JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

Czech Republic

Environmental Liability 2012

National ELD Report

Justice and Environment 2012

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I.

Comparative Legal Analysis on ELD and other liability legislation

CZECH REPUBLIC

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.[1][2]

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

The Czech Republic has these liability regimes for environmental damage:

- Criminal liability (used only for a few cases in practice)
- Civil liability (used only for two types of cases in practice)
- Administrative liability
    - Complex regulation:
        - Law on Environment (never used, except for one case in 20 years)
        - Environmental Damage Act (transposition of ELD, never used in practice)
    - Specific regulation:
        - 12 different regimes: Water Act, Law on Nature and Landscape Conservation, Law on Agricultural Land, etc. (used in practice)

The liability for environment damage is in the Czech Republic inconsistently regulated in a **large number of different laws** that can be divided into complex (Law on Environment and Environmental Damage Act, which is transposition of ELD) and "special".

[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

I. Complex Laws

The most general law – **Law on Environment** (No. 17/1992 Coll.) - contains a very brief regulation of environmental damage, which imposes an obligation to remedy the damage by return to the original state to all persons in all types of unlawful activities and all kinds of environmental damage. Environmental damage is described by a general rule as the 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. This liability is strict and it is carried by anyone who committed the infringement, which was cause of environmental damage. The unlawfulness of the conduct is necessary for liability under this regime, which is unusual within the strict liability claim. This liability system is **not used in practice** due to lack of procedural regulation in law (after 20 years of law, only one case is known). This regulation is rather the proclamation than the legal norm and I would not mention it any closer in this paper.

The ELD was transposed by a separate regulation: **Environmental Damage Act** (No. 167/2008 Coll.), which has been never used in practice in the Czech Republic. As environmental damage it is considered damage to flora, fauna, habitats, water and soil. Czech Republic took the opportunity when transposing the directive and broadened the range of damage to species that are protected only at the national level not at the EU level. Scope of the Act is too complexly defined in two points:

- firstly, the relation to other regulations of environmental damage and
- secondly, the scope of environmental damage is too complex and using uncertain legal terms which are not sufficiently clear for interpretation.

The regime under the Environmental Damage Act excludes from the scope of the Act immediate emergency response on accidents on waters, which are one of the most common causes of environmental damage in the Czech Republic. The accidents on water are still handled by the Water Act. The complicated scope of Environmental Damage Act leads in practice to increased demands for evidence and thus a higher financial burden for the authorities. The practical experience also shows that the higher evidence standards lead to unsuccessful imposing of preventive and restorative actions or delay in final implementation of necessary measures.

II. Special laws

Liability for environmental damage is regulated also on the basis of individual **"special" laws** (further referred as "special" national laws). In the Czech Republic, we can count at least **12 different laws**, some of them contain even more different liability regimes. The laws are mainly:

- Act on Nature and Landscape Conservation (114/1992 Coll.)
- Water Act (254/2001 Coll.)
- Clean Air Act (201/2012 Coll.)
- Forest Act (289/1995 Coll.)
- Law on Agricultural Land (334/1992 Coll.)
- Law on Prevention of Major Accidents (59/2006 Coll.)
- Waste Law (185/2001 Coll.) and more.

The regulation of liability regimes under all these laws is very simple and brief. The whole liability is usually regulated in a few short paragraphs. The liability regime regulates mainly the accident or illegal activities. An interesting **exception is Clean Air Act**, which states, that for the responsibility of a subject the violation of this Act without loss on the air or other environmental damage is enough. Protected interest in addition to the environment is in some laws the human health (it is reflected in corrective measures, such as obligation to ensure an alternative source of drinking water). The responsible subject is the operator of a regulated activity. Liability is always strict, usually without directly mentioned excuse defence.

Responsible subjects must carry three basic responsibilities: informative and perform preventive and corrective measures.

1. Informative obligation always refer to the appropriate public authority, the responsible entity must actively inform or provide information on request.

2. Preventive measures are general and special. The operator is required to hold general precautions at a time when no damage is imminent, such as emergency plans (§ 39 paragraph 2 Water Act, § 20 Law on Genetically Modified Organisms), measures flowing from the environmental impact assessment or from the integrated or other permits. Special precautions are taken to avert the immediate threat of injury. A special type is the competence of administrative authorities to restrict or stop endangering activity. This power is regulated by the most of laws (Act on Nature and Landscape Conservation, Water Act, Clean Air Act, Law on Prevention of Major Accidents).

3. The duty to take remedial action can be found *ex lege* by law or *ex-actu* of an administrative act. The decision of the administrative authority is issued to further specify the

condition of the remedy. The decisions on corrective measures are usually issued in the same decision as traditional financial penalties (fines) (except for the Waste Act, under which the fine and the remedy must be imposed in two separate decisions). The main drawback of imposing remedies is the lack of detailed methodology for the selection and justification of choice for the particular measures. The construction of enforcing corrective action is the same as required by the ELD. The responsible subject should implement a

corrective measure by law, if it refuses the public authority may impose the responsibility by decision. If it also fails, the public authority may enforce the decision by execution or by imposition of monetary penalties. In some cases, the public authority itself carries out corrective measures at the expense of the responsible entity.

Another major drawback is lack of interested public rights to effectively seek remedy for environmental damage. The laws contain no specific treatment of rights of individual subjects. Therefore, they can only ask to initiate proceedings to impose corrective measures. The competent public authorities do not have to follow these suggestions and do even not have to decide about them. The compulsory financial security is only required by some regulations (eg the Waste Act or Law on Prevention of Major Accidents).

2. Civil and Criminal Liability regimes

Civil liability for damage is regulated by the Civil Code (No. 40/1964 Coll.) as a general offense, i.e. a breach of any law or contract obligation. From 1st January 2014, a new Civil Code (N. 89/2012 Coll.) will be effective. There are some changes in liability regime, but their impact on practice is very difficult to predict.

There is no special civil liability regime for environmental damage. However, the damage can be caused also by breach of a preventive duty (par. 415 Civil Code – *Everyone must act so as to avoid damages to health, property, nature and environment.*). If the damage occurred without breaking the law or contract, it is still possible to create liability based on the breach of duty of prevention or strict liability, which does not require an unlawful act. Damage shall be paid in money, but if it is requested by the victim and, where it is possible and appropriate, the damage is remedied by the return to the previous state. In case the damage is caused by multiple parties, all of them are held liable jointly and severally.

The current Civil Code provides, in principle, two different types of liability - objective and subjective. The **strict liability** is further distinguished into two different types - general liability for damages resulting from operating activities and liability for damage caused by especcially dangerous operations. Both liability regimes are absolutely identical (this is legislative misconduct). The operational activities are activities purposeful, organized and carried out systematically, i.e. any entrepreneur could be strictly liable for operational activities. The liability regime is as follows (par. 420a Civil Code):

(1) Everyone shall be liable for damage caused to somebody else by operational activities.

(2) The damage shall be considered caused by operational activities if they were caused by

a) an activity of an operational nature or by a thing used in the course of such activity;

b) physical, chemical eventually biological influences of the operation on the surroundings;

c) a lawful operation or assurance of works that caused damage to somebody else's real estate property or that essentially aggravated or even prevented such person from using the real estate property.

(3) The person who caused the damage shall be relieved thereof only he proves that the damages were caused by an inevitable event not originating in the operation or by the own conduct of the damaged person.

The recognized defences are: contribution of the victim and force majeure. The permit defence was repeatedly denied by the court. The time limitation is very satisfactorily addressed, the limitation period begins when the real damage occurred, i.e. not at the time of harmful emissions but at the moment of appearance of damages (damage to trees occurred, harvest of empty crop). The case law even explicitly states that the subjective limitation period begins to run only when the victim becomes aware of the damage.

Subjective liability for damage (par. 420 Civil Code) is also known as the damage caused by the culpable unlawful act. This provision is one of the cornerstones for the whole Czech private law. The liability regime is based on:

- The breach of obligations

- The damage

- A causal connection between the breach of legal obligation and the damage

- A fault. The sufficient fault is in the form of unconscious negligence and there is a reverse burden of proof favouring the position of the victim.

The civil liability is limited by the fact that it has always refer to the sphere of property. The civil liability for damages is therefore only relevant for the environmental damage, which may be the subject of property rights (forest, land, fish, crops). A few cases of civil liability exist for forests damaged by air pollution and damages on fish population caused by water pollution. This case law is really supporting the coverage of environmental damage by the civil liability regime. The damage calculation can be based on mathematical models. The court states that operating business, with the release of sulfurdioxyde, has a causal link to the damage caused to forests, without any justification or closer analysis of the theoretical concepts of causal links.

Criminal liability

The criminal liability of natural persons for environmental damage is regulated in the **Criminal Code** (No. 40/2009 Coll.). The Directive 2008/99/EC was transposed by this code. The regime of criminal liability of legal persons is regulated by the **Law on Criminal Liability of Legal Persons** and Proceedings against them (No. 418/2011 Coll.).The crimes against environment are regulated in the Part VIII Criminal Code.

The most general crime is called Damaging or Endangering of the Environment (par. 293 Criminal Code). This crime can be committed intentionally or by negligence. Whoever contrary to other legislation intentionally injures or endangers soil, water, air or other parts of environment shall be punished by imprisonment for up to three years or prohibition of activities. The damage has to be:

- in a larger area, which means at least 3 ha of earth surface (or 1 ha of water surface and 2 km of water stream)
- in such a way that it can cause severe injury or death
- if its elimination costs more than 20.000 €.

The other crimes are:

- Removal or Destruction of Fauna and Flora
- Damage to Forest
- Damage to Water Resources
- Unauthorized Waste Disposal
- Unauthorized Handling of Protected Wild Fauna and Flora
- Unauthorised Production and Possession of Radioactive Material and Other Highly Dangerous Substances
- Spreading an infectious animal disease
- Cruelty to animals
- Failure to care for animal
- Poaching

Over the past ten years (from 2000 to 2009), 452 people were charged for environmental offenses, while only 175 people were sentenced in the same period for these offenses, which implies that the average success of the action is only about 39%. For comparison, the total number of persons charged in the Czech Republic in 2005-2009 was 365 780 and condemned was a total of 302,180 persons. The average success of the prosecution of an offense pending before the criminal courts is 83%.

3. Main differences of national liability regimes compared with ELD

a) Competent authorities

The competent authority for ELD is the **Czech Environmental Inspectorate** (see: http://www.cizp.cz/Departments-of-CEI). The competent authority under the special national liability regimes can be either Czech Environmental Inspectorate or the municipality. The only exemption is the Law on Agricultural Land, that provides for the municipality as the sole competent authority. The competent authority for criminal liabilities is the police and the state prosecution.

There is no big difference in competences between the Czech Environmental Inspectorate and the municipalities. The "special" liability regimes other than ELD usually do not distinguish between these authorities. The Czech Environmental Inspectorate and municipalities have the right:

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

The police and state prosecution have wider competences than the municipalities or Inspectorate.

b) Scope/Damage covered

The national regimes in specific laws are definitely **broader** than the ELD regime and cover damages on **water, soil, flora, fauna and habitats, forests and air**. The broadest scope of damage is covered by the Law on Environment (No. 17/1992 Coll.), 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. This law is not used in practice (see above).

The **Environmental Damage Act** covers the same scope of damage as ELD, the Czech Republic broadened the scope also for flora and fauna which are not protected under the EU law.

The **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.

The **Law of Water** distinguishes two regimes: accidents and state of fault. As an accident is considered any emergency or threat of serious deterioration in quality (not quantity) of water, the typical situations are given as examples of accidents: oil pollution, pollution in protected areas, technical defects in the equipment operating with particularly hazardous substances, etc. State of fault can occur as a result of illegal discharge of wastewater or illegal use of harmful substances in cases when the threshold for accident is not reached.

The remedial measures under the **Clean Air Act** are not conditioned by the occurrence of loss on the air. Air protection authority may decide to limit or stop the operation of stationary sources of air pollution if: ¨

- the operation was not permitted,
- the operator does not comply with emission limits,
- the operator does not fulfill the special obligations during the occurrence of "accident", e.g. take the remedial measures,
- the operator repeatedly violates the obligations for which he has already been fined.

The 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.

c) Extent of damage required/Thresholds

The thresholds in **Environmental Damage Act** are the same as in the ELD.

The specific thresholds are not stipulated in the Czech special 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. The thresholds limits is used under the Criminal Code (recovery of damage costs more than 20.000 €, damage more than 3 hectars of surface, endangered human health or life).

Under the civil law, the damage must be possible to be expressed in money, e.g. damage on forest is the difference between the value which the owner would have reached under the proper management and the price of wood actually acquired.

d) Liability/Accountability

The liable subjects in **Environmental Damage Act** are the same as in the ELD, i.e. strict liability for Annex III operators and fault-based liability for the damage to species or habitats for non-Annex III operators.

The special national laws:

The 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 definition, who can be liable (in contrast with the ELD). The only exemption is the Law on Agricultural Land, under this regime the liable person is always the owner or tenant of the land (soil). They can ask the country for cost reimbursement state for compensation in the case they did not cause the damage. This possibility of refunding has never been used in the practice.

e) Are Preventive Actions or Response Actions required?

The preventive and response actions in **Environmental Damage Act** are the same as in the ELD. The Decree to identify and remedy environmental damage to soil (No. 17/2009 Coll.) provide the details on response actions on soil, e.g. risk analysis, comparison of alternative response actions, etc.

The special national laws:

The liable subjects must carry three basic liabilities under the special national law: informative and perform preventive and corrective measures.

1. Informative obligation always refer to the appropriate public authority, the responsible entity must actively inform or provide information on request.

2. Preventive measures are general and special. The operator is required to hold general precautions at a time when no damage is imminent, such as emergency plans (§ 39 paragraph 2 Law on Water, § 20 Law on Genetically Modified Organisms), measures flowing from the environmental impact assessment or from integrated or other permits. Special precautions are taken to avert the immediate threat of injury. A special type is the competence of administrative authorities to restrict or stop endangering activity. This power is regulated by the most of laws (Act on Nature and Landscape Conservation, Water Act, Clean Air Act, Law on Prevention of Major Accidents).

3. The duty to take remedial action can be found *ex lege* by law or *ex-actu* by an administrative act. The decision of the administrative authority is issued to further specify the conditions of the remedy. The decisions on corrective measures are usually issued in the same decision as traditional financial penalties (fines) (except for the Waste Act, under which the fine and the remedy must be imposed in two separate decisions). The main drawback of imposing remedies is the lack of detailed methodology for the selection and justification for the choice of the particular measure. The liable subject should implement a corrective measure by its obligation from law, if it refuses the public authority may impose

the liability by decision. If it also fails, the public authority may enforce the decision by execution or by imposition of monetary penalties. In some cases, the public authority itself carries out corrective measures at the expense of the responsible entity.

The regime of imposing and enforcing the preventive and response action is the same under the specific national regime as under the ELD. The specific national regimes impose also obligation to take preventive or response action. However, they do not specify these actions any further. The national specific regimes also do 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) .

Under the civil liability regime, the damage shall be paid in money, but if it is requested by the victim and, where it is possible and appropriate, the damage is remedied by the return to the previous state. Criminal liability does not use the preventive or response action, but it is possible to forbid certain action which can have effects of response action.

f) Liability Regime

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

The special national laws:

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 do not use the permit defence, however the transpositon of ELD recognise the permit and state-of-art defence. However, the liability covers only accident or illegal activities.

The exemption is the civil code, the breach of any legal obligation is not neccessary for civil liability. The other exemption is the Clean Air Act, which holds the entity liable only for violation of this Act without having to create damage on air.

There is no regulation for the cases of multiple liable parties. Under the transposition of ELD and Civil Code they are liable jointly and severally.

g) Costs

The regime in **Environmental Damage Act** are the same as in the ELD.

The special national laws:

There is no methodology how to evaluated the costs in case of damage. The only exemption is the regulation on method of calculating amount of loss or damage caused to forests (No.

55/99 Coll.), that defines and calculates the different type of damage and Regulation on determining risk zones of forest under influence of air pollution (No. 78/1996 Col..).

The situation when natural restitution is impossible is not regulated neither. The competent authority would impose the preventive and responsive measure that would not lead to the previous state but would be helpful to some extent. The fines will be imposed on the liable subject. The fine is derived from the gravity of breach of legal duty and extent of the threat or damage on environment.

h) Access to Justice and Claims for Compensation

The NGOs or interested public have no rights to participate in proceedings under the specific national regimes. They do not have any legal standing or access to justice. Therefore, the public can only ask the competent authority to initiate proceedings to impose corrective measures. The competent public authorities do not have to follow these suggestions and do even not have to decide about this suggestion. The transposition of the 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 to initiate proceedings and the competent authority should have initiated the proceeding upon this request.

The plaintiff (owner) is entitled to remedy in civil liability cases. The state is entitled to remedy in other liability regimes. The private right for compensation is connected only with the plaintiff (owner or tenant) in the case of civil liability.

i) Burden of proof

Under the specific national regimes there are not any special rules in evidence procedures. The reverse burden of proof is used only for fault under the civil subjective (fault-based) liability for damage (par. 420 Civil Code).

j) Financial security

The financial security in **Environmental Damage Act** is obligatory from 1.1.2013. The financial security has to have all Annex III operators with exemption for:

- The operators that prove that they cannot caused harm for more than 800.000 €
- The operators with certificate on environmental-friendly management (EMAS)
- The operators discharging waste water not containing hazardous substances or especially dangerous harmful substances.

The governmental decree shall be prepared to rule the details of financial security.

The special national laws:

The compulsory financial security is only required by some regulations (e.g. Waste Act or the Act on Prevention of Major Accidents).The most common are the damages on water. For this purpose the regions have the special funds for remedying damage. The amount of money in this fund should be 400.000 € and it has to be refilled annually by the state. This financial instrument encouraged the regions to initiate proceedings on water damages because they do know in advance that they do have enough money to take recovery actions by themselves when it is necessary.

k) Time limits for presentation of claims

The time limits for civil claims are: 2 years from the time when the victim gets to know about the damage (the subjective time limit) and 3 or 10 years from the time the damage occurred (the objective time limits, 10 years are for intentional act, 3 for negligence). The time limits starts to go from the time the damage occurs, i.e. in the time of harvest there is no grain in cereals (and not from the time of emission).

The time limits for criminal claims are 3 years from the time the effect of criminal act occurred.

There are no time limits for starting the proceedings under the national specific laws. The time limits exist only for imposing fines under the national specific laws. The time limits are mainly 1 year for starting the proceedings and 3 years for imposing the fine (see Water Act and Clean Air Act), or only 3 years for imposing the fine (Law on Nature and Landscape Conservation) or 1 year of subjective time limit and 3 years of objective (Law on Agricultural Land).

4. Prevailing legal norms

No law has been repealed in connection with the transposition of ELD in the Czech Republic. The ELD has been transposed by separate act - **Environmental Damage Act.**

The liability regimes under the other special national law (nature conservation law, forestry law, water law, etc) would not be used when the ELD liability regime is used. There is one exemption of this regime – the environmental damages under the Clean Water Act (N. 254/2001 Coll.) in the case of accidents on water.

5. Damages not covered by a liability system

The Czech regulation covered all types of damages. However, some of them are not remedied in practice due to the weak enforcement of law and lack of rights of public interested.

6. Strengths and weaknesses of national liability systems

The liability for environmental damage is in the Czech Republic complex, but inconsistently regulated in a large number of different laws. Some of the regimes are not at all used in practice.

Environmental Damage Act properly introduced several innovative elements:

- Comprehensive regulation for several types of liability in a single law

- More detailed regulation of liability

- Emphasis on removal of damage rather than financial penalties

- Liability without any breach of law or fault

- Strengthening the rights of the public

- Remedial measures on alternative sites

- Compulsory financial security

Each of these innovative points is somewhat imperfect, e.g. the liability for action without any breach of law is fundamentally limited by permit defence, etc. These innovative points are now only in the Environmental Damage Act. This act has never been used because of:

- Too complicated scope of the act.
- Lack of funding of competent authorities (on the contrary, the special fund exists for water accidents). In the case the competent authority has to carry out the remedial actions, she does not have any special funding for this activity. This fact held her back from initiating the proceeding under the Environmental Damage Act and motive to initiate the proceeding under the Law on Water.

As a result, the Environmental Damage Act is not used in practice and the innovative points could not become the norm and spread to other regulation. The environmental damage regulation that is used (special nation laws) is too brief and does not regulate certain situation, e.g. the return to previous state is not possible, public participation, etc. As a result, in the case of some environmental damage no (or impropriate) remedial measures are carried out.

II.

CASE STUDIES

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)[3].

A) Damage on Forests

CZECH REPUBLIC

1. **Matter of case:**

In the Czech Republic, more than 60 % of all forests are damaged by the pollution. This number is exceptionally high within the others European states. This damage is most often made by the sulphur compounds (SO_2), which is contained in the ambient air in non-solid form of gas. What is important to understand the whole story, all these sulphur emissions are made within the valid permits of operator. The ten biggest operators caused almost three quarters of all the pollution, of which 48% is caused by only one operator – the Czech biggest electricity producer.

2. **Country:**

Czech Republic

3. **Short summary of the case**

In the Czech Republic, more than 60 % of all forests are damaged by the pollution by the sulphur. The sulphur emissions are made within the valid permits and the operators pay the fee for this pollution. Top 10 polluters represented 70% of all pollution. They are mostly operators of coal power plants. Despite these facts the courts grant compensation to forest owners.

4. **Applicable national laws**

Civil Code (No. 40/1964 Coll), Clean Air Act (No. 86/2002 Coll.), Forest Act (No. 289/95 Coll.), the subordinate acts are: Regulation on method of calculating amount of loss or

[3] DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004

damage caused to forests (No. 55/99 Coll.), which defines the different type of damage and Regulation on determining risk zones of forest under influence of air pollution (No. 78/1996 Col..).

5. Type of procedures and competent authority

Judicial, civil courts

6. Polluter

Electricity producer

7. Claimant

Forest owner

8. Other participants involved

No other participants

9. Description of the damage and the applied liability regime

a) Main impact and sort of damage caused

In the Czech Republic, more than 60 % of all forests are damaged by the pollution. This number is exceptionally high within the others European states. This damage is most often made by the sulphur compounds (SO_2), so-called acid rains. The acid rains are the main threat to forests in the Czech Republic. The sulphur dioxide is caused by burning of coal or oil. It is emitted by the operators of by most of coal power plant, heating plant and transport all over the Czech Republic.

b) Extent of damage caused:

The table below shows the quantity of forest influenced by pollution, sorted by the influence on their life expectancy. The total costs of damages on forests are cca 6 mil. € pro year. The Zone A is the most polluted, the Zone D is the least polluted.

Zone	A	B	C	D	Non
Tree life expectancy	< 20	21 - 40	41 - 60	61 – 80	
Quantity (%)	1	5	24	31	39

As a preventive actions can be seen all the investments in new environmental technologies that reduce the extent of polluting emissions or special measures in the forests management (e.g. liming of forests). As far as I know, no special preventive measures have been imposed by the courts or competent authorities.

c) Applied liability

Civil liability is based on Czech Civil Code (No. 40/64 Coll.), that in section 420a states: "*(1) Everyone is responsible for damage caused by other* ***operational activities****. (2) Damage is caused by operating activities, if it is due (among others) b)* ***physical, chemical, or biological influences on surroundings.*** *(3) Liability for damage to the person who caused it,* ***exempt*** *only if she proves that the damage was caused by* ***unavoidable events, having no origin in the operation or conduct of her own party****."* By the definition damage to forest caused by sulphur pollution is made by operational activity. The liability for operational activities is strict and operators could not use the permit defence. The only applicable exemption is force majeure (Act of God).

The contemporary case law is to the operators really strict. The liability is not precluded by the permit defence, charge payment neither investment in new environmental technologies. Below you can read part of judgment: *"****Responsibility*** *of the operator for damage caused to forests by discharges of pollutants into the air* ***is not precluded by*** *the fulfillment of obligations resulting from regulations on air protection, including the* ***payment of fees for pollution****. (25 Cdo 769/2006)"* 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. (25 Cdo 582/2007)"*.

d) Type of compensation

The only compensation is the satisfaction in money. Forest Act imposes an obligation on operators to take all necessary measures to prevent and mitigate harmful effects of

operation. On the other hand, owner should calculate the damage to forests and has the right to obtain compensation for damage. The damage is calculated on the basis of subordinate acts: Regulation on method of calculating amount of loss or damage caused to forests (No. 55/99), which defines the different type of damage and Regulation on determining risk zones of forest under influence of air pollution (No. 78/1996).

e) Description of the evidence procedure

The burden of proof held the claimant. He has to prove the damage, causal links and the extent of damage. The causal link and extent of damage is in the Czech case law defined very loosely: *"Operating activity, that emitted into the atmosphere sulfur dioxide, has a causal link to the damage caused to forests. To quantify the amount of the defendant share of the whole damage caused by multiple tortfeasors, mathematical model drawn up by an expert can be used."*(25 Cdo 62/2000). From a comparative perspective, it is absolutely extraordinary on this precedent that it allows not only to determine the share of the damage in case of multiple liable parties, but also the extent of damage according to mathematical models. The possibility to determine the exact amount of damages on the basis of theoretical models is confirmed in the following judgment: *"If there is no method yet, by which it would be possible to precisely determine the amount of damage on forests caused by pollution in each territory in relation to the different sources of pollution, the calculation based on Gaussian function and a mathematical model is fully sufficient basis for the conclusion on the amount of damages. "*(25 Cdo 1016/2004). In this case the claimant calculated the extent of damage based on Regulation on method of calculating amount of loss or damage caused to forests. The causal link was proved by the dispertion study of sulphur dioxid in the air, which shows the amount of sulphur dioxide in the air in the different parts of Czech Republic. The amount of sulphur dioxide is bigger near the big operators of coal power plants, etc.

f) Time limits for presentation of claims

The time limits for civil claims are: 2 years from the time when the victim gets to know about the damage (the subjective time limit) and 3 or 10 years from the time the damage occurred (the objective time limits, 10 years are for intentional act, 3 for negligence). The time limits starts to go from the time the damage occurs, i.e. in the time of harvest there is no grain in cereals (and not from the time of emission).

10. Outcome of the proceedings

The owners of forest have repeatedly granted remedy for damages on forests by courts. For further details on law and jurisprudence please see the question above, which have been quoted from different court decisions on the damage on forests.

The only compensation is the satisfaction in money. As preventive actions can be seen all the investments in new environmental technologies that reduce the extent of polluting emissions and special management of forest that reduce the impacts of the pollution.

11. Remedies taken

The operators take repeatedly remedies against the court decision. All the court decisions quoted in this case study were issued by the Supreme Court of Czech Republic.

The operators usually argue by these arguments (without any success):

- "old burdens" – it is a historical damage caused in past.
    - Counterargument of claimant: The claimant ask only for the share of damage caused in one year.
- The polluter claims that the damage was not caused by its emissions.
    - ? Counterargument of claimant: The liability is strict. For the more details on causal link see answer 11 sec. f.
- The polluter has to paid the fee for the pollution.
    - Counterargument of court: *"Responsibility of the operator for damage caused to forests by discharges of pollutants into the air is not precluded by the fulfillment of obligations resulting from regulations on air protection, including the payment of fees for pollution. (25 Cdo 769/2006)"*

12. Current status of case:

Result of this practice is hundreds of long lasting lawsuits with not satisfying results as you can see in table below. This practice could be changed by the New Civil Code (No. 89/2012 Coll.), that will be at force from 1.1.2014.

	Damage Milion CZK	Compen-sation asked	%	Compen-sation obtained	%	Litiga-tion open	Litiga-tion closed
1991	719	368	51	196	**27**		
1992	399	252	63	28	**7**		
1993	341	196	57	135	**40**		
1994	182	117	64	88	**48**		
1995	483	380	79	280	**58**		
1996	131	91	69	68	**52**	9	130
1997	96	54	56	34	**35**	8	74
1998	96	57	59	37	**39**	22	70
1999	146	116	79	27	**18**	38	121
2000	135	57	42	10	**7**	38	34
2001	100	35	35	6	**6**	31	27
2002	85	32	38	5	**18**	38	15

13. Obstacles/Challenges generated in this case

As you can see from the table, the contemporary system is really inefficient. The necessity to sue for compensation from each operator by each owner caused extensive transaction cost. The whole process is so expensive and time demanding, that only the one biggest owner – Lesy ČR – is able to sue for the compensation. However she does not sue every operator but only the biggest ones. This situation leads to market discrimination, when only some of owners are compensate by some of operators. There is no way to obtain any compensation for damage caused by transport or other than sulphur emissions. Only this fact can be sufficient to not use the civil liability for compensation. However there are some additional problems.

Some of the additional problems result from the nature of liability in environmental matters. It is always difficult to define and measure exact damage and find the causal link between harmful activity and damage as such. However the modern jurisprudence has formulated

several type and concepts to solve these problematic questions (such as but for test and others). The Czech courts do not use any of these concepts and just set the causal link among individual operators and damage on dispersion studies and mathematical models without any measuring of probabilities or further reasoning.

At the end we can raise the question whether the operator does not have to pay twice – one time for pollution charge and second time for liability. Or following the case law whether this system, when operators are liable for activity within the permit, paying the charge and what is more in spite of investing to more environmental friendly activities, still work as liability?

In my opinion the correctly set system of air pollution fees and redistribution of this fee would have lower transaction cost and would be cheaper, fairer and more satisfactory for all participants.

The indisputable advantage of civil liability for damage to the environment is the ability of each owner to claim for compensation (according to special national laws owner must de facto wait for the activity of state bodies). On the other hand, the owner is not obligated to use acquired money to improve the environment, but he can use them completely at his own discretion.

B) Toxic compounds leakage

CZECH REPUBLIC

1. **Matter of case:**
Toxic compounds leakage

2. **Country:**
Czech Republic

3. **Location:**
Prostejov

4. **Short summary of the case:**
Builders deposit oil contaminated soil in the pit without any proper permit since June 2005. Toxic compounds, however, began to leak into the environment and destroy the trees. The company took over to its device a total amount of 2500 cubic meters of sewage sludge and soil polluted by oil products to perform biodegradation. However, this treatment has never been done and hazardous waste left the facility which has not the necessary permits in accordance with the Waste Act, or the Act on Integrated Prevention and Pollution Control. The facility does not have the necessary technical parameters for operation.

5. **Applicable national laws:**
The case is regulated by the Water Act No. 254/2001 Coll.

6. **Type of procedures (administrative and/or judicial) and competent authority:**
The case was held by the administrative procedure (regulated by the Administrative Procedure Code No. 500/2004 Coll. The competent authority was Czech Environmental Inspectorate. The Czech Environmental Inspectorate (CEI) is an expert executive body within the state administration charged primarily with supervision in the area of environmental legislation enforcement. Additionally, CEI also supervises over the legal compliance of administrative decisions taken by the public administration bodies in the area of the environment. CEI was set up in 1991 by the Act. No. 282/1991 Coll., on the Czech Environmental Inspectorate and its competencies in forestry protection. The other environmental sectors - air and nature protection as well as waste management - were gradually, in 1991-1992, incorporated. CEI is an independent organization subordinate to the Ministry of the Environment and funded from the state budget.

The activities of CEI can be divided into five core areas air protection, waste management, nature, water and forests management supervision. CEI was gradually assigned also additional responsibilities in other areas: protection of the Earth's ozone layer, supervision over the handling of chemical substances, industrial accident prevention, packaging management and genetically modified organisms (GMOs).

7. Polluter:

Recom-PV., s.r.o. The polluter operated in the business of waste including hazardous wastes, their collection and further processing. The polluter was limited liability company (Ltd.)

8. Claimant:

The claimant was the Czech Environmental Inspectorate.

9. Other participants involved:

Other participants involved in the case were local municipalities.

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

a) Main impact and sort of damage caused

Obvious massive contamination by the leakage water by the polyaromatic hydrocarbons (PAHs). The leaked toxic substances subsequently contaminated ground water and cause serious damage to the surrounding forest.

b) Extent of damage caused

Total PAHs exceeds about three times the criteria set by Methodical instructions of Ministry of Environment for criteria for soil and groundwater from 19964. This concentration of PAHs represents pollution with a significant risk of danger to human health and ecosystem.

[4] See: http://www.mzp.cz/osv/edice.nsf/F5964CAB7EF17D95C12572590045E61A/$file/vestnik_03-2007_web.pdf

c) Preventive/response actions being taken

The polluter was fined already in 2006. In 2010 the response action was imposed to the polluter. The response action consisted in the obligation to process survey and documentation of the effect of storage of oil polluted soil with regard to risks to human health and ecosystems, including the spread of contamination and assessing potential threats to groundwater. Documentation had to be prepared by a qualified person and assessing the extent, causes and extent of groundwater contamination, and include a draft of the response actions. The second responsive actions impose the obligation to ensure the removal and disposal of wastewater.

d) Applied liability

The liability regime is strict (not fault-based) without directly mentioned the defence (e.g. no state-of-art defence or permit defence). However, the liability covers only accident or illegal activities. The regulation of liability regimes under all these laws is very simple and brief. The whole liability is regulated in a few short paragraphs, that do not mentioned any specific information about the type of liability.

The Water Act (254/2001 Coll.) distinguishes two regimes: accidents and state of fault (in fact “small accident”). As an accident is considered any emergency or threat of serious deterioration in quality (not quantity) of water, the typical situations are given as examples of accidents: oil pollution, pollution in protected areas, technical defects in the equipment operating with particularly hazardous substances, etc. State of fault can occur as a result of illegal discharge of wastewater or illegal use of harmful substances in cases when the threshold for accident is not reached.

Water Act § 42 paragraph 1 regulate the liability for this case. The Czech Environmental Inspectorate will impose the measures to remedy the defective condition to the operators who breached a duty to protect surface water and groundwater by illegal waste water discharges, illegal use of harmful substances or accidents. The goal of response action is to eliminate the consequences of these activities.

e) Type of compensation

The compensation would be in this case natural restitution. Beside the natural restitution a fine was imposed (cca 200.000€). The amount of the fine is calculated on basis of environmental loss.

f) Description of the evidence procedure

The burden of proof held the claimant. He has to prove the damage, causal links and the extent of damage. In this case the Czech Environmental Inspectorate used the pollution measurements using exploratory drilling5.

g) Time limits for presentation of claims

There are no time limits for starting the proceedings under the Water Act. The time limits exist only for imposing fines under the national specific laws. Concerning the fine, time limits are 1 year for starting the proceedings and 3 years for imposing the fine.

11. Outcome of the proceedings

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 cost of remediation of the environmental damage will be held by the state. As a result, the polluter pays principle has been violated.

12. Remedies taken

Not known

13. Current status of case

Not known

14. Obstacles/Challenges generated in this case

This case illustrates the major obstacle – the lack of interested public rights. The interested public could not to effectively seek remedy for environmental damage, because the laws contain no specific treatment of the rights of individual subjects. Therefore, they can only ask to initiate proceedings to impose corrective measures. The competent public authorities do not have to follow these suggestions and do even not have to decide about them. As a result, the illegal disposal site of oil polluted soil can exist for 5 years without any responsive actions.

[5] The pollution measurements is not available online. You can see the photografs of the site here: http://www.cizp.cz/2719_Za-nebezpecne-odpady-dostala-firma-pokutu-5-milionu-korun .

The situation was also complicated by the fact that the polluter as an owner of the site has rented the site to the other subjects. The second complication was that the polluter had no compulsory insurance because he disposed of waste without the required permit. The insurance is compulsory only for the operators with permit to waste disposal.

All of these errors should be corrected by the correct transposition of ELD to the national law and application of the national regime.

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