative authority which has issued the water permits for liability matters (Sec. 26 WRG).

Environmental criminal liability in accordance with the **Austrian Penal Code** is arbitrated before the respective **criminal courts** (functional competence is depending on the offense's range of punishment). The competent court is entitled to sentence fine and imprisonment in accordance with the relevant penal provisions. Injured parties may raise civil claims for compensation within the penal proceedings (cp. Sec. 67 Criminal Procedural Code – StPO).

Environmental criminal liability in accordance with sectoral **administrative penal provisions** is arbitrated before the respective **administrative authorities**. It is **subsidiary** applied with regard to the criminal liability according to the Austrian Penal Code. Unless otherwise stated in the sectoral provision the authority shall decide in accordance with certain provisions of the administrative law also on claims under the civil law resulting from an administrative offence (general provision according to Sec. 57 Administrative Penal Code). The claimant has no right to appeal against the part of the decision regarding his claims under the civil law (Sec. 57/2 Administrative Penal Code).

b) Scope/Damage covered

The Austrian environmental liability laws cover **damage on water, soil and biodiversity** – cp. ELD – caused by certain operational activities.

Sectoral public liability

Sec. 31 Water Management Act any protects any adverse effect on the water quality. Action has to be taken already with the imminent danger of water pollution.

General civil liability

*The **general civil liability regime** covers personal damages and financial losses caused by environmental degradations. With regard to the **neighbourly immission control** the focus lies on the adverse effect on a property by direct or indirect immissions from a neighbouring property or authorized facility. Immissions on soil, water, air and humans as long as they affect the property in question are covered.*

Single provisions in sectoral environmental laws:

| Water Management Act | Forestry Act | Genetic Engineering Act |
|--|--|---|
| <p>Sec. 26 – Civil liability</p> <p>1. Only damages on - already before the authorization created - buildings and land property resulting from the existence or operation of a water utilization system - e.g. hydroelectric power plants are covered</p> <p>2. Furthermore certain rights of use are protected by this provision – e.g. fishing rights (cp. Sec 26/2 Water Act).</p> | <p>The Forestry Act establishes liability for forestry harmful air pollution (Sec. 56 ForstG). Basically every damage caused by forestry harmful immissions is covered by this provision – health and personal damages might be covered by civil immission control according to Sec. 364a Civil Code which is applicable parallel to the liability provisions of the Forestry Act.</p> | <p>1. Personal injuries (death, bodily injuries, damage to health) and</p> <p>2. physical goods caused by works with or disclosure of GMO.</p> <p>3. Furthermore Sec. 79b grants strict environmental liability if damage produced on a physical good equally states a significant environmental harm.</p> <p>Damages caused by GMO after legal marketing of the products are covered by product liability (PHG).</p> |

Civil Liability Acts

| Nuclear Liability Act | Railway and Automobile Liability Act | Product Liability Act |
|---|---|---|
| <p>The operator can be held liable for damages on human beings or physical goods.</p> | <p>Personal damages (body, health) and physical goods are covered by this act.</p> <p>Regarding environmental matters applicable on tank car accidents causing environmental damages.</p> | <p>Covers environmental damages caused by defect products</p> |

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c) **Extent of damage required/Thresholds**

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 limits its scope by applying solely on the direct or indirect introduction, of substances, preparations, organisms or micro-organisms;

According to **Sec. 31 Water Management Act** 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 affect on the water quality is required for this provision to be applicable.

The **Civil Code** defines damage as every loss or disadvantage on property, rights or on a person caused by someone else (Sec. 1293 Civil Code). No special thresholds are established for creating civil liability. Some sectoral environmental laws provide for damage thresholds.

According to the Forestry Act **forestry harmful air pollution** is to be categorized as pollution causing **measurable damages** to forest soil and flora (endangerment of forest culture).

The environmental harm according to Sec. 79b **Genetic Engineering Act** is required to be significant. **Significant harm** is given if **human and environmental safety is not granted** anymore.

The **product liability** is limited damages with the part exceeding € 500,-- (Sec. 2 Product Liability Act). The **Railway and Automobile Liability Act** does not establish minimum thresholds for the liability but limits the liability to certain amounts – depending on the injured object of legal protection (cp. Sec. 15 Railway and Automobile Liability Act).

d) **Liability/Accountability**

ELD applies to **environmental damages caused by any of the occupational activities** listed in Annex I (B-UHG), 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 I, whenever the operator has been at fault or negligent. The operator can be hold liable for the damages produced – **basically this is the natural or legal, private or public person who operates or controls the occupational activity.**

Sectoral public liability

According to Sec. 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 persons¹², operators of facilities, natural persons etc. – can be hold 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.

General civil liability

A basic distinction regarding general civil liability has to be drawn first: tort liability and contractual liability have to be distinguished. According to the **general civil tort liability** basically, the person causing the damage is to be hold liable. Furthermore special rules on the liability for damage caused by sub-contractors or –workers (Sec. 1313a and 1315 Civil Code) exist. For building owners and holders of roads and pathways a special - partially third party - liability is established according to Sec. 1319 and 1319a Civil Code. **Contractual liability** in environmental matters may apply in connection with the purchase of land property and contaminated soils – the contracting partner can be hold liable for not informing about/or having caused soil contaminations. According to the neighbourly immission control the owner of the property respectively the operator of the facility from which the immissions emanate are obliged to set adequate remedial measures/to pay compensation.

¹² Cp. Austrian Supreme Court – Decison: 1 Ob 152/10 z

Single provisions in sectoral environmental laws:

| Water Management Act | Forestry Act | Genetic Engineering Act |
|---|--|--|
| <p>Sec. 26 – Civil liability The operator of the water utilization system can be held liable for damages produced by his/her facility.</p> | <ol style="list-style-type: none"> 1. The operator of a non authorized facility causing air pollutants or 2. The operator of an authorized facility causing air pollutants which exceed the extent specified by the authorization (Sec. 53/1 Forestry Act). 3. Furthermore the operator is liable for damage caused by sub-workers. | <p>The operator of a gene technology lab or facility or conducting works on GMOs or disposals (Sec. 4/18 Genetic Engineering Act).</p> <p>Does not establish third party liability</p> |

Civil Liability Acts

| Nuclear Liability Act | Railway and Automobile Liability Act | Product Liability Act |
|--|---|--|
| <p>The operator of a nuclear facility can be hold liable for damages on human beings or physical goods caused by the operation of the nuclear facility (Sec. 2 Nuclear Liability Act).</p> <p>The transporter of nuclear material can be hold liable for damages produced during the transport (Sec. 3 Nuclear Liability Act).</p> | <p>For the damages according to this law shall be held liable</p> <ol style="list-style-type: none"> 1.the operator of the railway company or 2. the holder of the motor vehicle. (Sec. 5 EKHG) | <ol style="list-style-type: none"> 1. the entrepreneur by whom it was produced and put into circulation, 2. the entrepreneur by whom it was imported into and put into circulation in the European Economic Area (importer). |

e) **Are Preventive Actions or Response Actions required?**

The national ELD legislation requires, that the operator has **to take preventive action**, in case of an imminent threat of an environmental damage (Sec. 5/1 B-UHG). If the imminent threat cannot be eliminated by the operator's action, the competent authority itself is authorised to take adequate action. The authority is allowed to **give any orders to or require any information about** the prevention the realization of imminent threat. The operator shall the **necessary remedial measures** and all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants. The authorities is also competent to take these measures on her own (cp. Sec 6 f B-UHG).

Sec. 31 Water Management Act establishes a general duty for environmental pollution control regarding private and public waters. **Everybody in his private or professional actions is legally obliged to prevent water pollution – even preventive measures have to be taken and the authority is to be informed.** Furthermore according to Sec. 31 Water Management Act protective and remedial measures need to be taken.

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 tort liability for damages caused thereby. Furthermore 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.

Preliminary injunction is guaranteed against acts or omissions within **civil immission control**, namely when a claim on omission is filed and the claim needs to be indemnified. Apart from this the claimant is entitled to file an **action of trespass** – in the course of immission control proceedings. Preliminary injunction is issued on request only. Responsible for issuing a preliminary injunction is the court where the main proceedings are hold. Condition for preliminary injunction is, that the substance or condition of the object which the procedure is about is endangered and cross-undertaking in damages is rendered. The claim of a preliminary injunction is directed on measure preserving the actual status so no impairment will take place.

In accordance with the principle of **product liability**, the producer of an environmental harmful product is obliged **to avert dangers by taking adequate measures** (duty to warn, recall).

The **Water Management Act (Sec. 26)** allows for **injunctive relief** if immissions are not covered by the water permit.

According to the **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. Sec. 101a Genetic Engineering Act). Concerning the neighbourly immission control of the Genetic Engineering Act injunctive relief and remedial actions are granted (Sec. 79k Genetic Engineering Act).

The **Nuclear Liability Act** requires remedial actions in case of environmental damage.

f) **Liability Regime**

Basically the Austrian Environmental Liability Acts establish 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.

Sectoral public liability

Sec. 31 Water Management 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.

General civil liability requires fault or negligence to create legal responsibilities for the wrongdoer. No uniform strict liability regime exists in Austria so far – **Strict liability** for the operational risk of an undertaking is mainly established by particular civil liability acts.

Industrial immission control according to Sec. 364a Civil Code establishes an intervention liability – liability for immissions from the rightful operation of an industrial facility (liability for legal acts).

Single provisions in sectoral environmental laws:

| | Water Management Act | Forestry Act | Genetic Engineering Act |
|-----------------------------|---|--|--|
| <i>Liability</i> | <p>Sec. 26 – Civil liability</p> <p>Under this provision of the Water Management Act an intervention liability was established – this liability covers only those damages which could have been theoretically considered in the water permit proceedings. The Act does not establish fault-based liability</p> | <p>Sec. 53 Forestry Act provides for a strict liability. Each polluter is liable for the damage caused by his/her facility</p> | <p>Basically, provides for strict liability and for neighbourly immission control.</p> <p>No liability exists if the damage was caused in compliance with law or official orders (Sec. 79c Genetic Engineering Act).</p> |
| <i>Collective Liability</i> | <p>If the operator acts grossly negligent, intentionally (Sec. 26/5 WRG)</p> | <p>Collective liability is applied if responsibilities can not be allocated.</p> | <p>Each polluter is liable for the damage caused by his/her operation. Collective liability is applied if responsibilities can not be divided (Sec. 79e Genetic Engineering Act).</p> |
| <i>Force majeure</i> | <p>Sec. 26 No liability in case of force majeure</p> | <p>No liability in case of force majeure</p> | <p>No liability in case of force majeure</p> |

Civil liability acts

| | Nuclear Liability Act | Railway and Automobile Liability Act | Product Liability Act |
|-----------------------------|--|---|--|
| <i>Liability</i> | <p>Provides for strict liability</p> <p>Sec. 9 provides for a fault-based liability for the holder of a radionuclide.</p> <p>Furthermore liability for sub-workers is explicitly established by Sec. 17 Nuclear Liability Act.</p> <p>Exemption from liability for personal injuries is expressly forbidden.</p> | <p>Provides for a strict liability regime.</p> <p>Exemption from liability for personal injuries is expressly forbidden.</p> | <p>Provides for a strict liability regime.</p> |
| <i>Collective Liability</i> | <p>Joint and several liability is established by Sec. 18 Nuclear Liability Act.</p> | <p>Joint liability - Several companies operating the same railway and several holders of the same vehicle (Sec. 5/2 Railway and Automobile Liability Act). Damage produced by several railways and several motor vehicles – all operators and</p> | <p>Joint and several liability is established by Sec. 10 Product Liability Act – if liability affects several parties, they shall be jointly and severally liable.</p> |

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| | | holders are jointly and severally liable (Sec. 8 Railway and Automobile Liability Act). | |
| <i>Force majeure</i> | | No liability in case of force majeure | |

g) Costs

The cost for preventive and remedial actions are in principle **to be borne by the operator** (Sec 8/1 B-UHG). Those who cause the environmental damage, or cause at least the risk of occurrence, should bear the resulting costs. **Exception:** If the operator proves that the damage was caused or the risk was caused by a third party or if the damage/risk is covered by an administrative permit or authorization.

Sectoral public liability

Sec. 31 Water Management Act applies the polluter pays principle– if specific actions created the danger of water contamination the polluter has to pay for the measures necessary to prevent adverse effect on the water quality. Against the administrative cost decision the polluter has access to the civil courts which will decide in application of general civil liability rules (Sec. 117 Water Management Act).

General civil liability

Basically **civil liability** provides for **natural restitution** in the first case (cp. Sec. 1323 Civil Code). If natural restitution is inappropriate satisfaction in money has to be done. According to prevailing case law the injured party has the right to chose between natural restitution and satisfaction in money, if both ways of compensation are appropriate. Regarding neighbourly immission control the neighbour is entitled to permanent injunctive relief and compensation.

Civil liability acts

The **Railway and Automobile Liability Act** limits the amounts for monetary compensation in its Sec. 15. Further claims can be filed according to general civil liability.

The **Nuclear Liability Act** states that Apart from satisfaction according to the civil liability regime the operator has to bear the costs for remedial actions if the damage on the good states simultaneously an environmental harm. The costs for remedial actions are not capped by the value of the affected good.

Single provisions in sectoral environmental laws:

| Water Management Act | Forestry Act | Genetic Engineering Act |
|--|--|--|
| <p>Sec. 26 – civil liability</p> <p>According to the Water Management Act satisfaction in money including profit and goodwill losses are granted.</p> | <p>Satisfaction in money has to be provided, compensation for profit and goodwill losses is controversial.</p> | <p>Satisfaction in money and compensation for profit and goodwill losses are to be granted.</p> <p>In case of environmental harm satisfaction in money may exceed the value of the damaged good.</p> |

h) Access to Justice and Claims for Compensation

Regarding to the Environmental Liability Act **legal standing is granted 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 there legal standing credibly. They have the right to appeal with the Independent Administrative Tribunal (UVS).

Sectoral public liability

Sec. 31 Water Management Act:

- The polluter has legal standing
- An appeal with the competent civil court can be filed against administrative cost decisions (cp. Sec. 117 Water Management Act)

General civil liability

Generally legal standing is granted to those being affected in their legally protected interests **in civil liability law** – basically no third parties, NGOs or other members of the public is granted legal standing in those liability proceedings.

Single provisions in sectoral environmental laws:

| | Water Management Act | Forestry Act | Genetic Engineering Act |
|--------------------------|--|---|--|
| <i>Legal Standing</i> | <p>Sec. 26 – civil liability</p> <p>The property or building owner</p> <p>The owner of the legal right of use</p> | <p>The forest owner as injured party affected legally protected interests (protective law – Forestry Act)</p> | <p>The by GMO injured/endangered parties.</p> <p>Environmental harm according to Sec. 79b Genetic Engineering Act not violating legally protected interests is not covered by civil liability under this act.</p> |
| <i>Access to justice</i> | <p>Sec. 26 – civil liability</p> <p>The property or building owner</p> <p>The owner of the legal right of use</p> | <p>The forest owner as injured party – affected legally protected interests (protective law – Forestry Act)</p> | <p>The by GMO injured/endangered parties</p> |

| | | |
|--|--|---|
| <i>Private rights for compensation</i> | | As civil liability generally compensation is granted for the injured parties (protected interests: property, person...) |
|--|--|---|

Civil liability acts

| | Nuclear Liability Act | Railway and Automobile Liability Act | Product Liability Act |
|--|---|---|---|
| <i>Legal Standing</i> | The injured parties (protected legal interests – person and property) | The injured parties (protected legal interests – person and property) | The injured parties (protected legal interests – person = body/health and property) |
| <i>Access to justice</i> | The injured parties | The injured parties | The injured parties |
| <i>Private rights for compensation</i> | As civil liability generally compensation is granted for the injured parties (protected interests: property, person...) | | |

i) Burden of proof

ELD legislation (Sec 11/3 ELD – Act) requires that the complainant filing an environmental complaint needs to **furnish prima facie evidence on the existence of an imminent danger or damage** to the environment (obviously no special documentation for proving this fact is required – cp. also Hauneschild/Wilhelm Kommentar zum B
UHG zu § 11 Rz 10. 2009)

Sectoral public liability

In the scope of **Sec. 31 Water Management Act** the authority has to take or order necessary actions for the examination of water pollution – Basically within administrative procedures the burden of proof is with the authority.

General civil liability

Austrian **civil law** states the general rule that the burden of proof lies with the injured party. But under certain circumstances burden of proof is reversed regarding particular facts. Furthermore sectoral legislation providing for civil liability provisions may establish special rules regarding evidence procedures.

Single provisions in sectoral environmental laws:

| Water Management Act | Forestry Act | Genetic Engineering Act |
|---|--|--|
| Sec. 26/5 Water Management Act states that the claimant needs to prove only the possibility that the authorization holder was the cause of water pollution (legal fiction) | Sec. 54 Forestry Act states a special legal fiction – if more than one facility may be the cause of the damage produced, the operators themselves need to refute the presumption. | A legal fiction is stated in Sec. 79d Genetic Engineering Act – if the GMO is suitable to produce the damages stated in the GTG the burden of proof lies with the operator. |

Civil liability acts

| Nuclear Liability Act | Product Liability Act |
|---|---|
| Sec. 9 Nuclear Liability Act provides for a fault-based liability for the holder of a radionuclide. The law states a reverse of the burden of proof – the holder can be held liable for assumed fault, unless he proves his due diligence trying to prevent the damage. | If a producer or importer claims not to have put the object into circulation or not to have acted as an entrepreneur, the burden of proof shall rest with him. (Sec. 7/1 PHG) |

j) Financial security

Austrian ELD implementation **does not provide for a mandatory financial security system.**

Within the **general civil liability regime** no mandatory financial security systems regarding environmental damages have been established. Some civil liability acts do provide for mandatory financial security. Section 16 of the **Product Liability Act** states that *“producers and importers of products shall be obligated, in a manner and to an extent customary in fair business dealings, to provide for the satisfaction of liabilities for damages under this Federal Act by taking out insurance or in another suitable manner.”*

Similar the **Nuclear Liability Act** incorporates mandatory financial security for operators of nuclear facilities. The operator of a nuclear facility situated in Austria to take out insurance covering potential liability. The insurance has to remain at least up to ten years after the completion of the operation of the nuclear facility. It has to cover all damages caused during the operation of the facility claimed within ten years after the occurrence of the damage (cp. Sec. 6/1 Nuclear Liability Act).

According to the Genetic Engineering Act potential liable operators of gene technology labs or facilities are obliged to take out financial security (Se.79j GTG).

k) Time limits for presentation of claims

According to ELD legislation, environmental NGOs and the ombudsman for the environment have their party rights **precluded if within two weeks after the publication of the remedial measures** by the competent authority they do not indicate their involvement. Party rights of other natural and legal persons are bound to the filing of an environmental complaint:

In general, damage claims can be submitted **within three years** after discovery of damage and wrongdoer/polluter (Sec. 1486 Civil Code). This is to be applied equally on Neighbourly immission claims. The right to **file an action lapses after thirty years** (Sec. 1489 Civil Code). If not regulated otherwise the general rule on time limits and lapses has to be applied.

Regarding damages according to the **Railway and Automobile Liability Act** the injured party has to notify the damage **within three months** after discovery of the damage and the polluter, otherwise the claim for compensation according to this act gets lost. Moreover the above mentioned limitation of civil liability is to be applied (Sec. 18 Railway and Automobile Liability Act)

According to Sec. 53/5 **Forestry Act** the injured party has to notify the damage **within three months** after discovery of the damage and the polluter, otherwise the claim for compensation according to the Forestry Act gets lost. Moreover the above mentioned limitation of civil liability is to be applied (Sec. 55/1 Forestry Act)

4. Prevailing legal norms

The above described legislation was not repealed or amended with the national implementation of the ELD and is still in force.

5. Damages not covered by a liability system

Basically the Austrian civil **liability regime focuses on damages produced by the violation of certain legally protected interests on certain legally protected goods**. As a consequence the law does not allow for liability in case of environmental damage on goods other than those stated within civil liability as legally protected. A general environmental liability would be able to cover all those damages not covered by sectoral liability provisions or acts. No

general liability on air pollution and soil contamination – without the condition of having significantly adverse effects on human health (cp. Sec. 4 Federal Environmental Liability Act) or mining damages – apart from the civil liability provided for by the Mineral Resources Act exist. Furthermore most regional Environmental Liability Acts do not extend their scope to protected areas under national law (as there are regional protected areas, national parks, natural monuments or certain protected landscapes).

6. Strengths and weaknesses of national liability systems

One of the **major weaknesses** of the Austrian civil liability regime is that there is **no general strict liability regime** established by the Austrian legislator – sectoral provisions on civil liability are fragmented and the conditions for the creation of liability formed very differently. The rules on the burden of proof regarding actions resulting in strict liability are just as little regulated uniformly. **Financial security is established partly** by certain liability acts but not required in general for the performance of hazardous activities. Regarding environmental damages it is often **difficult to establish a causal link** between action and damage – as civil law generally requires causality to create liability. Party rights are limited to the injured parties – so **the public is excluded** from the participation in procedures regarding environmental damages their effect often reaches further than infringing legally protected individual interests.

The public **environmental liability regime** implementing ELD does not embrace all kinds of environmental damage and **does not provide for mandatory financial security**, covers only **occupational activities**, requires **measurable impairments** and a **causal link**. The environmental pollution control according to **Sec. 31 Water Management Act** reaches much further in many areas – The obligation to prevent adverse effects on the water quality as well as the obligation to bear the cost for preventive/remedial measures is not restricted to occupational activities also private persons are obliged to take action. Furthermore any adverse effects on water quality regardless of thresholds are covered by the Water Management Act - while the Austrian Environmental Liability Act states higher thresholds. The Environmental Liability Act is *lex specialis* and therefore preferably applicable to water pollution issues (see Haunschild – Wilhelm, Kommentar B-UHG zu § 2, Rz 4. 2009).

II.

CASE STUDY

Leakage of an Oil Pipeline

AUSTRIA

The elaboration of case studies on liability proceedings (non-ELD and ELD cases) is meant to give, – in addition to the legal analysis of national liability regimes - an appropriate insight into the practical application of different liability regimes and the shortcomings of ELD legislation regarding its scope and definitions. The identification of respective obstacles and challenges will give important incentives for the improvement of the Environmental Liability Directive (ELD)¹³.

General remarks:

Generally it was very difficult to get hold of an adequate case on public sectoral liability (here: according to the Water Management Act). Several authorities have been accessed to acquire information on certain liability cases – the subject of the case, environmental impacts, costs etc. We have accessed the competent water authorities in the respective cases and asked them for information on those cases (Rem: environmental information). None out of four authorities passed one single environmental information, justifying their silence by the argument of official secrecy, absence of legal standing of our organization within the procedure or a remark that the respective case is still under evaluation (ongoing procedure). Although we highlighted our legal rights deriving from the Environmental Information Act (informally) we did not acquire the environmental information we have asked for. In this respect it is to be explained, that information rights – especially access to justice rights - according to the Austrian Environmental Information Act are quite weak – it might take up to two years until the competent authority delivers the environmental information requested by the applicant. Access to justice rights are not in compliance with the Aarhus Convention, which was also criticized by the ACCC with respect to the Austrian Case.¹⁴ As for practical reasons a study is to be provided promptly we decided - after two months of ongoing and fruitless correspondence with the competent authorities - to assess a case decided by the Administrative Court and published in the Austrian legal database -

¹³ DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004

¹⁴ Cp. **ACCC/C/2010 – 48**: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-48/Findings/ece_mp.pp_c.1_2012_4_eng.pdf

that's the reason why we do not dispose of detailed and personal information on all the aspects of the case which we cannot provide in the current study.

1. Matter of case:

By renovation works on a salesroom an oil pipeline was damaged, which led to a discharge of a huge amount of heating oil into the ground. This case study tends to assess the liability according to the Austrian Water Management Act and therefore analyses the highest court decision (delivered by the Administrative Court¹⁵) in the before mentioned matter – trying to show the practical application of this liability regime.

2. Country:

Austria

3. Location:

The accident took place in the district **area of Schärding/Upper Austria**. Due to the anonymization of published case law no further indication on the concrete area can be provided within the current case study.

4. Short summary of the case:

During the **renovation of a salesroom** in October/November 2000, a **pipeline** – running under the floor - **was damaged**. In January 2001 a thereby produced leakage led to a **discharge of about 5000 liters of heating oil extra light** into the ground. Special drillings in the area discovered massive defined pollution and facilitated first assessments of the damage. It was assumed that the damage reaches up to 4 m depth and covers an area with a diameter of approximately 12 m. In the following four monitoring stations have been set up for a regular assessment of an eventual pollutant dispersion – these monitoring measures did not indicate any such pollutant dispersions in the wider area.

The competent district authority conducted **extensive preliminary proceedings** and assigned the renter of the salesroom to **take further measures for the overall assessment** of the contamination produced by the leakage (formal decision of the 6th June 2006). Beneath others (information duties, remediation proposals etc.) the renter was urged to conduct 15 rotary core drillings for the assessment of groundwater flow direction and based on this the

¹⁵ VwGH 16.07.2010, 2007/07/0036:

http://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2007070036_20100716X00/JWT_2007_070036_20100716X00.pdf (German version)

exact assessment of the pollution produced – by administrative decision an obligation to tolerate the mentioned core drillings was imposed on further affected property owners.

The obliged party filed an appeal with the Upper Austrian Governor **combating the measures imposed** by the first instance decision as mainly **not necessary and disproportional**. The second instance authority slightly adapted the original conditions and obligations for the conservation of evidence. Against this decision the obliged party filed a complaint with the Administrative Court in 2007. The court dismissed the arguments of the claimant – consequently the measures imposed by the Upper Austrian Governor are to be taken.

5. Applicable national laws:

- **Article 30/1f Water Management Act¹⁶**

Para 1 of this provision formulates that **all waters, including groundwater are in the public interest and are to keep clean and to be protected**.

Aim is to **protect the natural quality of waters** regarding their physical, chemical and biological composition.

According to Art 30 Water Management Act **water pollution** is to be understood as **any deterioration of water quality and any reduction of its self-purifying capacity**.¹⁷ Whereas the Austrian **Federal Liability Act** requires a **significantly adverse effect on** the ecological, chemical or quantitative status or ecological potential of the respective waters. So a **significant difference in damage thresholds** is to be noticed between the liability according to the Water Management Act and the Federal Liability Act.

¹⁶ Federal Law Gazette I Nr. 215/1959 – as amended on Federal Law Gazette I Nr. 14/2011

¹⁷ Cp. also Oberleitner/Berger, WRG³ (2011) § 30 Rz 1.

- **Article 31/1f Water Management Act¹⁸**

According to **para 1** *“anyone whose assets, actions or omissions may produce an impact on waters, has to construct, maintain and operate his facilities with due diligence or has to behave in such a way that a water pollution contrary to Art 30 Water Management Act or not covered by a water permit is avoided”*

Para 2 states that if, however, the risk of water pollution arises, obliged parties according to par 1 are obliged to set the respective preventive or remedial measures. In case of imminent danger the obliged person has to inform the competent administrative authorities.

Para 1 provides for a **behavioural obligation**, while par 2 establishes a **duty to action**. The omission of the mentioned duty to action by the obliged persons leads to **interference by the competent authority (Para 3)**. The duty to action according to Art 30 para 2 Water Management Act obliges those who have neglected their behavioural obligation (para 1) as well as those who did not breach their obligations.¹⁹

- **Article 72 Water Management Act²⁰**

Provides for an **ex lege restriction of property rights**. No formal administrative permit is necessary for the execution of this right. Property owners have to admit the access to and the usage of their property to this extent as it is necessary to conduct measures for the prevention and control of water pollutions et al. (Cp. Art 72/1 Water Management Act).²¹

6. Type of procedures and competent authority:

The current case was assessed according to the liability regime of Article 31 Water Management Law – a **public liability provision**.²²

¹⁸ Federal Law Gazette I Nr. 215/1959 – as amended on Federal Law Gazette I Nr. 14/2011

¹⁹ Oberleitner, WRG (2004) § 31 Rz 2.

²⁰ Federal Law Gazette I Nr. 215/1959 – as amended on Federal Law Gazette I Nr. 14/2011

²¹ Also Oberleitner/Berger, WRG³ (2011) § 72 Rz 1.

²² Cp. Justice and Environment Legal Analysis on Environmental Liability: Austria. 2012: Reference

- a) According to this provision (cp. Article 31/3 Water Management Law) the **water authority** (generally the competent **administrative district authority** - *Bezirksverwaltungsbehörde*) is competent to formally order/conduct preventive or remedial measures or to impose the duty to inform about a possible pollution of waters. The **administrative procedural rules** applied thereby are provided by the same Water Management Act, subsidiary by the General Administrative Procedure Act²³.
- b) The **appellate body** was the Governor (*Landeshauptmann*) of Upper Austria.
- c) The **extraordinary remedy** against the decision of the mentioned governor was filed with the Administrative Court.

7. Polluter:

Renter of the salesroom – presumably it was a **legal person (Inc.)**²⁴

Due to the anonymization of published case law no further personalized data can be provided within the current case study.

8. Claimant:

As this study refers to a **case on public liability** in environmental sectoral law – **no private claims for compensation** stand in opposition to the polluter's public duties to inform prevent and remediate water endangerment or pollution.

With respect to the current case the **polluter himself claims the illegality of the administrative decisions** before the Administrative Court.

9. Other participants involved:

The liability regime according to Art 31 Water Management Act is a so called '**single party procedure**' (*Einparteienverfahren*). Legal standing is granted solely to the obligated party.

10. Description of the damage and the applied liability regime:

- a) Main impact and sort of damage caused:

Basically by the oil leakage **soil damages** have been produced (regarding their extend see below Section b.) Furthermore pollution of **ground water** is probable but not proved yet.

²³ Federal Law Gazette Nr. 51/1991 as amended on Federal Law Gazette I Nr. 100/2011

²⁴ Cp. VwGH 16.07.2010, 2007/07/0036: p.1

b) Extent of damage caused:

An **oil leakage** and the **discharge of about 5000 liters** of heating oil extra light into the ground was ascertained by the authority. It was assumed that the oil pollution reaches up to **4 m depth into the ground** and covers an area with a **diameter of approximately 12 m**. As already stated above, monitoring stations have been set up to enable regular assessment of eventual **pollutant dispersion** – especially with regard to the ground water. As these monitoring measures did not indicate any such pollutant dispersions in the wider area further drillings were viewed as necessary by the authority to determine the extent of contamination and consequently to plan and assess all necessary remediation measures.

c) Preventive/response actions being taken:

The most critical point within the proceedings was the question whether the imposed preventive/remediation measures have been necessary in the sense of Art 31 Water Management Act.

Based on the assumption remediation needs to be realized by **soil excavation the first instance authority** assigned the renter of the salesroom (=the obliged party) to take further measures for the overall assessment of the contamination (**conservation of evidence**) produced by the leakage. Beneath others the obliged party was urged to conduct 15 rotary core drillings.

After a professional assessment by a hydrological official expert **the second instance authority** (the Upper Austrian Governor) reduced the obligation to conduct rotary core drillings from 15 to 10 - necessary to assess the extend of the contamination. The authority stated as well:

“Since the groundwater flow direction and thus the direction of propagation of the contamination is not known rotary core drillings are necessary.”²⁵

²⁵ VwGH 16.07.2010, 2007/07/0036: p.2

As water pollution control states **an overall public interest, high costs are justified** to carry out the exploration of groundwater pollution and the assessment of necessary remedial measures.

The **obliged party** argued that **all necessary measures** for the conservation of evidence and the assessment of the pollution **have already been set** – the monitoring stations set up by the water authority and the constant observation of them have been sufficient – under utilization of these measures no further damage has been observed – so an appropriate remediation measure can be chosen and set by now.

Regarding the **remediation measures** the obliged party highlighted that soil excavation would not be a necessary and reasonable measure as **only one third of the contaminated soil could be excavated** due to further legal and factual obstacles. Therefore also the obligation to conduct rotary core drillings (which are intended to provide information on the necessary excavations) stays **in no reasonable relation with a possible rehabilitation success**.

The **Administrative Court** argued in accordance with the official expert opinion that **partial soil excavations are the only adequate and convenient way** to consequently prevent ground water contaminations. Former experiences in the remediation of similar damages have proven the method – as already stated above – as adequate and convenient.

d) Applied liability:

The public liability regime regulated in Art 31 Water Management Act provides for **absolute liability**. As we have seen within the arguments raised above (see section c.) the **sole endangerment of the ground water** leads to a broad variety of duties which can have huge financial implications for the party in question. No interest was given to the culpableness of the event – the **behavioural obligation** to prevent water pollution sticks with the **concrete danger** - it does not matter if damage has occurred already or if it was predictable, if obligatory precautions have been taken or not.

The obliged party is the **objective polluter** – which is the one being in a close relation to the source of danger: this can be legal persons²⁶, 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.²⁷

In the current case the **renter of the salesroom** was the one in a close relation to the source and therefore responsible or obliged party in accordance with the Water Management Act. In **comparison with the Austrian Environmental Liability Acts** where the liability is restricted to damages produced by certain occupational activities the current liability regime has a **much broader scope of application** – enabling the allocation of the environmental damage and the corresponding responsibility to the objective polluter. Thereby **important responsibility gaps can be closed** and **excessive public expenditures** for prevention and remediation can be generally **diminished**.

e) Type of compensation:

No information on the remediation costs can be provided so far – The case did not provide information on the explicit costs for the preventive measures set and assigned neither. But basically, the **polluter pays principle** was applicable in this case – **the obligation to bear the cost does not depend on the guilt factor.**²⁸

The **obliged party criticized the high costs** arising from the applied measures – so it is to assume that already the costs for the conservation of evidence might be considerable in this case. The Administrative Court argued in reply of the obliged party's reasoning that *“as far as the appellant asserts the disproportionality of the ordered measures, it is to be highlighted that **financial burdens resulting from the implementation of necessary measures** according to § 31 paragraph 3 Water Management Act, **are in the public interest** in pollution control of waters **and therefore do not play a decisive role**”*²⁹

²⁶ Cp. Austrian Supreme Court –1 Ob 152/10 z

²⁷ Cp. Justice and Environment Legal Analysis on Environmental Liability: Austria. 2012:

²⁸ Cp. Oberleitner, WRG (2004) § 31 Rz 13.

²⁹ VwGH 16.07.2010, 2007/07/0036: p.5

The authority ordered already a detailed set of measures for the **measurement of the damage** produced (conservation of evidence). The obliged party is responsible for the realization of these measures and has to bear the costs for those measures. Consequently the obliged party has to bear further preventive and – if applicable – remediation costs, which still have to be assessed - according to the Administrative Court the question of cost regarding all these measures plays a subordinate role as **water pollution control is in the public interest.**³⁰

Against the administrative cost decision the polluter has **access to the civil courts** which will decide in application of general civil liability rules (Sec. 117 Water Management Act).

f) Description of the evidence procedure

The basic rule in administrative evidence proceedings is manifested by the **state's duty to find all relevant facts on a certain case** (*Offizialmaxime*). So the authority is obliged to conduct evidence procedures on its own motion (cp. Art 39 General Administrative Procedure Act³¹).

Parties can introduce new evidence in first instance administrative procedures as well as second instance procedures. They have a right to provide information on all relevant aspects of the case and are entitled to request the presentation of evidences (Art 43/4 General Administrative Procedure Act). **The authority is entitled to reject** the request if it evaluates it as irrelevant for the case.

Basically the **content of expert opinions is not binding** on the authorities due to the principle of free consideration of evidence (Art 45 General Administrative Procedure Act). The authority might proof the opinion on accuracy, conclusiveness and completeness. If the authority is not convinced of the quality of the opinion, a second expert opinion has to be solicited.

³⁰ VwGH 16.07.2010, 2007/07/0036: p.5

³¹ Federal Law Gazette Nr. 51/1991 amended on Federal Law Gazette I Nr. 100/2011

Within the **current proceedings** an **official expert on hydrology** was assigned to assess the situation. He stated that all measures already set by the authority (four monitoring stations – see above Chapter 5) – are not designed to monitor ground water contamination – and therefore not sufficient to assess the extent of the damage produced – upon the experience in comparable situations he recommended the conduction of 10 rotary core drillings. The obliged party assigned **an extern company** for the same assessment. In its statement this company asserted that rotary core drillings are necessary but to a lesser extent.

In assessment of all opinions and evidences found within the proceedings the Administrative Court stated, that **only damage control or remediation measures in application of Art 31/3 Water Management Act which consequently prevent pollution of waters are definitely necessary**. The measures suggested within the official expert opinion have been reasoned necessary as the only **practicable method to consequently achieve this goal**.

g) Time limits for presentation of claims:

Art 31 Water Management Act does not provide for concrete time limits with regard to the actions set by the obliged party or the authority. The **existence of an imminent or current pollution of waters** activates the corresponding obligations according to the Water Management Act. The Administrative Court highlighted in one of its decision that this might be already the case if **following the natural course of things water pollution might be expected**.³² There is no legal significance whether damage has already occurred or if it might have been predictable. The duty to action lasts until and so far the water pollution is still imminent or existent.³³

In the current case it is highly visible that the **polluter's obligation already starts with the imminent danger of water pollution or its dispersion**. No damage on waters has been assessed or proved at the beginning – it was the main fact **that ground water pollution might be probable** that urges the polluter to take action. The obliged party's duties do not start with control or remediation measures - In the current case it was already his duty to take evidence on the extent of possible water pollution on its own cost.

³²VwGH 28.03.1996, 93/07/0163

³³Cp. Oberleitner/Berger, WRG³ (2011) § 31 Rz 6.

11. Outcome of the proceedings:

The **Administrative Court confirmed** the decision taken by the Upper Austrian Governor (second instance) – See argumentation above. The obliged party has to set all the control and preventive and informative measures established by the second instance decision.

12. Remedies taken:

The Administrative Court is the last (already extraordinary) instance. Against the administrative cost decision – meaning if the administrative authority takes measures on pollution control and charges the costs to the polluter - the polluter could **access the civil courts** which will decide in application of general civil liability rules (Sec. 117 Water Management Act).

13. Current status of case:

Unknown.

14. Obstacles/Challenges generated in this case:

As we could see in the foregoing case assessment the **sectoral public liability** according to the Water Management is **stricter** in comparison to the Austrian Environmental Liability Acts. Especially because the scope of the Water Management Act regarding the concept of the polluter is quite broad:

- c) The obliged party is the **objective polluter** – which is the one being in a close relation to the source of danger: this can be legal persons³⁴, operators of facilities, natural persons etc. – can be hold 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.
As **ELD** and in consequence the **Austrian Liability Acts** link environmental liability to certain occupational activities only – the scope of the liability according to the Water Management Act is considerably broader and leads to much higher application in practice.
- d) Furthermore the damage or the danger is not measured on the basis of certain thresholds:
 - According to Art 30 Water Management Act **water pollution** is to be understood as **any deterioration of water quality and any reduction of its self-purifying capacity**.³⁵
 - According to the Federal **Environmental Liability Act** only those damages are covered which **significantly adversely affect** the ecological, chemical or quantitative status or ecological potential of the respective waters.

³⁴ Cp. Austrian Supreme Court –1 Ob 152/10 z

³⁵ Cp. also Oberleitner/Berger, WRG³ (2011) § 30 Rz 1.

Generally the liability according to the Water Management Act is restricted to waters only – and ELD refers also to soil and biodiversity damages – so the scope of ELD is definitely broader. But still it is to be criticized, that the thresholds are significantly higher within ELD regime, the main reason for the inapplicability of the Environmental Liability Acts in praxis.

- c) On the other hand it is to be criticized that the liability procedure according to the Water Management Act is a sole **one party procedure** – no possibility for public participation is given within this system. In the light of recent ACCC case law this undoubtedly is a breach of participation and access to justice rights established by the Aarhus Convention – of which Austria is a party.³⁶
- d) Another negative aspect of the assessed procedure might be the **long period for the realization of certain measures and the long run of the procedure** – As we could see within the analysis the leakage was produced in 2001 and the first instance decision was rendered in 2006 (it is to be pointed out, that within this time period other informal measures have been ordered and carried out – so this information should be taken into consideration by weighing the last argument).

All in all the Water Management Act liability shows a strong liability regime with respect to water pollution, which is also applied in practices, serving as a useful tool to prevent and remediate environmental damages on behalf and mainly on cost of the polluter himself, thereby diminishing extensive burden on public treasury. That is why this liability regime would be predestined to serve as benchmark for further environmental liability provisions – including ELD.

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³⁶ Cp. ACCC/C/2010 – 48: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-48/Findings/ece mp.pp c.1 2012 4 eng.pdf>