

# Hungary

## 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

#### Hungary

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.<sup>12</sup>

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

Before the ELD was adopted in Hungary, the Act No. LIII. of 1995 on environmental protection (EPA), the Act No. LIII. of 1996 on nature conservation and few related government decrees have covered liability regulations.

**The general rules on environmental liability did not basically changed, but the level of environmental protection has been raised with transposition of the directive, as some requirements became stricter, more detailed and comprehensive with special regard to the administrative liability provisions.**

New requirements have also been introduced which have not been regulated before. A new system of preventive and remediation measures, a systematic approach on how to estimate the size of damage to nature and on the rules of remedying the damage to nature were introduced and a new system of remediation measures in surface water protection was set up.

The liability regulation of EPA has wider scope than ELD, its liability rules shall be applied in case of environmental damages not falling under the scope of ELD as well.

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<sup>1</sup> 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>

<sup>2</sup> See **J&E legal work in 2011** with regard to ELD:

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

The ELD has been implemented into the national legal system with the following regulations:

- Act XXIX of 2007 on the amendment of different environmental related acts in connection with environmental liability;
  - o Act LIII of 1995 on environmental protection (hereinafter as EPA)
  - o Act LVII of 1995 on water management;
  - o Act LIII of 1996 on nature protection;
  - o Act XLIII of 2000 on waste management;
- Gov. Decree 90/2007. on the system of preventing and remedying environmental damage;
- Gov. Decree 91/2007. on the provisions related to the assessment of the size of damages to nature and on the rules of remedying the damages
- Gov. Decree 92/2007. on the amendment of Gov. Decree 219/2004 on groundwater protection;
- Gov. Decree 93/2007. on the amendment of Gov. Decree 220/2004. on surface water protection.

As it can be deduced, there were two major steps of transposition of the Directive, firstly, the Act XXIX of 2007 basically amended the EPA. introducing new or amended definitions, such as the preventive measures, remedial measures, natural resources services, costs, etc.

The transposition did basically not vary the already existing general regime of liability:

- no-fault liability in case of administrative liability;
- no-fault liability for damages caused by activities dangerous to the environment;
- fault based liability (for intentional/negligent action/omission) in case of criminal law

The most important change took place within the chapter on liability, where the major requirements of the ELD have been introduced. New articles – 102/A, 102/B and 102/C –implemented the ELD scheme, actually as a means of translation:

- the escape clauses,
- the need to take preventive measures,
- the scope of preventive measures,
- the option of compensation measure,
- obligations of the operator to provide information,
- the rights of the authorities to intervene, to oblige
- the options of remedying (that has already been in place more or less)
- the methods of using the land-register in order to sign the damage.

The acts on water management, nature protection and waste management have direct reference on environmental liability, but these refer back to the provisions of EPA. The above listed four Gov. Decrees cover several environmental liabilities related and specific regulation.

The nature conservation act has also been amended, inserting the possibilities to adopt remedying obligations, such as in integrum restitutio. The waste management act (Act XLIII of 2000) could get a specific reference to the environmental act in connection with the environmental threats, and also the statutory limitation of liability extended to 30 years after closure. Finally, the Act LVII of 1995 on water management has been also amended referring to the liability provisions in the EPA.

The main rules of ELD were transposed by amending the above mentioned acts and the Gov. Decree No. 90/2007. implemented the detailed rules of the Directive.

Regarding the exemptions of Art. 4. sub (1) of the Directive, the EPA uses almost the same wording; however, the defences listed in Art. 8.4. of the Directive, are not applied in Hungary.

## **2. Civil and Criminal Liability regimes**

The system of environmental liability is based upon the following three pillars according to the EPA:

- administrative liability;
- civil liability;
- criminal liability.

The rules on administrative liability cover the rights and competences of environmental authorities to take different actions and measures described in the mentioned separated pieces of legislation, and levy environmental fines as well.

According to EPA, polluters of the environment shall

- refrain from engaging in any activity, posing imminent threat or causing damage to the environment and cease such activity where applicable;
- without delay notify the environmental authority concerning any threat to the environment or environmental damage, and supply the information requested by the environmental authority;
- where environmental damage has occurred, take all practicable steps to mitigate the adverse impact, limit and prevent further environmental damage;
- where environmental damage has occurred, take measures to restore the baseline condition, or a similar level, or restore, rehabilitate, or replace the damaged natural resources and/or impaired services;
- accept responsibility for the environmental damage they have caused, and cover the costs of prevention and rehabilitation.

The regulation regarding administrative liability was amended with exceptions. The user of the environment is exempted from the administrative liability, if he can prove that the environmental threat/damage

- was caused by an act of armed conflict, war, civil war, armed riot or natural catastrophe;
- was directly resulting from the implementation of a final decision of the authority or the court.

As regards administrative liability EPA contains provisions on

- a) direct intervention of the authorities, that is limitation, suspending or prohibit the operation or activities, and obligations such as remedying the damages;
- b) payment of environmental protection fines in the event of failure to comply with the requirements specified by law or by official decisions.

Users of the environment shall take the measures specified by law to prevent environmental damage and where environmental damage has occurred all the necessary remedial measures.

The environmental authority shall order users of the environment to take preventive and remedial measures specified by law or may itself undertake the preventive remedial measures in connection with environmental damages, or may hire others to do so.

Damage caused to third parties by virtue of activities or negligence entailing the utilization of the environment shall qualify as damage caused by an activity endangering the environment, and the provisions of the Civil Code on damages originating from hazardous operations shall be applied.

According to the regulations on damages originating from hazardous operations, the EPA adopted a strict liability system that makes the entities - causing damage - liable irrespective of negligence or fault, with very limited exemptions available.

Damage caused to third parties as a result of utilization of the environment must be remedied according to the regulations of the Civil Code on hazardous activities.

In order to have compensation, the aggrieved party has to prove the damages he claims, the unlawfulness of the action causing damages and the causal link between the unlawful action and the damages sustained.

If the aggrieved party is able to prove the actual damage and the casual link, the defense for the party causing the damage is proving that the damage was the result of an unavertable cause falling out of the increased hazards of the activity.

In Art 341 of the Civil Code there is a possibility of prevention, as the one who may prove that there is a direct and close danger of being damaged, may require the court to adopt preventive measures. The mentioned preventive measure in Civil Code is not equal to the definition used in ELD.

As regards criminal liability, the Criminal Code Criminal includes three special provisions: damaging the environment, damaging the nature and infringement of waste management regulations (Articles 280, 281 and 281/A of Act IV. of 1978 on Criminal Code).

### 3. Main differences of national liability regimes compared with ELD

#### a) Competent authorities

**The system of environmental administrative authorities and their competences in Hungary is quite complex; however, it can be stated that the competent authorities – on first instance - responsible for proper application of environmental liability (based on ELD) are the regional environment, nature conservation and water management inspectorates (inspectorate) and - - as their supervision body - the National Inspectorate for Environment, Nature and Water.**

According to the transposing legislation, beside the inspectorates the following authorities having different tasks and competences - under particular circumstances described in the national legislation - in applying environmental liability provisions:

- regional water directorates** (VIZIG) - supervised by the National Directorate of Water;
- national parks** (NPI) - supervised by the Ministry of Rural Development
- directorates of disaster recovery** - supervised by the National Directorate of Disaster Recovery;
- county-based policy administration **services of public health** - supervised by the National Public Health and Medical Officer Service;
- **Hungarian Food Safety Office** - as competent authority in issues of fishery and forestry.

According to the Gov. Decree 90/2007 the environmental inspectorate

- endorses remediation plans (operating plans prepared by the user of the environment, area remediation plans prepared by the VIZIG);
- keeps records;
- provides permanent duty;
- detects environmental damages with VIZIG and NPI;
- – with participation of authorities listed below without the directorate of disaster recovery - classifies the environmental damage;
- makes decision on the necessity of the actions to apply;
- defines and orders the I. or II. degree of emergency preparedness;
- terminates the emergency preparedness.

## The VIZIG

- prepares area remediation plans;
- keeps standby the materials and devices described in the area remediation plan;
- operates a monitoring system in order to discover the pollutions of groundwater and geological media;
- provides permanent duty;
- carries out inspection on the spot based on notifications received;
- participates in classification of environmental damages in aspect of involvement of waters;
- - based on the inspectorate's classification - cooperates with NPI in defining the possible methods of prevention;
- manages remediation actions – in cooperation with NPI;
- defines and orders the III. degree of emergency preparedness;
- terminates the emergency preparedness;
- takes remedial actions, if
  - the pollution spreads over from beyond the state borders
  - the polluter is not known
  - the polluter/user of the environment does not – or not sufficiently - take preventive, or remedial measures

## The NPI

- cooperates with the authorities in procedures mentioned above;
- participates in classification of environmental damage from aspect of nature conservation;
- monitors areas of nature conservation;

*(In accordance of the EPA, the Gov. Decree 91/2007. designates NPI as responsible body for taking remediation actions in case of damages in nature.)*

The directorates of disaster recovery, the services of public health and the Hungarian Food Safety Office also cooperate with the authorities in procedures mentioned above.

### **b) Scope/Damage covered**

**The liability regulation of EPA shall also be applied in case of environmental damages not falling under the scope of ELD.**

The scope of Gov. Decree No. 90/2007 - implementing the detailed rules of the Directive - extends to surface water, groundwater, species and habitats described in Bird Directive and Habitats Directive, protected species, areas of Natura 2000 and protected areas having nationwide relevancy. Gov. Decree No. 91/2007 covers damages in nature and its scope extends to species and habitats described in Bird Directive and Habitats Directive, protected species, areas of Natura 2000 and protected areas having nationwide relevancy.

Consequently, the decrees also restrict their application; however, the definition of environmental damage is a bit more detailed in EPA than in the Directive. The "environmental damage" means any measurable adverse and significant change in the environment or any environmental media which may occur directly or indirectly, or any measurable impairment of a natural resource service which may occur directly or indirectly. (Art 4. point 13 of EPA)

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

**Basically, both the national liability regime and the transposing legislation of ELD are applicable in case of significant adverse effect to or significant adverse change in the environment; however, it has not been formulated yet by the decision-makers how the significance of adverse effects or changes in the environment shall be evaluated.**

As the legal definition of environmental damage on the EPA contains the expressions "any measurable adverse and significant change" and "any measurable impairment of a natural resource service", damages in environment and nature are covered by the regulation if these can be classified as mentioned.

The Gov. Decree No. 90/2007 does not include further definitions; however, the Gov. Decree 91/2007 on specification of the extent of damage caused to nature (Art. 2. 1. of the ELD) specifies the definition of "damage in nature". According to Art. 2. point c. of the Decree, "damage in nature" means any environmental damage which results in significant adverse effect in species, habitat or area.

Annex 1. of the Gov. Decree 91/2007. provide the aspects of defining the likely adverse effects (based upon Annex I of the ELD), such as the fragility of the population, the length of a cave or the human health consequences, the aspects of remediation and the interventions taken by the authority (based on Annex II of the ELD).

**d) Liability/Accountability**

**Based on the EPA, polluters of the environment shall bear liability for the impact of their activities upon the environment according to civil law and criminal law, regulatory and administrative provisions ("polluter pays" principle).**

The liability for environmental damages or threats shall burden under joint and several liability the owner as well as the possessor (user) of the real property, on which the activity is or was carried out - until evidence is provided to the contrary.

The owner shall be exempted from the joint and several liability, when naming the actual user of the real property and proving beyond any doubt whatsoever that the responsibility does not lie with him.

Where damage to the environment has been established by final decision, the environmental authority shall adopt a resolution ordering remedial measures, with a prohibition of transfer and encumbrance, concerning those properties of the person required to undertake the said remedial measures, which are deemed sufficient to cover the estimated costs of the remedial measures.

If any part of the costs of preventive and/or remedial measures in connection with environmental damage had been financed from the central budget instead of the polluter of the environment, the environmental authority shall file a lien on the real estate properties owned by the polluter of the environment to the benefit of the Hungarian State up to the amount financed, and - with a view to provide security - shall order prohibition of transfer and encumbrance registered on the properties in question.

If the properties owned by the polluter in question fail to cover the sum financed from the central budget, the environmental authority shall file a lien on the movable assets of the polluter affected.

As secondary liability, EPA prescribes if several operators jointly form a company that combines the similar or complementary activities that each had formerly performed, the company is regarded as the successor in title to each of its founders and its liability is joint and several with the founders.

The EPA laid down that the owners and executive officers who have supported a resolution/taken a measure that they knew or should have known with reasonable care that it would cause environmental damage if carried out, bear unlimited, joint and several liability in the event of the termination of the business association for the company's liability for remediation and compensation for environmental damages, which the company has failed to satisfy.

The members/shareholders and executive officers, who did not take part in the process of adopting the resolution/taking the measure, voted or protested against the measure, are exempt from liability.

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

**The transposing legislation introduced the system of measures and actions according to the provisions of Annex II. of ELD. The general obligation of taking preventive/response actions is regulated in EPA and the implementing government decrees contain the detailed regulation of those.**

According to Art. 101. 2. of EPA, user of the environment shall take the measures - specified by law or by official decisions - to prevent environmental damage and - where environmental damage has occurred - all the necessary remedial measures.

The environmental authority shall order users of the environment to take preventive and remedial measures specified by law or may itself undertake the preventive remedial measures in connection with environmental damages, or may hire others to do so.

In its Art 2. par. 1., the Gov. Decree 90/2007 regulates that

- in order to eliminate the threat of the environment, preventive measures,
- in order to eliminate environmental damage, remedial measures shall to be taken.

To mitigate the damages and to prevent further damages, a user of the environment is obliged to take preventive measures, in particular, to take control immediately, to retain, to remove, or to manage appropriately the substances or other factors harmful to the environment.

The decree differentiates between remedial measures in case of damages requiring immediate action and remedial actions in any other cases.

Immediate remedial action is required

- if the environmental damage threatens public health, public safety; or
- if thereby elimination of the environmental damage can be more effectively, more efficiently, more economically enforced; or
- if thereby future environmental damages can be prevented. (Art. 2. 4. of the Gov Decree)

Before enforcing immediate remedial action, it is to be ensured, that

- the damage does not shift to other element of the environment,
- it has the least possible impact on the environment,
- it does not cause environmental threat or damage.

Beside the regulation explained above, the II. Annex of Gov. Decree 91/2007 on the provisions related to the assessment of the size of damages to nature and on the rules of remedying the damages implemented the measures and actions from II. Annex of ELD applying those to remediation of damages to nature.

Remedial actions in any other cases are regulated by separated pieces of legislation:

- Gov. Decree 219/2004 (VII. 22.) on groundwater protection - amended by Gov. Decree 92/2007. (IV.26.)
- Gov. Decree 220/2004. (VII.22) on surface water protection – amended by Gov. Decree 93/2007. (IV.26.)

#### **f) Liability Regime**

For its adoption, EPA's environmental liability system has been based on the principle that the user of the environment shall be liable for the environmental impacts of its activity as defined in this Act, and as regulated in this Act and other legal rules.

The owner and user of real property on which environmental damage or a risk of environmental damage occurs, are jointly and severally liable until evidence is provided to the contrary.

The owner is exempted from liability if the owner names the actual user of the property and provides proof "beyond any reasonable doubt" that the owner is not liable for the damage or risk of damage

The owner or possessor/user of a non-stationary (mobile) contaminating source which results in environmental damage or a risk of environmental damage is jointly and severally liable for the costs of preventive or remedial actions caused by the mobile source. The owner is exempted from liability if the owner identifies the actual user of the mobile source and provides proof "beyond any reasonable doubt" that the owner is not liable for the damage or risk of damage.

The user of the environment shall be liable for the environmental impacts of its activity under criminal law, civil law, administrative law in accordance with the contents of this Act and the provisions of separate legal rules.

Following the different liability regimes:

- strict liability is to be applied in case of administrative liability;
- strict liability exists for damages caused by activities hazardous to the environment;
- fault based (intentional or negligent action/omission) liability is the base in case of criminal law.

Implementation of ELD made the regulation of administrative liability more detailed. There are no concrete thresholds for the application of the liability regulation based on ELD, the definitions of Art. 4 point 13 of EPA (environmental damage) and Art. 2 point c. of the Gov. Decree 91/2007 (damage to nature) requires significant and adverse effect in the environment, species or habitat.

#### **g) Costs**

The costs are evaluated on case-by-case basis. The definition of EPA lays down that costs of prevention and remediation mean all costs necessary to prevent or remediate environmental damage including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs and the amount of compensation

Based on the regulation of Art. 56. 1 of EPA, if the liability for the environmental damage cannot be delegated to anyone, the state authorities shall take the remediation actions and the state budget shall ensure the financial sources thereof.

Where damage to the environment has been established by final decision, the environmental authority shall adopt a resolution ordering remedial measures, with a prohibition of transfer and encumbrance, concerning those properties of the person required to undertake the said remedial measures, which are deemed sufficient to cover the estimated costs of the remedial measures.

If any part of the costs of preventive and/or remedial measures in connection with environmental damage have been financed from the central budget instead of the polluter of the environment, the environmental authority shall file a lien on the real estate properties owned by the polluter of the environment to the benefit of the Hungarian State up to the amount financed, and - with a view to provide security - shall order prohibition of transfer and encumbrance registered on the properties in question.

If the properties owned by the polluter in question fail to cover the sum financed from the central budget, the environmental authority shall file a lien on the movable assets of the polluter affected.

Based on the regulation Annex II. point 2.2 of Gov. Decree 91/2007, if it is not possible to use the resource-to-resource or service-to-service equivalence approaches, then alternative valuation techniques shall be used. The nature conservation authority may prescribe the method, for example monetary valuation, to determine the extent of the necessary complementary and compensatory remedial measures. If valuation of the lost natural resources and/or services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time-frame or at a reasonable cost, then the competent authority may choose remedial measures whose cost is equivalent to the estimated monetary value of the lost natural resources and/or services.

## **h) Access to Justice and Claims for Compensation**

The Hungarian legislation ensures access to justice for the persons regarding the provisions of Article 12. of ELD. EPA provides that civil associations established for the representation of environmental interests (hereinafter as organizations) which are active in the impact area shall be entitled to have legal standing in environmental administrative procedures.

Based on EPA and on Article 15. of Act CXL. of 2004 on general rules of administrative procedures and services, in environmental administrative procedures the following persons shall have legal standing:

- individuals (natural persons, legal entities and companies without legal personality) whose rights or legitimate interests are affected; who owns or legitimately uses a piece of land in the impact area of an activity;
- environmental organizations active in the impact area of an activity;
- organizations not active in the impact area have only a right of commenting in the procedure.

Accordingly, in the second instance of the administrative procedure and later in judicial proceeding, persons specified in the first two paragraphs also have legal standing, not so the NGOs not active in the impact area.

The regulation of Art. 99 of EPA entitles organizations to intervene in the interest of the protection of the environment and

- request the competent authority to take action in respect of the threat or damage,
- file a suit against the user of the environment

in case a hazard is being posed to the environment or the environment is being damaged or polluted.

In the lawsuit, the party to the case may request the court to

- a) enjoin the party posing the hazard to refrain from the unlawful conduct (operation);
- b) obligate the same to take measures necessary for the prevention of the damage.

The aggrieved parties have the right to claim their damages based on the rules of the Civil Code in a civil procedure.

Private rights for compensation are regulated in the field of civil law that covers the following elements of the damage (Art 355 of the Act VI. of 1959 on Civil Code):

- the material damage: the actual damage (*damnum emergens*), the economic loss (*lucrum cessans*), costs;
- the immaterial damage (at the moment it is limited to the protection of private persons and in a more limited scope to legal persons).

**i) Burden of proof**

The base of the Hungarian environmental liability system is that owner and user of real property on which environmental damage or a risk of environmental damage occurs are jointly and severally liable until evidence is provided to the contrary.

The owner is exempted from liability if the owner names the actual user of the property and provides proof “beyond any reasonable doubt” that the owner is not liable for the damage or risk of damage.

According to ELD, in case of environmental threat or damage, and in order to be exempted from administrative liability, the user of the environment has to prove that the environmental threat or damage

- is caused by an armed conflict, war, civil war, armed riot or natural catastrophe;
- is directly resulting from the implementation of a final decision of the authority or the court.

It is however to mention, that these provisions do not provide exemptions from mitigation and taking remedial measures.

In civil liability - according to the strict liability system making the entities causing damage liable irrespective of negligence or fault – there are very limited exemptions available for users of the environment.

Damage caused to third parties as a result of actions or omissions including the utilization of the environment must be remedied according to the regulations of the Civil Code on hazardous activities. If the aggrieved party succeeds in proving all of these conditions, the only excuse for the party causing the damage is to prove that the damage was brought about by an unavoidable cause falling out of the increased hazards of the relevant activity (Art. 345. 1. of the Civil Code).

**j) Financial security**

Although Art. 101. 5-6 of the EPA requires that the user of the environment undertaking activities specified in separated piece of legislation shall provide financial guarantee or, that – under separately regulated conditions - environmental insurance may be required, the decree on detailed rules of financial guarantees has not adopted yet

The adoption of the specific legislation falls under the competency of the Government.

#### **k) Time limits for presentation of claims**

If the central budget has covered the costs of remediation, the deadline for the competent authority to demand reimbursement is five years from the date on which:

- measures have been completed, or
  - the user of the environment who caused the environmental damage has been identified,
- whichever last occurs.

Art. 345.1-4 of the Civil Code contains the main rules of liability for hazardous activities. These provisions state that a person who carries on an activity involving considerable hazards shall be liable for any damage caused thereby. Being able to prove that the damage occurred due to an unavoidable cause that falls beyond the realm of activities involving considerable hazards shall relieve such person from liability. These provisions shall also apply to persons who cause damage to other persons through activities that endanger the human environment.

Damage shall not be compensated for to the extent that it originates from an activity attributable to the aggrieved person and the period of limitation for compensation claims is three years.

#### **4. Prevailing legal norms**

The legislation on environmental liability has been amended with the detailed provisions transposing ELD in 2007. As consequence of these legislative acts, the level of environmental protection - compared to the previous environmental liability system – raised, as some requirements became stricter, more detailed and comprehensive with special regard to the administrative liability provisions. (see point No.1.)

#### **5. Damages not covered by a liability system**

The definition of environmental damage is a bit more detailed than in the directive, but the major problem is that the word “significant” is inserted in the definition. That means, that the minor damages are not covered.

#### **6. Strengths and weaknesses of national liability systems**

As strengths of the Hungarian regulation on environmental liability, the followings may be mentioned. The administrative liability in the EPA as well as the liability of the transposing legislation is strict liabilities; the exceptions are listed in the EPA.

The user of the environment is exempt from administrative liability if it is able to prove that the imminent threat of, or actual, environmental damage was caused by an act of armed conflict, war, civil war, armed hostilities, insurrection, or natural disaster; or it is the direct result of the enforcement of a final and compulsory resolution of an authority or court; the other exceptions and defences of the ELD were not implemented.

Besides providing less opportunity for the polluters to be exempt from administrative liability, the definition of environmental damage is wider and does not exclude damages to any environmental element or any damage caused by any activity or omission in the environment. If environmental damage or imminent threat to the environment occurs, - depending on the case - administrative, civil and criminal liabilities are to apply.

On the other hand, as a weakness of the liability regime is that the same legal definition of environmental damage in the EPA requires the significance of the adverse effect or adverse change in the environment or in the natural resource. The evaluation criteria of significance would be carried out by the decision-makers; however, there has not been relevant case law yet which would provide guidelines. Consequently, deducing from the term of environmental damage, minor adverse effects or minor adverse changes are not covered by the liability regime.

One of the major weaknesses of the Hungarian legislation on environmental liability is the lack of detailed regulation on financial guarantees. Although the provisions of EPA require “users of the environment” to provide an environmental security and may be required – under the conditions set out in specific other legislation – to obtain environmental liability insurance for the financing of clean-up operations for any unforeseeable environmental damage that may result from their activities, the detailed, specific regulation has not been issued yet by the competent legislator.

The complexity in the competencies of different authorities and the long-drawn-out procedures are relevant obstacles of effective prevention as well as remediation.

As it has been concluded from the Kolontar case<sup>3</sup>, beside negligence of the operator, ambiguous and not clarified competences of different authorities during the permitting procedures may also lead to serious environmental damages.

The administrative – and also the judicial – procedures often last extremely long that also cause delay in remediation.

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<sup>3</sup> <http://lehetmas.hu/wp-content/uploads/2011/05/Kolontar-report.pdf>

## II.

### CASE STUDY

#### Pharmaceutical Production Works in East Hungary

#### HUNGARY

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)<sup>4</sup>.

##### **1. Matter of case:**

During the 1950s and the 1960s, barrels containing hazardous substances stemming from production of pharmaceuticals had been buried in the area of the operating pharmaceutical factory. As it was revealed in the early 2000s, this activity resulted in severe soil contamination later and the pollution also had spread to the neighbouring areas owned by other entities.

The successor of the works denied the responsibility for the pollution. Regarding the damages on its own areas, the works referred that the relevant environmental regulation has not been in force when the barrels were buried. In connection with the pollution of the soil of the surrounding areas, the company argued that the owner is responsible for the damages revealed on its territory and it was not sufficiently proved, that the pollution of the other areas arose from the barrels buried under the pharmaceutical works' container-park.

##### **2. Country**

Hungary

##### **3. Location**

Debrecen /in Hajdú-Bihar county/

##### **4. Short summary of the case**

The pharmaceutical production works has been built in 1950 and, in 1952 – using the highly toxic tetrachloroethane (C<sub>2</sub>H<sub>2</sub>Cl<sub>4</sub>) – had started the production of penicillin. As by-product of the old technology, huge amount of “tetra-sludge” arose. In lack of environmental requirements, the sludge was firstly led to the canal, but later collected and buried in barrels under the container-park of the factory.

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<sup>4</sup> DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004

During the reconstruction of the container-park in 2000, severe soil and groundwater contamination was detected in the territory of the works.

In connection with six VOCs compounds, the regional environmental, nature conservation and water inspectorate (hereinafter as KTVF) ordered the pharmaceutical works (firstly the BIOGAL Ltd. that was the predecessor of TEVA Ltd) to carry out and to submit the documentation of fact finding about the pollution in the affected areas.

Between 2001 and 2004, during the fact-finding of groundwater contamination in the factory and in its surroundings, it has been revealed that significant chlorinated hydrocarbon contamination occurred not only in the site of the factory, but in the surrounding areas located in the west side of the factory's former container-park.

In 2005, in the administrative process of clarifying the facts, the TEVA Ltd. (successor of BIOGAL Ltd.) disclaimed its responsibility for the pollution.

In 2007 KTVF made its decision and ordered TEVA Ltd. to carry out a technical action plan. The decision was appealed by TEVA Ltd. and withdrawn by the second instance of the KTVF. The National Environmental, Nature Protection and Water Inspectorate (hereinafter as OKTVF) found the decision reasoned not sufficiently and ordered the KTVF to repeat the proceeding of the first instance.

As result of the repeated proceeding based on the assessment of external experts, the KTVF ordered TEVA Ltd. to carry out a technical action plan and technical intervention.

In 2008, TEVA Ltd. submitted its appeal against the decision of the KTVF to the OKTVF; however, OKTVF found the decision reasonable, well-grounded and lawful, and - with prolongation of the deadline set out for execution - affirmed the decision of KTVF. The company filed a suit against the decision of the OKTVF to the Court of Hajdú-Bihar County that also determined the responsibility of TEVA Ltd.

In order to have the judgment of the county court supervised by the Supreme Court, the company filed its request for judicial review. The judgment of the Supreme Court in 2011 finally stated that TEVA Ltd. is responsible for carrying out the technical action plan and intervention.

## 5. Applicable national laws

In the case the following basic rules were applied:

- a. Article 101 par 1 and 2; Article 102. par 1-2 and 4 of Act LIII of 1995 on the General Rules of Environmental Protection (EPA)
- b. Articles 13.; 21. and 44. of Government Decree No. 219/2004 (VII.21) on the protection of groundwater (Gov. Decree)
- c. Act CXL of 2004 on the general rules of public administration official procedure and service (Ket.)
- d. Act III of 1952 on Civil Procedure (Pp.)

*Ad a.*

Article 101. par 1. regulates that user of the environment shall be liable for the environmental impacts of its activity as defined in this Act, and as regulated in this Act and other legal rules.

Article 101. par 2. lays down that user of the environment shall

- refrain from engaging in any activity, posing imminent threat or causing damage to the environment and cease such activity where applicable;
- notify without delay the environmental authority concerning any threat to the environment or environmental damage, and supply the information requested by the environmental authority;
- - where environmental damage has occurred - take all practicable steps to mitigate the adverse impact, limit and prevent further environmental damage;
- - where environmental damage has occurred - take measures to restore the baseline condition, or a similar level, or restore, rehabilitate, or replace the damaged natural resources and/or impaired services;
- accept responsibility for the environmental damage they have caused, and cover the costs of prevention and rehabilitation.

Article 102 par 1 prescribes that the owner and possessor/user of real property on which environmental damage or a risk of environmental damage occurs, are jointly and severally liable until evidence is provided to the contrary.

Article 102 par 2 provides that the owner is exempted from liability if the owner names the actual user of the property and provides proof “beyond any reasonable doubt” that the owner is not liable for the damage or risk of damage.

*Ad b.*

The Gov. Decree has come into effect in 2004 and its amendment transposing few provisions of ELD is in force since 2007.

Before implementing ELD, Article 21 par 2 of the Gov. Decree prescribed that remediation shall be carried out by the user of the environment

- whose activity caused environmental damage or its successor; or
- who undertakes the liability for environmental damage by acquiring the ownership of the contaminated area;
- who is liable according to the regulation laid down in the Articles 101-102 of the EPA.

After the amendment of the Gov. Decree which transposed the provisions of ELD, Article 21 par 2 regulates that the remediation shall be carried out by the user of the environment who shall be liable under regulation of Articles 101-102/A of the EPA.

Article 21 par 4 defines the different stages of remediation: fact finding, intervention and monitoring.

Article 13 par 1 made the following activities subject to permit: disposal of pollutants, direct or indirect introduction of pollutants into groundwater.

Article 41 par 11 prescribed that - regarding activities defined in Article 13 par 1 - its regulation shall be applied after the environmental revision of the ongoing activities; or from the new stage of remediation.

*Ad c. and d.*

The provisions of Ket provide the basic and general rules in administrative procedures and Pp is the base of civil procedures.

## **6. Type of procedures and competent authority**

The administrative procedure of KTVF began in 2001; the authority ordered firstly the BIOGAL Ltd. to prepare the documentation of fact finding in 2001. Afterwards, the successor of the polluter company, the TEVA Ltd. had been ordered to prepare the technical intervention plan and to carry out technical intervention.

In case of administrative decisions there is the right to have remedy against the unlawful decision of the administrative body. This procedure is before the county court applying the general rules of Pp. with the special provisions applicable to administrative lawsuits.

The TEVA Ltd. appealed the decision and filed a suit to the county court against the decision of the authority which was affirmed the order of the first instance.

The judgment of the county court was – by request of the company – reviewed by the Supreme Court in its judicial review.

#### **7. Polluter**

The pharmaceutical works' predecessor was the polluter.

#### **8. Claimant**

The pharmaceutical works, TEVA Ltd., as successor of BIOGAL Ltd.

#### **9. Other participants involved**

During the administrative procedure, the company owning the territory contaminated outside of the property of TEVA Ltd. had submitted its declaration that its activity has never been in connection with chemistry nor pharmaceutical production and, as consequence of this fact, their activity could not result in the contamination revealed. Furthermore, the owner and operator of the tracks located on the territory contaminated outside of the property of TEVA Ltd. also had submitted its declaration that during its activity there had never occurred any accident which could have resulted in the pollution in question.

The KTVF approved the declarations of the mentioned entities and did not hold them liable for the environmental damage.

Other participants had not been involved in the procedure nor in the administrative neither in the judicial procedure.

#### **10. Description of the damage and the applied liability regime**

##### **a) Main impact and sort of damage caused (e.g. Air, water resources, fauna, flora...):**

The predecessor of the pharmaceutical production company had the byproduct of penicillin production buried in the area of the factory's container-park. The buried barrels supposedly got damaged during the past five decades and their content spread from the soil to the groundwater and to the soil and groundwater of the surrounding territories. By evaporation of the pollutants the air also has been polluted.

b) Extent of damage caused

The main pollutants from the “tetra-sludge” were tetrachloro-ethane and its decomposition products and the compounds of the “tetra-sludge” – by the groundwater stream – could easily spread over. The concentration of the pollutant’s compounds exceeded the thresholds prescribed by the relevant regulation. The groundwater was contaminated in 8.6 to 12.8 meters deep in the affected area including the territory located in the southwest area of the factory’s container-park.

c) Preventive/response actions being taken

After the pollution was detected, the authority ordered BIOGAL Ltd. to prepare and submit the documentation of findings. Because of its incompleteness, the documentation had to be amended several times.

In order to prevent further spread of the tetra-sludge, the contamination had been horizontally separated.

During the years – following the year of the detection of the pollution – coming to the decision on measures and actions was hindered by the incompleteness of the documentation and the debate with the pharmaceutical works on the question of liability.

As the Supreme Court finally stated the TEVA liable for carrying out the actions necessary, the company has to tackle the significant historical ground water pollution which originated decades ago.

d) Applied liability

In the case, the liability of TEVA Ltd. has been stated according to the rules of EPA on administrative liability (Articles 101 and 102). Administrative liability is strict liability which means that the user of the environment is liable for the environmental impacts of its activity with few exceptions available.

e) Type of compensation

*Including an explanation on the evaluation method of replacement costs, private compensation granted?*

Nor the decision of the authority neither judgment of the court did not include prescriptions regarding compensation.

f) Description of the evidence procedure

Based on the Article 50 par 1 of Ket., the authority shall ascertain the relevant facts of the case in the decision-making process. If the information available is insufficient, the authority shall initiate an evidence procedure.

After detection of the pollution, the KTVF conducted an extensive evidence procedure; letters from the archives, registers, notifications written in the 1950s and in the 1960s were also examined.

These documents verified that the disposal of the by-products of penicillin-production had not been solved for years and - pouring out to the floor - it had threatened the health of the employees.

After the by-products had been led to the canal, the inhabitants of the settlement were claiming against the stink of tetrachloro-ethane evaporating.

The first order about technical intervention of KTVF was withdrawn by the OKTVF because the authority of second instance did not find proved that the pollution of the surrounding areas arose from the activities of the predecessor of TEVA Ltd.

Therefore, the procedure had to be repeated in 2008.

In 2008 the ministry in charge for environmental protection provided financial sources for KTVF ensuring the opportunity of hiring external experts. From the main findings of that analysis it could be deduced that the streams in the groundwater had been able to spread the tetra-sludge to the areas in question.

The regulation of the administrative lawsuit – the lawsuit against the authority which made the final decision – is implied into the Pp as a special civil procedure. As basic rule of evidence in the civil lawsuit, the party has to provide evidence if he seeks to have his arguments approved by the court.

As a deviation to the general regulation, if the authority (respondent) did not fulfil its obligation of clarification of facts (see Article 50 par 1 of Ket – explained above) during the administrative procedure, due to the rules of the administrative lawsuit (Article 336/A par 2 of Pp), the respondent shall provide evidences to verify the facts on which its decision was based.

g) Time limits for presentation of claims

Against the final decision of the administrative authority - usually the decision of the second instance - the client, or whom the decision may concern is entitled to file a suit within 30 days of becoming aware of the decision.

Furthermore, it is to be mentioned that based on the special regulation on environmental liability in civil law, within 3 years the aggrieved party has the right to sue the user of the environment in case of damage caused by use of the environment.

According to EPA, organizations are entitled to intervene in the interest of the protection of the environment and request the competent authority to take action in respect of the threat or damage, and/or file a suit against the user of the environment in case a hazard is being posed to the environment or the environment is being damaged or polluted. EPA does not include deadlines for exercising these rights.

## **11. Outcome of the proceedings**

In its action brought to the county court, the argumentation of the pharmaceutical works was that

- the pollutions detected outside of the property of the factory could not derive from the barrels buried;
- the owners and users of the territories outside of the factory - and their predecessors - also could cause the pollution;
- burying the barrels had not been illegal activity because of the lack of regulation concerning disposal of waste and hazardous substances;
- the rules of EPA, of the Gov. Decree are not applicable in the case because these regulations came into effect later than the barrels were buried;
- during the lawsuit the administrative authority has to prove that the facts ascertained - on which the decision was based - were proper and correct.

The county court rejected the company's argumentations and explained that the claimant is liable for taking the necessary measures, for carrying out the technical intervention plan, the technical intervention and monitoring as well.

In its decision the county court referred to the judgment No. C-378/08 of ECJ. The reasoning of the judgment explained that the condition for the application of environmental liability is that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area.

The company requested the judicial review of the county courts judgment from the Supreme Court repeating the above mentioned argumentation amended with the followings:

- the regulations of ELD are not applicable in the case because of Article 17 subpar 3 thereof.

The Supreme Court affirmed the judgment of the county court stating that the pharmaceutical production works has to bear the administrative liability and - as successor of the polluter - TEVA Ltd. is liable for taking the necessary measures and for carrying out the technical intervention plan and the technical intervention.

Although the judgment was affirmed, the Supreme Court varied the reasoning thereof explaining the laws applicable in the case.

The claimant argued that the decisions which stated the liability are unlawful, because the environmental regulations referred came into force later than the barrels had been buried, thus – in lack of environmental legal requirements – the activity of the predecessor could not be unlawful.

The Supreme Court stated that EPA is in force since 1995 and its regulation shall be applied in respect of environmental measures occurring afterwards it came into effect.

The Gov. Decree was adopted in 2004. and Article 41 par 11 point a. of the Gov. Decree lays down that its regulation is applicable to the activities defined in its Article 13 par 1, and in case of remedying environmental damage it is also applicable from the new stage of remediation.

The stages of remediation have been listed in the Article 24 of the Gov. Decree and these are the followings:

- fact finding
- technical intervention
- monitoring

The process of fact-finding started in 2001 and in 2003 KTVF ordered BIOGAL Ltd. to measure the pollution in the surrounding areas as well. In 2007, as result of the exploration of the polluted areas, the new stage of remediation, namely carrying out technical intervention became necessary.

Since the Gov.Decree requires its application from new stages of remediation, the claimant's argument was not approved by the Supreme Court.

The Supreme Court explained that in respect of activities in the 50ties and 60 ties the legislator does not require the application of the recent regulation; however the successor is required to detect the sources polluting the environment and to remediate the damages caused by the activities of the predecessor.

The claimant referred that the county court could not have applied the provisions of the ELD and the reference to the judgment No. C-378/08 of the ECJ and, the Supreme Court approved the claimants argumentation in this point explaining that - due to the Article 17 subpar 3 of the ELD – the application of the Directive is excluded in the given case.

The Supreme Court did not agree with the claimant and refused its argument that the authority should have had the burden of proof during the lawsuit. The Supreme Court stated that the deviation in Article 336/A par 2 of Pp. could have been applied if the claimant had proved that the obligation of clarification of facts was not fulfilled by the respondent during the administrative procedure.

Since the claimant did not prove that the respondent did not clarify the facts sufficiently in the administrative procedure, the claimant had the burden of proof; the claimant however did not initiate evidence procedure.

The Supreme Court explained that the EPA, the Gov.Decree and the regulations implementing ELD came into force in 1995, 2004 and 2007, and in spite of the argumentation of the claimant - these regulations are not applied to the activity carried out in the past, but to the obligation of detection of sources of pollution and to the remediation of environmental damages caused by the predecessor.

## **12. Remedies taken**

In the administrative procedure, the pharmaceutical works submitted its appeal against the decision of the KTVF to the OKTVF. After the repeated procedure, the factory appealed the decision of KTVF again.

The decision of KTVF made in the repeated proceeding was affirmed by OKTVF and - in order to have the administrative decision set aside by the county court - the company filed a suit against OKTVF.

The court however found the procedure and decision of the administrative authority lawful. Afterwards, the pharmaceutical works requested the Supreme Court to set aside the judgment in its procedure of judicial review.

### **13. Current status of case**

The judgment of Supreme Court has been delivered for one and a half year and - under domestic law - there is no legal remedy against the sentence of the Supreme Court. Therefore, in order to prevent further pollution and to remedy the damages, TEVA Ltd. is obliged to prepare the technical intervention plan, to take measures and shall monitor these actions.

### **14. Obstacles/Challenges generated in this case**

As consequence of the facts that in the 1950's and 1960's industry had top priority and environmental regulations did not exist, the environmental damages generated by these activities shall be revealed, the further damages shall be prevented in the present.

In connection the contamination discovered in this case the main obstacles were the followings:

- the successor – beyond making the fact finding report - disclaimed its responsibility for taking measures;
- until 2008 the environmental authority - having the obligation to ascertain the facts to make its decision - did not have sufficient financial sources to have expertise prepared;
- because of the obstacles of fact finding, the administrative procedure lasted almost 7 years from the detection of the pollution and, in the meantime the only measure taken was the horizontal separation of the pollution.

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